ARTICLES

LIBERTY, THE NEW EQUALITY

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Over the past century, especially after the demise of Lochner, *both judges and scholars have increasingly endorsed judicial review of equality claims. The Warren Court's jurisprudence and John Hart Ely's theory of representation-reinforcement, for example, helped to legitimate the role of courts in requiring reasons for legislative classifications that disproportionately burden certain groups. By contrast, countermajoritarian concerns have led courts to refrain from judicial review of liberty claims. In this Article, Professor Rebecca L. Brown argues that to stay true to their democratic role courts must protect liberty in the same way that they have protected equality. Turning first to history, Brown shows that from the Revolution onward representatives have been expected to achieve what James Madison termed a "communion of interests" by according positive value to the interests of all their constituents and by subjecting themselves to the burdens they impose on others. Suspect classifications have become the prime indication of a breakdown in the legislative process—a clear sign that the communion of interests has been severed. Under Ely's theory, judicial review is justified in these cases to reinforce a representational system gone awry. In an increasingly heterogeneous society, however, the representative process can malfunction—the communion of interest can be severed—even without the use of suspect classifications. Why then, Brown asks, should judicial review be justified for equality claims but not for liberty claims, when the underlying interests are the same and there is a failure in the representative system? Pushing Ely's theory further, Brown offers a new approach to the judicial review of liberty claims. The approach requires courts to weigh the public reasons asserted to justify burdening individual liberties, thereby satisfying themselves that lawmakers likely would be willing to assume the same burdens they impose on others. This protection of individual liberty, Brown shows, is the logical evolution of the theory of judicial review that currently supports equality jurisprudence.*

INTRODUCTION

"[T]he government rarely takes a fundamental right away from all persons . . . ."[1] This one brief hornbook truism exposes a key fea-

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[1] John E. Nowak & Ronald D. Rotunda, Constitutional Law § 11.7, at 439 (6th ed. 2000).

ture of American constitutional structure: the interdependence of equality and liberty. When the government does take away a fundamental right, accordingly, it is likely that not only liberty has suffered but also equality. This insight suggests that courts can use what they have learned about protecting equality to develop a more meaningful protection of liberty.

As equality was to the last century, so should liberty be to the next. Equality jurisprudence, after all, has achieved the stunning accomplishment of reconciling a robust judicial enforcement with the demands of democratic constitutional theory. Judges and scholars of all stripes now appear satisfied with courts' legitimacy in invalidating political efforts to single out groups for onerous treatment without good reason[2]—a degree of accord elusive only a few decades ago.[3]

The evolution of equality jurisprudence, neither quick nor painless, occurred for innumerable reasons. Perhaps the most significant was the gross and increasingly obvious injustice arising from the denial of equal treatment to African Americans in this country. Majoritarian democratic theory had difficulty standing alongside the systematic oppression of large numbers of individuals.[4] And eventu-

[2] See generally Laurence H. Tribe, American Constitutional Law ch. 16 (2d ed. 1988) (describing how norm of equality imposes constraints upon political majorities and their representatives). To avoid overstating the case, I should confess that the unanimity surrounding the principle of equality does not always extend to its application. See, e.g., United States v. Virginia, 518 U.S. 515, 531-33, 567-70 (1996) (revealing disagreement between majority and minority on how to apply intermediate scrutiny to gender classification at issue); Romer v. Evans, 517 U.S. 620, 631-35, 636-40 (1996) (revealing disagreement between majority and minority on issue of whether state constitutional amendment that disadvantaged gays satisfied rational basis review); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 255, 271 (1995) (holding that all racial classifications are subject to strict scrutiny while dissenters argued for greater deference to legislature when such classifications are benign or remedial).

[3] See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 366-67 (1949) (discussing controversial nature of Court's decision whether to engage in realistic scrutiny of legislative classifications).

[4] There was a remarkable ability to look the other way, however. The voracious scholarly debate about the legitimacy of *Brown v. Board of Education* is testament to the depth of the commitment to majority rule in America. See, e.g., Learned Hand, The Bill of Rights 54-55 (1958) (criticizing Court in *Brown* for reappraising values at stake in segregation policy and thus inappropriately overruling legislative judgments of states); Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 58-59 (1955) (discussing how Court in *Brown* confronted history of Fourteenth Amendment that showed clear congressional purpose to permit segregation); Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424 (1960) (defending *Brown* on ground that state segregation laws were intentionally and inevitably discriminatory); Alfred H. Kelly, The Fourteenth Amendment Reconsidered: The Segregation Question, 54 Mich. L. Rev. 1049, 1085-86 (1956) (characterizing original meaning of Fourteenth Amendment as fluid enough to support *Brown*'s reading). Compare Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 31-33 (1959) (questioning neutrality, and hence legitimacy, of *Brown*) with Louis H. Pollak, Racial Discrimi-

ally, "*Brown* became a paradigm of the courts doing something right, just as *Lochner* was a paradigm of the courts doing something wrong."[5]

Theory, too, played an important role in the evolution of equality jurisprudence. The principle of equality, standing alone, did not obviously entangle the courts in an assault on majority rule. It could be understood to specify a formal, rather than a substantive, constraint on legislatures: Make any rules you want, as long as they apply to everyone.[6] Courts embraced this understanding of equality, thereby permitting themselves to conceive of their intervention as something other than a compromise of democracy or an indulgence in judicial hubris. Remaining faithful to the post–*Lochner* credo that denied courts a role in articulating substantive policy, they would reinforce, rather than displace, democratic representation.[7] Through a tapestry of morality, social imperative, constitutionalism, and democratic theory, courts and scholars slowly fabricated the equality jurisprudence that we know today—quite astonishingly transforming the idea of equality from a starry-eyed patriotic aspiration[8] into a judicially enforceable right. This transformation has been so dramatic, indeed, that we are beginning to see the debate come full circle as sanguine new scholars call for an abandonment of judicial involvement in equality issues on the ground that the courts are assertedly no longer needed to ensure equality.[9]

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nation and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1, 31-32 (1959) (refuting neutrality as basis for resolving equality issue raised by *Brown*). But early on many scholars had a sense that perhaps there was a role for courts in preventing certain forms of intentional inequality. For example, Felix Frankfurter, a leading rights skeptic and opponent of judicial review, suggested that the Due Process Clause of the Fourteenth Amendment could enable courts to prohibit certain kinds of discrimination. See Sanford V. Levinson, The Democratic Faith of Felix Frankfurter, 25 Stan. L. Rev. 430, 439 (1973) (describing Frankfurter's belief that Fourteenth Amendment should be reserved for unreasonable racial and religious discrimination).

[5] John C.P. Goldberg & Benjamin C. Zipursky, The Moral of *MacPherson*, 146 U. Pa. L. Rev. 1733, 1792 (1998).

[6] See Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand.").

[7] This view is widely associated with John Hart Ely, whose work I discuss in detail below. See infra Part III.

[8] Cf. Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.) (showing lack of enthusiasm for equality claims by suggesting that they are "the usual last resort of constitutional arguments").

[9] This perhaps overly optimistic view has been voiced by, for example, Stephen M. Griffin, Judicial Supremacy and Equal Protection in a Democracy of Rights, 4 U. Pa. J. Const. L. 281, 283 (2002) ("[H]eightened scrutiny is no longer needed in equal protection

Liberty—the traditional companion of equality in rights discourse—has not fared so well over the past century.[10] In contrast to the new attitude about equality, the judicial guarantee of individual liberty has been branded antithetical to democracy. Accordingly, claims of liberty are often understood as assertions of "trumps" against majority decisions and thus in tension with democratic rule.[11] Courts have been wary.

Viewed historically, the different treatment accorded to these rival siblings—liberty and equality—is puzzling. Liberty boasts at least as strong a pedigree in our constitutional democracy as equality. Equality is not mentioned, as is liberty, among the inalienable rights enumerated in the Declaration of Independence;[12] equality is not mentioned, as is liberty, in the great Preamble of the Constitution.[13] Indeed, a right to equality is not explicitly provided for, as is liberty, in

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jurisprudence . . . [because] the political branches have a distinct deliberative advantage over the judiciary in ensuring that racial minorities are protected against discrimination."). This position offers a hint of déjà vu, for it is reminiscent of such pre-*Brown* scholars as Commager and Corwin, who always felt that majoritarian government was the best way to protect rights. See Henry Steele Commager, Majority Rule and Minority Rights 80 (1943) (doubting "that the courts are . . . more tender of minority rights than are legislative bodies"); Edward S. Corwin, Constitutional Revolution, Ltd. 115 (1941) ("[R]ights . . . must generally depend for their most complete and beneficial realization upon the ordinary law as it comes from the legislature fully as much as upon the extraordinary interventions of the Court.").

[10] By "liberty" I am referring to claims of unenumerated rights that would be asserted under the Fifth and Fourteenth Amendments.

[11] See Ronald Dworkin, Taking Rights Seriously 184-205 (1977). But see Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 725-30 (1998) (critiquing this understanding of rights).

[12] The Declaration, of course, does emphasize the pre-political state of natural equality. See The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[13] It reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

any part of the pre-Civil War Constitution.[14] No revolutionary patriot quipped, "Give me equality or give me death!"[15]

Moreover, the emphasis on liberty in the founding period was not accidental. To a generation of revolutionaries who wished to rouse a population to rebellion in the name of clear and passionately held visions of a better life, a clamor for liberty sounded a stirring call to action. Equality, on the other hand, did not so clearly articulate an independent vision of the good life. Unanchored to a source of substantive values, a call for equality does not necessarily guarantee any particular freedoms or opportunities.[16] Indeed, the American colonists rejected the King's equality-based defenses that sought to justify infringements of their basic liberty by noting the infliction of similar burdens on many native Britons back in the motherland.[17]

Ironically, the very feature that made liberty a more rousing revolutionary cause than equality—its powerful promise of better lives for citizens—has proven to be the greatest obstacle to its judicial enforcement as a constitutional right. Unlike equality, liberty constraints seem to tell legislatures that there are certain important human interests that they cannot impair, no matter how evenhandedly they may do so, at least without a very good reason. Courts have been reluctant to make the judgments necessary to constrain majority rule for the

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[14] Perhaps the Privileges and Immunities Clause could be viewed as implicitly endorsing a brand of equality—that between citizens of different states. See U.S. Const. art. IV, § 2, cl. 1. And the First Amendment religion clauses—in their explicit protection of a specific liberty—contain an equality component, a good illustration of the intimate relation and occasional tension, between liberty and equality. See Lisa Schultz Bressman, Accommodation and Equal Liberty, 42 Wm. & Mary L. Rev. 1007, 1007-08 (2001) (observing that constitutional problems arise "when legislatures protect religious liberty in a manner that compromises another fundamental constitutional commitment—equality"). Additionally, equality shows up implicitly in some of the Constitution's structural components, such as equal representation by population (excluding the three-fifths rule for slaves). See U.S. Const. art. I, § 2, cl. 3.

[15] The reference, of course, is to Patrick Henry's famous words uttered in 1775: "[G]ive me liberty, or give me death!" 2 Annals of America, 1755-1783: Resistance and Revolution 323 (William Benton ed., 1968). By contrast, the slogan of the French Revolution—"Liberté, Egalité, Fraternité" (Liberty, Equality, Fraternity)—explicitly intoned both values. The slogan grew out of the 1789 Declaration of the Rights of Man and Citizen. See William Doyle, The Oxford History of the French Revolution 118-19 (1990).

[16] See generally Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982) (arguing that equality can be meaningful only when attached to substantive values).

[17] Cf. John Phillip Reid, The Concept of Representation in the Age of the American Revolution 53 (1989) (describing how Americans rejected argument that they, like nonvoting natives of Great Britain, were guaranteed equality through "virtual representation" in Parliament). The now blatantly obvious tension between liberty theory and the institution of slavery was placed to one side in the philosophical debates.

sake of protecting these important individual liberties.[18] They have remained confident in the conviction—which ultimately gave way in equality jurisprudence after *Brown v. Board of Education*—that political institutions are the best guarantors of individual freedom and should, for the most part, be left alone to set public policy, unhindered by courts. Democracy, courts claim, requires this reticence.[19]

I have suggested in the past that holders of this view have overstated the tension between judicial review and democracy.[20] Yet the view boasts many subscribers. For them, judicial review will continue to bear the brand of "deviant institution"[21] as long as they see it as an extrinsic constraint on political representation. The purpose of this Article is to demonstrate that basic judicial protection of unenumerated liberties is not such an extrinsic constraint. Rather, it can be understood to be a necessary corollary to the representation that the Constitution envisions, as our society evolves into an ever larger, ever more heterogeneous community.

There are those who, unlike me, believe that constitutional rights exist primarily to protect the representative process of public policymaking. But even they must seriously confront the argument that representation, under conditions of profound societal difference, cannot alone serve the liberty-protecting function that many assume it performs. This portrait of the role of liberty under the Constitution should not be viewed as a limit on its promise, but rather as an additional justification for involving courts in at least the basic enforcement of liberty. The understanding of judicial review that supports an equality jurisprudence necessarily also entails, at a minimum, some meaningful scrutiny of liberty claims under the Liberty Clauses of the Fifth and Fourteenth Amendments.[22]

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[18] See Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) (arguing that broadly drawn traditions should not support new liberty claims because "they permit judges to dictate rather than discern the society's views").

[19] See Washington v. Glucksberg, 521 U.S. 702, 735 (1997) ("Our holding permits this debate to continue, as it should in a democratic society."); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

[20] See generally Rebecca L. Brown, Accountability, Liberty, and the Constitution, 98 Colum. L. Rev. 531 (1998) (framing judicial review and democracy as interrelated means toward common end and not in tension as has been widely lamented).

[21] Alexander M. Bickel, The Least Dangerous Branch 18 (2d ed. 1986).

[22] I intentionally decline to employ the term "substantive due process," which was first used by a Supreme Court Justice as late as 1948 and which has since become popular for reasons that I can only believe are not sympathetic to the right. See Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) ("The basic question here is really one of substantive due process.").

Structural arguments have long been a popular weapon deployed to criticize judicial review of liberty claims.[23] In this Article, I mount a structural argument in its defense. The structural case for judicial protection of liberty claims is quite simple. I will seek to show that representation under the Constitution entitles all citizens to have their interests valued equally with those of all other citizens. This entitlement does not preclude representatives from passing laws that disadvantage individuals or groups, but it does guarantee a particular relationship of representative to constituent—what James Madison referred to as a "communion of interests."[24]

The communion of interests is a very old idea, stemming back to English common law before the Revolutionary War.[25] It entails an expectation both that representatives will sympathize with their constituents by sharing common interests and that they will accordingly share in any burdens they impose by law onto others. This concept of representation, resting on a basic principle of equality, has, for centuries, been recognized as serving a constitutional function of protecting liberty.[26] If representatives should pass laws out of either hostility or indifference to the interests of those on whom they inflict burdens, then they have severed the communion of interests and have occasioned a constitutional failure of the representative process.

The Constitution does not countenance this we/they approach to legislation.[27] Consequently, when a law appears to burden important interests of only some people, it is appropriate for courts to intervene to inquire whether there are good reasons for the burden. This examination gives the state an opportunity to dispel the inference that the representatives have acted with inadequate attention to their constituents' interests and thus have failed to meet their obligation to represent them. The ultimate validity of the law scrutinized in this manner will depend on the reasons offered to justify the burdens imposed. The court's role is thus devoted to policing the integrity of the legislative process, filling a remedial role in the constitutional structure.

This analysis should sound vaguely familiar. It has employed the core of the very argument that has so successfully rendered equality

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[23] See Bickel, supra note 21, at 21 (expressing concern that judicial review weakens democratic functioning of two elected branches); John Hart Ely, Democracy and Distrust 73-75 (1980) (suggesting that giving substantive content to broad provisions of Constitution results in imposition of judicial values).

[24] The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961).

[25] See infra Part II.

[26] See infra note 114.

[27] See Ely, supra note 23, at 103 (arguing that malfunction of representative process occurs when "ins" oppress or exclude "outs").

jurisprudence palatable to democratic theorists for decades. But the new insight is that the legitimacy of the court's role in facilitating democratic representation should not turn on whether a claim is framed in terms of equality or of liberty. The prior century's wariness on this score is best left behind.

John Hart Ely's *Democracy and Distrust* has made representation-reinforcement, if not a household word, at least a widely accepted basis for understanding and tolerating the judicial role in a democracy. He argued that democratic representation can fail even when nominal procedural process (such as every person having a vote) has been observed.[28] For Ely, such a failure manifests itself only in laws that implicitly or explicitly classify groups for disfavored treatment—the familiar "suspect-class" analysis under the Equal Protection Clause.[29] Yet his understanding imbues the representative process with something more, I suggest, than simply an agreed upon conception of procedural fairness; it necessarily implicates values that transcend the procedural requirements of formal equality.[30]

Considered carefully, these values support a role for courts that extends beyond merely scrutinizing suspect legislative classifications. I say "merely" because, while that type of insidious representative malfunction was quite common at the time *Democracy and Distrust* was written, it appears no longer to be the pervasive societal phenomenon that it once was. But that does not mean that courts have a shrinking role in policing the legislative process. The kind of we/they prejudice that indicates the existence of a malfunction in the democratic process can take forms other than overt legislative classification. Indeed, in a world of increasingly diverse personal and moral values, supporting very different notions of the good life, the communion of interests between representatives and represented can degrade even when laws nominally operate evenhandedly. For example, laws that provide that "no one may [blank]" can exploit difference as effectively as a classification, when the blank is an activity that "we," the political ins, have no wish to do, but that "they," the outs, claim a profound need to do in pursuit of personal fulfillment. This type of prohibition suggests a more refined way than the equality theorists anticipated to sever the communion of interests between representative and represented that otherwise helps protect against oppressive laws in a representative democracy.

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[28] See id.

[29] See id. at 84.

[30] Ely might disagree. Cf. id. at 87 (arguing that Constitution is overwhelmingly concerned with process, not substance).

"[T]he majestic equality of the laws . . . forbid[s] rich and poor alike to sleep upon the bridges, to beg in the streets, and to steal their bread."[31] Anatole France's caustic aphorism reminds us that a trace of we/they thinking can escape detection in a system looking only for formal inequality. It captures the fallacy of adhering to ironclad distinctions between liberty and equality in considering the role of judicial review. I will argue that, with regard to the institutional legitimacy of judicial activism, the differences between equality claims and liberty claims have been overstated.

The structural arguments commonly raised against judicial recognition of liberty claims tend to emphasize the primacy of the representative political process in developing public policy.[32] They tend to overlook, however, the critical question of what representation actually means to our democracy. If representation provides, as those arguments suggest, the principal protection of our liberty, then we must consider how it serves that critical function. Traditionally, the answer has been that, because representatives are no different from anyone else and because they are required to live by their own laws, their incentives will be to pass good laws for all.[33] This conscription of equality has been our constitutional assurance that liberty is protected.

The challenge for the continued protection of liberty in a changing world is to consider how this integral relationship between equality and liberty can be employed in an age when representatives cannot *but* be different from many of their constituents. In a world in which the protective influences of commonality of interest, empathy, and homogeneity are dramatically declining from the representative relationship,[34] courts must play a correspondingly greater role in ensuring that the very features of the democratic process that make it an appropriate primary decisionmaking locus in a free society do not give way to the pitfalls of we/they legislation.

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31 Anatole France, The Red Lily 95 (Winifred Stephens trans., 1908) (1894).

32 See Robert A. Dahl, A Preface to Democratic Theory 23-37 (1956) (critiquing coherence of Madison's notion of majority tyranny and arguing that only majority rule satisfies democratic principle); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 6-8 (1971) (arguing that American constitutional model is primarily majoritarian).

33 See, e.g., Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is [not the Due Process Clause, but] the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

34 See, e.g., George Gallup, Jr., The Gallup Poll: Public Opinion, 1997, at 70-71 (noting, on basis of polling data, that "[a]ttitudes toward gays are far from uniform across American society, with large differences evident across generational and gender lines").

This Article will proceed in five Parts. I will first document the striking preference that the Supreme Court has shown for claims of equality as compared with claims of liberty in the past half-century or so. This preference has contributed to, or perhaps merely facilitated, a discomfort with judicial protection of liberty. In Part II, I will describe the traditional explanation of the way in which representation can protect liberty, an explanation based largely on an assumption of societal homogeneity. Part III tracks the changing understanding of representation during the twentieth century, prompted by a growing awareness of the fallibility of that key assumption. The change, though significant, has not been adequate, to carry forward the original constitutional commitments in the ever-evolving context of the present day, as I argue in Part IV. This gives rise to a critique of two popular theories of judicial review and their positions on the judicial protection of liberty. Finally, in Part V, I suggest a way for courts to employ the lessons from equality jurisprudence to fashion a meaningful role for themselves in the protection of liberty that facilitates, rather than displaces, representation.

I
LESSONS FROM EQUALITY

For many decades, the Supreme Court has appeared more confident in its own legitimacy when protecting equality rather than liberty. When it has addressed issues of unequal treatment on the basis of race or other group characteristics—even when judicial intervention meant the dismantling of entrenched local policy—the Court has not expressed the severe disquiet with its institutional role that we have come to expect when it addresses issues arising under the Liberty Clause. Indeed, for example, the Supreme Court took special pains to preserve its role in protecting equality, even at the very moment when it was authoring one of the most conspicuous examples of judicial reticence in the protection of liberty. In *United States v. Carolene Products Co.*, decided in 1938, the Court assumed a most deferential posture toward legislatures seeking to impose economic restrictions, but added its famous footnote 4, which suggested a different result would ensue if a statute were challenged on the basis of inequality.[35] Equality cases have not recently triggered an institutional alarm warn-

[35] Compare United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (upholding economic legislation on grounds that legislature's judgment on such issues must be affirmed if "any state of facts either known or which could reasonably be assumed affords support for it"), with id. at 152 n.4 (asserting that "more searching judicial inquiry" would likely replace "presumption of constitutionality" when legislation appears to result in "prejudice against discrete and insular minorities").

ing of antidemocratic judicial tyranny. But repeatedly, against constitutional claims of liberty, that bell tolls.

To illustrate, contrast the rhetorical tones in each of two relatively recent Supreme Court opinions: *Adarand Constructors, Inc. v. Pena*,[36] involving a federal affirmative action plan providing a benefit to minority contractors, and *Washington v. Glucksberg*,[37] addressing a state law prohibiting physicians from assisting terminally ill patients to end their lives. In *Adarand*, nonminority contractors claimed interference with equality; in *Glucksberg*, terminal patients claimed interference with liberty.[38] Both laws reflected hard-fought legislative resolutions of socially divisive, morally contestable issues. One might expect that the response from the Court to these two challenged laws would be the same: either defer to the results of the democratic process in both cases or intervene to protect both cases' plaintiffs from burdens imposed by majority moral beliefs that they do not share. But the Court did neither. Instead, it adopted polar opposite positions with respect to its roles in the two disputes.

In *Adarand*, the Court approached the equality claim by employing "the strictest judicial scrutiny."[39] To support such a role for judicial review in the democratic process, the Court quoted Justice Powell's opinion in *Regents of the University of California v. Bakke*:

> Political judgments regarding the necessity for the particular classification . . . are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.[40]

In *Glucksberg*, however, the Court was less enthusiastic:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.[41]

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[36] 515 U.S. 200 (1995).

[37] 521 U.S. 702 (1997).

[38] *Adarand*, 515 U.S. at 204; *Glucksberg*, 521 U.S. at 708.

[39] *Adarand*, 515 U.S. at 224.

[40] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978), quoted in *Adarand*, 515 U.S. at 224-25.

[41] *Glucksberg*, 521 U.S. at 720 (citations omitted) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

The contrast portends a significant difference in the rights themselves. The doctrine bears it out: The list of equality claims entitled to something more than the minimal rational basis scrutiny has continued to expand,[42] while the list of fundamental rights sufficient to garner heightened scrutiny under the Liberty Clause has not grown since 1973[43] and, indeed, arguably has shrunk since that time.[44] More importantly, a three-, four-, five-, or even six-tiered framework (depend-

[42] See United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring "exceedingly persuasive justification" for gender classifications); Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating as irrational classification based on sexual orientation); Davis v. Bandemer, 478 U.S. 109, 143 (1986) (recognizing justiciability of equal protection claims in political gerrymandering cases); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (striking down classification based on mental retardation because irrational); Plyler v. Doe, 457 U.S. 202, 230 (1982) (requiring "substantial state interest" to justify using illegal alien status as classification for denying free public education); Zablocki v. Redhail, 434 U.S. 374, 388-91 (1978) (rejecting classification that burdened indigent persons' right to marry); Lubin v. Panish, 415 U.S. 709, 709 (1974) (invalidating candidate filing fee as applied to indigent persons who cannot pay); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (exercising "close scrutiny" of civil service statutory scheme that classified applicants according to citizenship status); Frontiero v. Richardson, 411 U.S. 677 (1973) (establishing mid-tier scrutiny in gender discrimination claims); Gomez v. Perez, 409 U.S. 535, 538 (1973) (striking state child-support law that classified recipients according to legitimacy of children); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (declaring poll tax unconstitutional as de facto wealth classification); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying "the most rigid scrutiny" in claim of racial discrimination against Japanese Americans); Strauder v. West Virginia, 100 U.S. 303, 305-10 (1880) (exercising exacting scrutiny in claim of racial discrimination against African Americans).

[43] See Troxel v. Granville, 530 U.S. 57, 65, 68-69 (2000) (citing *Meyer* and *Pierce*, infra, in reaffirming parental liberty to control upbringing of children); *Glucksberg*, 521 U.S. at 728 (rejecting claim that physician-assisted suicide is fundamental liberty); Planned Parenthood v. Casey, 505 U.S. 833, 873-74 (1992) (modifying "fundamental rights" analysis of *Roe* and adopting "undue burden" analysis for pre-viability restrictions on abortion); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 286-87 (1990) (failing to recognize liberty of family members to establish comatose patient's wish to die); Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (refusing liberty claim to establish paternity of child); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (rejecting liberty claim to practice same-sex sodomy); Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (recognizing liberty to structure family); Roe v. Wade, 410 U.S. 113, 164 (1973) (upholding individual right to first-trimester abortion and holding state may regulate that right in second trimester only to protect health of mother); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (validating marital liberty to use contraceptives); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing liberty of parents to direct education of their children); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (protecting liberty to teach foreign languages in school).

[44] The "undue burden" analysis adopted in *Casey* undeniably removes abortion from the list of fundamental rights, providing states with broader regulatory power than they enjoyed under *Roe*. See generally Alan Brownstein, How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine, 45 Hastings L.J. 867 (1994). Moreover, the pigeonhole analysis used in *Bowers* thwarted a growing jurisprudence of personal autonomy, appearing to foreclose reasonable common law extrapolation from prior cases recognizing such rights. See *Bowers*, 478 U.S. at 190-91 (reviewing such cases as *Pierce*, *Skinner*, *Griswold*, and *Roe* and concluding that "none of the rights announced in those

ing on how you count) has developed for accommodating some of the nuances of equality claims. The frameworks provide claimants with a range of analytical possibilities beginning with the most deferential rational basis,[45] rising to rational basis "with a bite,"[46] intermediate scrutiny,[47] possibly intermediate scrutiny with a bite,[48] strict scrutiny not fatal in fact,[49] and strict scrutiny.[50] While not quite the sliding scale that Justice Marshall advocated,[51] this doctrinal approach is somewhat more refined and responsive to the nuances and equities of individual cases than an on-off switch for judicial review *vel non*.[52]

During the same historical period, liberty claims have been relegated increasingly to an all-or-nothing approach.[53] *Griswold* appeared to portend significant developments toward liberty protection when it recognized a "fundamental" right to privacy in 1965,[54] as did *Roe v. Wade* when it extended that right to abortion in 1973.[55] But

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cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy").

[45] See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981) (upholding, under rational basis scrutiny, classification that focused on type of milk containers).

[46] See *Romer*, 517 U.S. at 631 (using rational basis scrutiny to invalidate classification based on sexual orientation); *Cleburne*, 473 U.S. at 450 (using rational basis scrutiny to invalidate classification based on mental retardation).

[47] E.g., Rostker v. Goldberg, 453 U.S. 57, 81-83 (1981) (upholding gender classification in military draft statute because it served important governmental objective).

[48] See United States v. Virginia, 518 U.S. 515, 555-56 (1996) (invalidating exclusion of women from Virginia Military Institute because "exceedingly persuasive justification" was lacking for different treatment).

[49] See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (asserting that strict scrutiny is not necessarily fatal when applied to narrowly tailored race-based classifications).

[50] See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964) (applying strict scrutiny to state statute that made it criminal for unmarried interracial couple to live together); cf. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (characterizing strict scrutiny as "strict in theory, but fatal in fact").

[51] See Dandridge v. Williams, 397 U.S. 471, 520-23 (1970) (Marshall, J., dissenting) (calling for Court to abandon dichotomy between fundamental and nonfundamental rights and instead weigh state interest asserted to justify discriminatory classification against interests of those disadvantaged by that classification).

[52] See Gerald Gunther, The Supreme Court—1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17 (1972) (sensing "undercurrent of resistance" to sharp dichotomy between minimal and strict scrutiny).

[53] See generally Rebecca L. Brown, The Fragmented Liberty Clause, 41 Wm. & Mary L. Rev. 65 (1999) (criticizing dichotomy between fundamental and nonfundamental rights under Liberty Clause).

[54] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[55] See Roe v. Wade, 410 U.S. 113, 153 (1973). This development occasioned much commentary predicting that "substantive due process" would replace equal protection as the wave of the future. See, e.g., Ira C. Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 993-94, 998 (1979) ("[F]undamental rights activism stemming from the equal protection clause has been laid to rest, and in its stead has arisen

the Court's failure to locate forthrightly the source and authority of such a right in the Liberty Clause,[56] combined with its obvious ambivalence about its own role in recognizing the right, has rendered the right fragile, limited, and controversial. This approach deprived the right itself of the benefits of a hundred years of constitutional precedent to buttress it against skeptics' attack.[57]

Current constitutional analysis divides the world of liberty claims into two discrete categories. The so-called "fundamental" rights trigger strict scrutiny,[58] but prevailing modes of analysis ensure that almost nothing other than enumerated rights can qualify for that elite status.[59] The other category comprises the "nonfundamental" rights, a classification that covers everything else and gains virtually no scrutiny from courts.[60] The modern Supreme Court's one bold, forthright acknowledgment of a right to liberty under the Fourteenth Amend-

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an active doctrine of substantive due process."). Much scholarship predicted an exciting new approach to constitutional law in the direction of protecting privacy. See, e.g., William M. Beaney, The *Griswold* Case and the Expanding Right to Privacy, 1966 Wis. L. Rev. 979, 985 (characterizing *Griswold*'s significance as lying in Court's decision to recognize constitutional rights that do not have explicit textual support in Constitution); Thomas I. Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 234 (1964) (observing that right to privacy "seems to have a viable and significant future"); Paul G. Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case, 64 Mich. L. Rev. 235, 248 (1965) ("[R]ecognition of the right of privacy may well be an opening wedge for extension of that right in new directions.").

[56] U.S. Const. amend. V ("[N]or shall any person . . . be deprived of . . . liberty . . . without due process of law . . . ."); U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . liberty . . . without due process of law . . . ."). See *Roe*, 410 U.S. at 153 ("[R]ight of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment[ ] . . ., is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Griswold*, 381 U.S. at 484 (finding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees," which protect privacy).

[57] See Brown, supra note 53, at 88-91 (discussing history of substantive nature of due process protection); James W. Ely, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const. Comment. 315 (1999) (tracing substantive roots of due process back to Magna Carta and to seventeenth- and eighteenth-century American jurisprudence).

[58] See *Roe*, 410 U.S. at 155.

[59] See Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (declaring that Court's approach to substantive due process claims "avoids the need for complex balancing" and "tends to rein in the subjective elements" by requiring "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition"). But see Troxel v. Granville, 530 U.S. 57, 65, 72-73 (2000) (reaffirming basic right of parents to determine interests of their children).

[60] See Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (finding that even simple majority preference supplies rational basis for burden on nonfundamental liberties). The introduction of an "undue burden" analysis in *Casey* may be a refinement of the dichotomy here, although its circumstances suggest that the motivation behind that development was not to provide a more nuanced review of liberty claims; rather, it was to ratchet back the right recognized in *Roe* from a fundamental right to something less formidable to state regula-

ment's Liberty Clause finally came, ironically, in *Planned Parenthood v. Casey*, a case that cut back on prior constitutional protection of a fundamental right.[61] In that opinion, the Court, for the first time, located liberty squarely in the Due Process Clause and explicitly rejected any limitation of its reach to procedural rights, to specific practices protected at the time the Fourteenth Amendment was ratified, or to rights enumerated in the Bill of Rights. Indeed, the "undue burden" test that it adopted to govern the regulation of abortion could, in the abstract, be considered to have signaled a retreat from the Court's hostile, categorical, all-or-nothing view of liberty claims. The application of that test in the abortion context, however, has resulted in greater power for state regulation. Perhaps the *Casey* opinion, opening and closing as it does with the word "liberty," sought to strengthen and protect other liberty rights from the erosion occasioned by the most controversial of their number—abortion. So far, however, that promise has yet to be realized.

This difference in attitude toward equality claims and liberty claims reflects an apparent belief of an increased number of Supreme Court Justices,[62] and the scholars who celebrate them,[63] that the judiciary should refrain from plucking issues out of the marketplace of political forces, rendering them off limits to state oversight. Justice Jackson's characteristically eloquent insight captured a widely held instinct when he contrasted the degree of readiness with which a Court should recognize a liberty, as opposed to an equality, claim.[64] "The

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tion. In any event, there has yet to be any indication that the undue burden analysis will find its way into the analysis of any liberty interests other than abortion.

[61] See Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (

> Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, . . . the Clause has been understood to contain a substantive component as well . . . .).

[62] See, e.g., *Glucksberg*, 521 U.S. at 735 (Rehnquist, C.J.) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."); *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

[63] See Cass R. Sunstein, The Supreme Court—1995 Term, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 9 (1996) (arguing for judicial minimalism that is "democracy-forcing").

[64] Justice Jackson felt he was swimming against the tide of Supreme Court practice in pressing his insight. See Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949) ("My philosophy as to the relative readiness with which we should resort to these two

burden should rest heavily," he wrote, "upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance." That act "leaves ungoverned and ungovernable conduct which many people find objectionable."[65] A Court, however, should not be so reluctant to invoke the Equal Protection Clause. Equal protection analysis "does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact."[66] Thus, the protection of individuals from policies that they find oppressive is better achieved, in the long run, by policing equality norms than by imposing substantive limits on what governments can do.[67]

Perhaps reflecting the power of this belief, some constitutional claims that appear to resound in liberty have succeeded only because the Court was able to recast them as claims of unequal treatment. Consider *Skinner v. Oklahoma*.[68] In that well-known 1942 case, a state law provided that upon conviction of three felonies "involving moral turpitude,"[69] a defendant could be subjected to mandatory sterilization. When Skinner, thrice convicted, challenged the state's effort to require him to undergo sterilization, the Court acknowledged the liberty at stake, calling reproduction "one of the basic civil rights of man."[70] Yet in identifying a constitutional flaw in the state law, the Court looked to the Equal Protection Clause, noting that under a statutory exception for largely white-collar crimes, if Skinner had "embezzled" chickens rather than simply stolen them, he would not have been subject to this penalty. The potential for "invidious discrimination" rendered the statute impermissible as a violation of *equality,* not

clauses is almost diametrically opposed to the philosophy which prevails on this Court."). In hindsight, however, it is clear that the period in which he wrote was a low point for fundamental rights protection in the Supreme Court. See Lupu, supra note 55, at 991. Justice Jackson's view, I suggest, proved to be an extremely tantalizing one that ultimately captured the Court.

65 *Ry. Express Agency*, 336 U.S. at 112.

66 Id.

67 See Gunther, supra note 52, at 41-43 (arguing that equal protection analysis, by focusing on legislative means rather than ends, is preferable to value-laden due process approach); cf. *Glucksberg*, 521 U.S. at 732-35.

68 316 U.S. 535 (1942).

69 Id. at 536.

70 Id. at 541.

liberty.[71] Curiously, *Skinner* is often cited as one in the line of cases establishing a constitutionally protected right to liberty.[72]

A similar phenomenon can be seen in *Loving v. Virginia*,[73] in which the Court primarily relied on equal protection grounds to strike down a state law prohibiting interracial marriage. As in *Skinner*, the Court perceived an infringement of "one of the 'basic civil rights of man'"[74]—the classic hallmark of a liberty claim. Again, the Court relied on the Equal Protection Clause, even though the statute imposed the same criminal punishment on both parties to the interracial marriage and thus did not create an inequality of the standard doctrinal variety.[75] Interestingly, when the Court separately did consider the liberty claim concerning a right to marry in *Loving*, it still did not apply a straightforward liberty analysis. Rather, the Court explicitly linked the liberty claim to the equality claim: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, *classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment*, is surely to deprive all the State's citizens of *liberty* without due process of law."[76] The law infringed the petitioners' liberty because it rested on distinctions with clear implications for equality: a sort of substantive equal protection, still presented in the garb of formal equality. It is interesting that Ely viewed the "fundamental freedom" language in *Loving* as an "unnecessary addendum" by the Court and a lapse into the "value-oriented approach favored by the academy."[77]

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[71] We know from Chief Justice Stone's concurring opinion that the Court had considered resolving the case on the basis of the Due Process Clause alone, but instead chose the equal protection rationale. Chief Justice Stone understood the issue as "not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty . . . satisfies the demands of due process." Id. at 544 (Stone, C.J., concurring).

[72] See Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[73] 388 U.S. 1 (1967).

[74] Id. at 12 (quoting *Skinner*, 316 U.S. at 541).

[75] The Court found a violation of equality despite the nominal evenhandedness of the statute in part because the statute's antimiscegenation policy was clearly part of a larger system of racial oppression. In a transparent attempt to maintain only white racial purity, the statute divided races into white and nonwhite, prohibiting marriages between these two groups but not those between different nonwhite races. See id. at 11 n.11.

[76] Id. at 12 (emphasis added). The choice to take this approach made it possible to limit the precedent to limitations on marriage involving racial classifications. Other restrictions on marriage—though still limiting "one of the basic civil rights of man"—have not been found to be unconstitutional, except where they disproportionately burden those living in poverty. See Zablocki v. Redhail, 434 U.S. 374, 388-91 (1978) (invalidating, on equality grounds, statute prohibiting marriage by those who have not met prior child support obligations).

[77] Ely, supra note 23, at 73, 221 n.3.

Even more telling is that the Court itself has described, as equality cases, two opinions that most had thought to involve liberty protection. In its famous 1938 *Carolene Products* footnote, the Court described the earlier case of *Pierce v. Society of Sisters*[78] as a case justifying judicial review because it involved a statute directed at "particular religious . . . minorities."[79] For those familiar with the constitutional law canon, this is a surprising description of the 1925 case. The *Pierce* decision, addressing a statute requiring all children to attend public school, is usually described as having recognized the fundamental liberty of parents to direct the educational upbringing of their children.[80] In the same footnote, the Court described another case, *Meyer v. Nebraska*,[81] as one involving a "statute[ ] directed at particular . . . national . . . minorities."[82] *Meyer*, which in 1923 had struck down a state prohibition of German language instruction in schools, is also widely credited with recognizing the fundamental liberty of parents to control the education of children as well as perhaps acknowledging an occupational liberty of teachers.[83] Yet in 1938 the Court explained the results of these now-iconic liberty cases on equality grounds[84]—at the very moment that it was simultaneously adopting its hands-off view of the Liberty Clause in the *Carolene Products* opinion.[85] In this way, the Court tossed those precedents a lifeline for a better chance of surviving the shift away from *Lochner*.

The interdependence of liberty and equality emerges even more clearly from the so-called "fundamental interests" strand of the Equal Protection Clause. This often inscrutable variation on the equality

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78 268 U.S. 510 (1925).

79 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

80 See Geoffrey R. Stone et al., Constitutional Law 811 (4th ed. 2001); Tribe, supra note 2, § 15-6, at 1319.

81 262 U.S. 390 (1923).

82 *Carolene Prods.*, 304 U.S. at 153 n.4.

83 See Stone et al., supra note 80, at 810-11.

84 In very real ways *Meyer* and *Pierce* are indeed about equality, a fact made clear when one understands why the laws at issue were passed. The ban on foreign language teaching in Nebraska was born of postwar anti-German hysteria. William G. Ross, Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927, at 30-114 (1994) (documenting historical and societal origins of nativism movement behind Nebraska law). The compulsory public school initiative at issue in *Pierce* was largely the product of organized anti-Catholic hostility mobilized by, among others, the Ku Klux Klan. Id. at 148-73. These laws underscore the larger point that important liberties are rarely taken away from everyone and that the motives underlying liberty violations are never far removed from those driving equality violations. Liberty and equality claims, when asserted against state-imposed restraints, tend to constitute the same fundamental complaint. See infra text accompanying notes 96-102.

85 See *Carolene Prods.*, 304 U.S. at 152 (upholding federal law outlawing filled milk on ground that facts providing rational basis for legislative judgment are to be presumed even if not proven).

principle has perplexed and concerned many commentators, primarily because it depends upon a blending of liberty and equality concepts.[86] It emerged when the Court began to identify certain liberties that, although unspecified in the Constitution, should receive special protection from legislative infringement. Curiously, however, it grounded the special protection for unenumerated liberties in the Equal Protection Clause. A few salient examples should be sufficient to illustrate the point.

The first unenumerated interest to gain special recognition was the right to vote. The Court explained its concern that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[87] This sounds very much like a concern about liberty. Yet the Court used the Equal Protection Clause as the source of protection in these cases and again in *Harper v. Virginia Board of Elections*,[88] in which it invalidated a poll tax.[89] Explicitly and revealingly endorsing Justice Holmes's dissenting jab in *Lochner* about Mr. Herbert Spencer's *Social Statics*,[90] the Court in *Harper* self-consciously aligned itself on the opposite side of that now-reviled case, squarely on the more righteous trajectory from *Plessy v. Ferguson*[91] to *Brown v. Board of Education*[92] and beyond.

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[86] See, e.g., Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1123 (1969) (characterizing fundamental rights analysis as "judicial preference for individual interests over legitimate state interests" that resembles "the type of judicial interference with legislative choice which gave rise to criticism when couched in the language of substantive due process"); see also Kenneth L. Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 UCLA L. Rev. 716, 739-46 (1969) (criticizing fundamental rights analysis for permitting judges to impose their own values on issues before them); Ralph K. Winter, Jr., Poverty, Economic Equality, and the Equal Protection Clause, 1972 Sup. Ct. Rev. 41, 43 (characterizing fundamental rights analysis as inappropriate "[t]heoretical cover" for those who wish to use judicial process to redistribute wealth in United States). The doctrine also has its fans. See generally Frank I. Michelman, The Supreme Court—1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).

[87] Reynolds v. Sims, 377 U.S. 533, 562 (1964) (invalidating system of apportionment that did not maintain districts of roughly equal population).

[88] 383 U.S. 663 (1966).

[89] See id. at 666. The district court had held that the poll tax had no racially disproportionate impact, so the case did not pose a classic case of unequal treatment. See Harper v. Va. State Bd. of Elections, 240 F. Supp. 270, 271 (E.D. Va. 1964).

[90] See Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (criticizing opinion of Court for disregarding political will of majority and observing that Due Process Clause "does not enact Mr. Herbert Spencer's Social Statics").

[91] 163 U.S. 537 (1896).

[92] 347 U.S. 483 (1954).

The protection of interstate travel has followed a similar journey. Although recognition of the right to travel as a basic liberty antedated the Fourteenth Amendment,[93] the Supreme Court in *Shapiro v. Thompson*[94] rejected the invitation to analyze a welfare residency law directly under the classic liberty analysis.[95] Instead, the Court constructed a new amalgam of liberty and equality to hold that unequal treatment based on the exercise of a constitutionally protected *liberty* would give rise to heightened scrutiny under the Equal Protection Clause.

The rights to vote and to travel derive from constitutional sources outside the Equal Protection Clause and thus could presumably have been enforced directly under the rubric of liberty.[96] Yet in these two important cases, the Court instead rested its decisions on equality grounds.[97] Significantly, however, the method of doing so was to examine the nominally evenhanded laws in the context of the burdens they actually inflicted on certain subsets of affected persons. The Court recognized here that, at least for some important interests, facial neutrality of a law was not sufficient to ensure equality. (This is a principle to which my analysis of liberty will return below.) The Court sought, in these each of these cases, to avoid a more hazardous route by finding, in each, an opportunity to resolve the issue on the basis of ostensibly distributional, rather than substantive, principles. Thus it could disclaim any intention to elevate some interests over others, to define the public good, or to substitute its judgment for that of a legislature. One can almost hear the whispers of "Lochnerism" poised in the background, the gun at the head of judicial review. Indeed, despite the evasive tactics, at times the charge became explicit.

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[93] See United States v. Guest, 383 U.S. 745, 757-58 (1966) ("[A] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."(footnote omitted)); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867) (recognizing constitutional right to travel before passage of Fourteenth Amendment).

[94] 394 U.S. 618 (1969).

[95] Such an approach would involve determining whether the durational residency requirement for welfare placed a significant burden on the right to travel. Cf. Califano v. Jobst, 434 U.S. 47, 54 (1977) (finding that federal law, which terminated welfare benefits to disabled dependent child upon that child's marriage, did not unconstitutionally interfere with right to marry).

[96] Some were not taken in by the Court's subterfuge. See, e.g., Karst, supra note 86, at 745-46, 749 (noting that *Harper* employs substantive equal protection analysis that amounts to return to natural-law constitutionalism); cf. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

[97] See Lupu, supra note 55, at 1061-62 ("[A] more justifiable liberty-centered view . . . could produce similar . . . outcomes in those cases, without the vices and distortions of substantive equal protection thinking.").

In *Harper*, Justice Black held nothing back: "[The Court] seems to be using the old 'natural-law-due-process formula' to justify striking down state laws as violations of the Equal Protection Clause."[98] Then in *Shapiro*, Justice Harlan also leveled the *Lochner* accusation directly:

> I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it . . . would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause.[99]

The Court sought to avoid this indictment—as it also had done in *Skinner* and in *Loving*—by cloaking the liberty analysis in the garb of inequality, even though the inequality may have been in some sense contrived. It managed to construct a whole "strand" of equal protection jurisprudence around the idea of avoiding substantive evaluation of liberty interests by resolving claims on the basis of unequal allocation of benefits and burdens.[100] When the gravamen of the constitutional violation could be grounded on a footing of inequality, the Court could step in with head held high. When a quasi-equality analysis has been elusive, the Court has consistently refused to step in at all.[101]

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[98] *Harper*, 383 U.S. at 675 (Black, J., dissenting) (footnote omitted).

[99] *Shapiro*, 394 U.S. at 661-62 (Harlan, J., dissenting).

[100] Claimants could gain heightened scrutiny by identifying either a fundamental right (e.g., the right to vote) allocated unevenly on the basis of a nonsuspect criterion (e.g., wealth), as in *Harper*, or a nonfundamental right (e.g., welfare benefits) allocated unevenly on the basis of a suspect criterion (e.g., exercising the right to travel), as in *Shapiro*.

[101] Compare Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (declining to protect same-sex partners under Liberty Clause from operation of sodomy law), with Romer v. Evans, 517 U.S. 620, 631-32 (1996) (invoking Equal Protection Clause to strike down state provision burdening gays). Justice Scalia, dissenting in *Romer*, argued that the two outcomes could not be reconciled. See id. at 641 (Scalia, J., dissenting).

If one sees a significant structural distinction between judicial intervention on behalf of liberty and that on behalf of equality, however, then the different results could make sense. Cf. Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (refusing to apply heightened scrutiny, under Free Exercise Clause, to generally applicable laws that burden religious liberty). In *Smith*, there was no argument that religious individuals were denied "equal access" to the participatory opportunities afforded by the government. In a prior similar case, however, an equality argument had been made and the case had come out the other way. See Sherbert v. Verner, 374 U.S. 398, 406 (1963) (invalidating, as infringement of "religious liberty," state law that burdened Sabbatarians more than Sunday worshippers, adding that law's unconstitutionality was "compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects"). Indeed, the Court in *Smith* recognized that those with religious liberty objections to generally applicable laws could seek relief in the political process. Religious adherents—even members of minority religions—have been relatively successful at obtaining protection in the political process. Thus, there was no perceived need for the Court to intervene to protect an equality inter-

It is worth asking what theory of institutional power permits the unapologetic striking down of laws on inequality grounds, while it counsels against any review of the same laws in the name of liberty. Presumably both types of constitutional claims involve the plea of a "loser" in the democratic process for an independent court to protect that loser from majority-backed political outcomes. What is more, as we have seen, "the government rarely takes a fundamental right away from all persons."[102] Thus, equality and liberty are interdependent ideals, both essential to the fulfillment of constitutional promise. Yet they meet with starkly different receptions from the bench and scholarly community. The explanation for the different treatment apparently lies in some deep instinct about judicial review. In the following Sections, I argue that the instinct is misguided.

II
EQUALITY, THE AGE-OLD GUARDIAN OF LIBERTY

The Constitution protects liberty in a variety of structural ways by erecting incentives and barriers to government action, harnessing the energy of self-interest to drive the machinery necessary to check oppressive lawmaking. Separated powers, federalism, and accountability are all examples of such checks. Representation under the Constitution has its own such check: the requirement, known as the communion of interests, that legislators effectively burden themselves as they burden others. The history of the concept of representation in this country suggests that the communion of interests, grounded in equality, provides a principal protection of liberty in the representative structure established by the Constitution.

The eighteenth-century understanding of representation in Britain and the American colonies included an important notion referred to as the doctrine of "shared interests."[103] That doctrine stipulated that, despite the absence of universal suffrage, the House of Commons in Parliament represented all legitimate "interests"—as opposed to citizens—of the realm.[104] Not everyone needed to vote because "[t]he interest of the body represented has been precisely the same

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est, leaving only the religious liberty claim, which was predictably unsuccessful. See Bressman, supra note 14, at 1042-43.

102 Nowak & Rotunda, supra note 1, § 11.7, at 439.

103 Reid, supra note 17, at 45.

104 Id. Thomas Jefferson's notes from the Continental Congress report John Adams as saying, "Reason, justice, & equity never had weight enough on the face of the earth to govern the councils of men. It is interest alone which does it, and it is interest alone which can be trusted." Thomas Jefferson's Notes of Proceedings in Congress (n.p. 1776), in 4 Letters of Delegates to Congress, 1774-1789, at 443 (Paul H. Smith ed., 1979).

with that of the body unrepresented."[105] The importance of this doctrine lay in the belief that the representatives "cannot betray the people without, at the same time, betraying themselves."[106] "[I]f they act for themselves, (which every one of them will do as near as he can) they must act for the common Interest."[107]

The doctrine of shared interests gave rise to the related theory of virtual representation, which sought to assure the American colonists that, although they were not entitled to vote for members of Parliament, that body was capable of representing them adequately because it sufficiently shared in their interests.[108] This argument rested on the possibility of tying or equating the interests of those without political power to the interests of those with it, as a way of ostensibly protecting against oppressive laws for all.[109] "The security of the nonelectors against oppression," it was said, "is that their oppression will fall also upon the electors and the representatives."[110] This conception of what it would mean to be represented was intelligible only because of the widespread assumption that the English people "were essentially a unitary homogeneous order with a fundamental common interest."[111] What was good for some was good for all.

A distinct but related doctrine, which suggested that what was inflicted on some must be inflicted on all, was also invoked in defense of virtual representation. This principle, referred to as the doctrine of "shared burdens," was said to be "one of the most significant principles of British constitutionalism guaranteeing liberty and security."[112] It required that representatives be "affected by the laws of their making equally with their constituents."[113] Commentators were perhaps given to some overstatement in their praise for this doctrine, but

105 Thomas Somerville, Observations on the Constitution and Present State of Britain 36 (Edinburgh, William Creech 1793).

106 William Pulteney, The Effects to Be Expected from the East India Bill, upon the Constitution of Great Britain, If Passed into a Law 30-31 (London, J. Stockdale 1783).

107 O Liberty, Thou Goddess Heavenly Bright 2 (New York 1732), quoted in Reid, supra note 17, at 48.

108 See Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 173-74 (1969).

109 See Hannah Fenichel Pitkin, The Concept of Representation 174-76 (1967) ("Virtual representation exists where the substantive content and effect occur without election.").

110 Daniel Dulany, Considerations on the Propriety of Imposing Taxes in the British Colonies (n.p. 1765), reprinted in 1 Pamphlets of the American Revolution, 1750-1776, at 612 (Bernard Bailyn ed., 1965). Dulany was the foremost American antagonist in the debate over representation.

111 Wood, supra note 108, at 174.

112 Reid, supra note 17, at 49.

113 Spotsylvania County (Virginia) Resolutions (June 24, 1774), reprinted in 1 American Archives 448 (Washington, D.C., 1837).

clearly it was viewed as a principal bulwark of liberty.[114] "The great provision made by the constitution for securing the property of the people, arises from their representatives being made to bear their due proportion of the burthens they impose, in common with the people on whom they are laid."[115]

Both justifications for virtual representation of the colonies, however, struck a hollow chord to colonial ears. The Americans tenaciously resisted any claim that their subjection to laws passed by a Parliament for which they had no opportunity to vote was constitutional.[116] Their position did not rest, however, on a rejection of the theory of virtual representation itself.[117] Rather, their objection was based on the absence of a foundation for invoking it: the actual lack of both shared interests and shared burdens across the vast width of the Atlantic Ocean.[118] They argued that their interests were not the same as those of their fellow subjects in England, nor were the burdens they bore equally inflicted on the members of Parliament or their electors.

The colonists' complaint is illuminating on the general question of how to understand the obligations of representation under conditions of pervasive difference. The Pennsylvania Assembly protested that the members of Parliament, "at the great Distance they are from

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[114] See Edward Bancroft, Remarks on the Review of the Controversy Between Great Britain and Her Colonies 95 (London, 1769) (referring to principle of shared burdens as "an effectual barrier against Oppression"), quoted in Reid, supra note 17, at 49; J.L. DeLome, The Constitution of England 283 (London, 1817) (calling shared burdens "a complete security"), quoted in Reid, supra note 17, at 49; Francis Dobbs, A Letter to the Right Honourable Lord North on his Propositions in Favour of Ireland 8 (Dublin, 1780) (asserting that doctrine of shared burdens was basis for "the boasted freedom of a subject of Great-Britain"), quoted in Reid, supra note 17, at 49; Joseph Hawley, Letter to the Inhabitants of the Massachusetts Bay (Mar. 30, 1775), in 2 American Archives 247 (Washington, D.C., 1837) (calling doctrine of shared burdens "a grand security, a constitutional bulwark of liberty"), quoted in Reid, supra note 17, at 49; William Pulteney, Plan of Re-Union Between Great Britain and Her Colonies 43 (London, 1778) (claiming that doctrine of shared burdens was responsible for securing "the whole empire"), quoted in Reid, supra note 17, at 49.

[115] An Argument in Defence of the Exclusive Right Claimed by the Colonies to Tax Themselves 79-80 (London, Evans & Davis 1774), quoted in Reid, supra note 17, at 60.

[116] See Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 242 (1988) (describing colonists' denial that virtual representation could extend beyond shores of Great Britain).

[117] See Reid, supra note 17, at 132 (

> The issue posed by the revolutionary controversy was not the constitutionality of virtual representation in either Great Britain or the colonies but whether it could constitutionally and legally be extended to a part of the empire in which the protection and security of shared interests, shared burdens, and equal assessments might not operate to the same degree of exactitude as in the electoral part.).

[118] See Wood, supra note 108, at 177.

the Colonies," could not "be properly informed, so as to enable them to lay such Taxes and Impositions with Justice and Equity, the Circumstances of the Colonies being all different one from the other."[119] Notably, the failure of the legislators to represent the colonies was not limited to the Americans' lack of a vote. More importantly, it related to their inability to appreciate the circumstances and particular situations of the regulated: The member of Parliament could represent even nonvoting Britons because "[t]hey have all fathers, brothers, friends, or neighbors in the House of Commons, and many ladies have husbands there. Few of the members have any of these endearing ties to America. We are as to any personal knowledge they have of us as perfect strangers to most of them as the savages in California."[120] The member of Parliament "is an eye-witness of their condition, he can judge of their abilities, he can be wounded at the sight of their distresses. But he cannot see our misery, he cannot judge of our abilities."[121] "If we are not their constituents, they are not our representatives."[122] Put in more modern terms, the deep differences and unfamiliarity between representatives and represented made the legislators incapable of according these distant and unknown constituents the empathy that constitutional representation requires.

Moreover, shared burdens were also illusory. For example, the Stamp Act and tea tax, so onerous to the Americans, did not apply to those in Britain, and thus the "great security" of legislators' self-interest as a check on oppressive laws was simply absent for the colonists.[123] It is not insignificant that the colonists viewed these structural flaws in representation as part of their justification for revolt.[124]

The concepts of shared interests and shared burdens survived under the American Constitution.[125] Shared interests became sub-

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[119] Instructions from the House of Representatives to Richard Jackson (Sept. 22, 1764), reprinted in 7 Pennsylvania Archives 5644 (Charles F. Hoban ed., 1935).

[120] James Otis, A Vindication of the British Colonies 19-20 (n.p. 1765), reprinted in 1 Pamphlets of the American Revolution, supra note 110, at 567.

[121] Case of Great Britain and America, Addressed to the King, and Both Houses of Parliament 4 (Boston, 1769), quoted in Reid, supra note 17, at 57.

[122] A Letter from a Plain Yeoman, Providence Gazette, May 11, 1765, reprinted in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1776, at 76 (Edmund S. Morgan ed., 1959).

[123] Reid, supra note 17, at 62.

[124] See Wood, supra note 108, at 178 ("Indeed, the British had violated the very essence of any kind of representation, virtual or not, by framing laws to bind the people, without, in the same manner, binding the legislators themselves.").

[125] Virtual representation also survived after 1776. See id. at 181 (noting that Americans "hung on to the assumptions behind virtual representation and attempted to work them into their constitutional documents"). Wood intriguingly suggests that "[w]hatever one may think of the notion of virtual representation as it pertained to the Americans in 1765, no better justification of majority rule has ever been made." Id. at 176.

sumed into the American theory of republicanism. This strand of constitutional thought, with its devotion to the transcendence of the public good, logically presumed a legislature in which the various groups in the society would realize the necessary dependence, connection, and commonality each had with the others.[126] The good representative had a duty "to be assiduous in promoting the interest of the whole, which must ultimately produce the good of every part"—a theory inevitably bound up with the belief in the homogeneous unity of the people.[127]

Some historians talk about this theme in British and American history as an element of "sympathy" in the representative relationship. John Adams captured the idea with "new precision"[128] when he wrote that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them."[129] Historian Jack Rakove explains that this "portrait" metaphor connoted a notion of sympathy. "Sympathy was most likely to exist," he writes, "when electors and the elected *shared* underlying traits; sentiment alone would not do when the allure of power worked its charms."[130] His analysis suggests support for an understanding of sympathy in structural terms. It could, in theory, contribute both to the protection of the people against arbitrary power and to the affirmative adoption of policies that would further the good of society.[131] One Anti-Federalist confirmed his party's sense that the former was the greater concern when he contended that representation "calls for a knowledge of the circumstances and ability of the people in general, a discernment how the burdens imposed will bear upon the different classes."[132] In the "science of representation sympathy *was* the highest form of knowledge, but that sympathy could be attained only when the interests of elector and elected were one."[133]

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126 Id. at 179.

127 Id. at 180.

128 Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 203 (1996).

129 John Adams, Thoughts on Government (1776), reprinted in 4 The Works of John Adams 195 (photo. reprint 1969) (Charles Francis Adams ed., 1850-56).

130 Rakove, supra note 128, at 204.

131 See id. at 205.

132 Melancton Smith, Speech (June 21, 1788), in The Anti-Federalist 331, 340 (Herbert J. Storing ed., 1985).

133 Rakove, supra note 128, at 233. I do not intend to minimize the differences between the Federalists and Anti-Federalists regarding the issue of how to reconcile the sympathy necessary for fair representation with the aristocratic virtue of deliberation. The Federalists did not discount the importance of sympathy but believed that it could be attained without exact replication of the social traits of all constituents. See generally id. ch. 8. This debate goes well beyond the structural point about sympathy that I am seeking to establish here.

The related doctrine of shared burdens—so celebrated in British constitutionalism—was seen as a central tenet of representation under the American system as well. Madison reaffirmed it in *Federalist No. 57*:

> [A] circumstance in the situation of the House of Representatives, restraining them from oppressive measures, [is] that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. *It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.*[134]

The legislators' obligation to bear the burdens of the laws arose out of law's equality and enhanced its quality. It served the dual function of "ensur[ing] a community of interest and guard[ing] against oppressive legislation."[135] At the time of the founding, the principal means of enforcing the community-of-interests obligation would be at the ballot box. Popular election would be a significant force to oppose any tendency in rulers to separate themselves from the ruled.[136]

It was quite clear that the more homogeneous the society, the greater protection this structural design afforded to liberty and equality. "To the extent that the ideal of homogeneity could be achieved, legislation in the interest of most would necessarily be legislation in the interest of all, and extensive further attention to equality of treatment would be unnecessary."[137] In contemplating that every citizen would garner equivalent respect in the legislative process, the Constitution assumed "that 'the people' were an essentially homogenous group whose interests did not vary significantly."[138] With this understanding, the republican ideal of representation was possible.

But it did not work forever. "What the system . . . does *not* ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us."[139] The requirement that legislators treat themselves as they treat *most* of the rest of us "would be no guarantee whatever against unequal treatment for minori-

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134 The Federalist No. 57, at 352-53 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

135 Ely, supra note 23, at 78.

136 See id.; Brown, supra note 20, at 565-66 (describing how purpose of popular elections was to punish elected officials for breaches of trust).

137 Ely, supra note 23, at 79.

138 Id.

139 Id. at 78.

ties."[140] Of course, the key assumption—that everyone's interests are essentially identical—was questionable even at the time of the founding.[141] Yet to the extent that important differences among the people were familiar to the Founders, the Constitution employed several strategies to attempt to limit the power of bald majority rule over those matters.[142]

While the Constitution recognized a role for differences in the democratic development of public policy, it also imposed limits on what kinds of differences could be resolved by the political process alone. Differences would help legislators hammer out a concept of the public good, as to which they then could enact laws equally for themselves and others to live by. This vision is reflected in *Federalist No. 10*, with its exhortation that out of difference would come the hope of keeping oppression at bay.[143] "For the framers, heterogeneity was beneficial, indeed indispensable; discussion must take place among people who were different. It was on this score that the framers responded to the antifederalist insistence that homogeneity was necessary to a republic."[144] The act of representation would necessarily include the consideration and discussion of different views, perspectives, and preferences. It could not be correct to say, then, that the constitutional notion of representation is necessarily compromised by differences among the population. Indeed, the task of representation is enhanced.

But it would be equally incorrect to conclude that the Constitution contemplates that all matters on which people hold profoundly different views will be resolved by the political give-and-take of pluralist bargaining (or even deliberative discussion) through the representative process. The founding community was familiar with differences: *Federalist No. 10* itself lists the debtor/creditor divide, as well as numerous "interests" related to source of livelihood, in addi-

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140 Id.

141 See J.R. Pole, Political Representation in England and the Origins of the American Republic 538 (1966) (discussing how representation of majority was perpetually complicated by persistence of diverging "interests"—"economic, geographic, ecclesiastic, and dogmatic").

142 See, e.g., U.S. Const. art. I, § 7, cl. 2 (requiring concurrence of two differently constituted legislative houses to pass legislation); U.S. Const. art. IV, § 2, cl. 1 (ensuring that states do not discriminate against citizens of other states); U.S. Const. amends. I-VIII (limiting power of Congress to legislate in areas affecting certain individual rights).

143 The Federalist No. 10 (James Madison) (advocating various structural measures to control excessive accretion of power by factions).

144 Cass R. Sunstein, The Partial Constitution 24 (1993); see also The Federalist No. 70, at 426-27 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The differences of opinion, and the jarring of parties in [the legislature] . . . often promote deliberation and circumspection, and serve to check excesses in the majority.").

tion to political and religious diversity, that separated the American population.[145] Most of those types of differences the Founders were willing to leave to political solutions, trusting that structural protections such as the communion of interests in representation, as well as separation of powers, bicameral legislation, electoral accountability, and others, would stave off any grossly oppressive legislative solutions to divisive social problems.[146] But it is instructive to look as well at the matters on which the Constitution did *not* trust that representation alone could respond adequately to difference.

The Constitution's clearest structural accommodation of difference was its decision to base representation on geographic criteria.[147] By allocating representative power on the basis of geography, the Constitution automatically ensured that people bound by common representation would share at least some very important features, determined by where they lived. This would facilitate the communion of interests so important to good lawmaking. The importance of geographically based districts seemed, perhaps, naturally salient to a community whose greatest complaint against its former sovereign had been that its only "representation" was undertaken by representatives three thousand miles away.[148] The structural accommodation of difference based on geography has become much less valuable over time, as people's livelihoods and values continue to become less and less associated with their places of residence.[149] Other characteristics have begun to displace geography as defining attributes.

The Constitution also placed several types of issues, those particularly susceptible to intractable disagreement, out of the domain of legislative determination. For example, the Framers were amply familiar with diversity of religious belief and political viewpoint.[150] The

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145 See The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

146 See Pitkin, supra note 109, at 196 ("Madison . . . sees representation as a way of stalemating action in the legislature, and thus in society, until wisdom prevails among the people.").

147 See U.S. Const. art. I, § 2, cls. 2-3 (imposing residency and apportionment requirements for House of Representatives).

148 See Morgan, supra note 116, at 241 (discussing colonists' complaints that members of Parliament did not represent them).

149 See Lani Guinier, The Tyranny of the Majority 92-94 (1994) (advocating nonterritorial basis for vote distribution as means to address failure of representation). The Supreme Court, of course, continues to emphasize the importance of plain geographic boundaries in its voting rights cases. See, e.g., Miller v. Johnson, 515 U.S. 900, 913 (1995) (concluding that bizarrely shaped voting districts are circumstantial evidence that district lines were drawn in way that violates equal protection); Shaw v. Reno, 509 U.S. 630, 647 (1993) (same).

150 See Pole, supra note 141, at 533 (describing colonial awareness that political representation included only white population, which "contained persons of a variety of different origins and religions").

First Amendment explicitly ensured that, on matters of religious freedom and personal conscience, the representative process would not be the forum for the resolution of differences.[151] Representation, with its broad substantive definition necessary to the advancement of liberty, was perhaps understood to be impossible on First Amendment issues due to an expected lack of communion of interests. Nor did the Constitution permit legislatures to resolve differences of political persuasion by allowing majoritarian responses to the expression of unpopular political viewpoints.[152] The Fifth Amendment placed outer bounds on the degree to which the groups Madison called "those who hold and those who are without property"[153] could overbear one another legislatively.[154] In addition, the original Constitution placed out of the realm of legislative reach the intense moral debate over abolishing or permitting slavery, at least for a time,[155] and ultimately placed it permanently out of political reach with the Thirteenth Amendment.

These constitutional provisions suggest that there are some matters which, by their nature, are not readily subject to deliberation or compromise. These areas of difference are not the shifting and temporary interests that Madison's *Federalist No. 10* envisioned would be subject to "the restraining, balancing, and accommodating machinery" of government.[156] Rather, they have in common the attributes of being largely pre-political, deeply held beliefs about defining human values. The Framers' act of protecting these areas of difference with explicit provisions in the Constitution tends to confirm a sense that the representative process alone is not well suited to handling such matters.

III

AN EVOLVING THEORY OF REPRESENTATION

The constitutional provisions described above were sufficient to accommodate many differences common to the first century of the Republic. Even prior to the passage of the Fourteenth Amendment, some state courts explicitly understood the Constitution's "due process" guarantee—today's source of "liberty interests"—to be a guar-

151 U.S. Const. amend. I (Free Exercise Clause).

152 U.S. Const. amend. I (Free Speech Clause; Petition Clause).

153 The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

154 U.S. Const. amend. V (Takings Clause; Due Process Clause); U.S. Const. art. I, § 10, cl. 1 (Contracts Clause).

155 See U.S. Const. art. I, § 9, cl. 1 (prohibiting Congress, until 1808, from legislating against "importation" of persons).

156 Alfred de Grazia, Public and Republic: Political Representation in America 96 (1951); see also Pitkin, supra note 109, at 196 (describing Madison's conception of "interest").

antor of generality and equality in the application of law. By due process of law, wrote one court, "we understand laws that are general in their operation, and that affect the rights of all alike; and not a special Act of the Legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws."[157] "If the law be general in its operation, affecting all alike," wrote another, "the minority are safe, because the majority, who make the law, are operated on by it equally with the others."[158] This understanding of the law of the land reflects a deep sense of the importance of a particular type of equality concern in the protection of important rights.

It was this deep sense about the generality of law that appears to have led the Supreme Court to begin, near the close of the nineteenth century, to lean toward an increasingly aggressive enforcement of liberty rights.[159] To distinguish valid from invalid legislation under the state's police power, the Court at this time began to insist that legislatures offer good evidence that their laws accomplished a public purpose, reflecting a concern about the possibility of favoritism or hostility having corrupted the neutrality of the representative process.[160] This concern became particularly acute at a time when the nation was experiencing dramatic demographic and societal changes as a result of the Industrial Revolution and the ensuing shifts in the economic structure of society.[161] Thus, the Supreme Court, with a strong enforcement of a right to liberty, responded to its sense that undue influence in the political processes may have compromised the

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157 Sears v. Cottrell, 5 Mich. 251, 254 (1858); Bank of the State v. Cooper, 10 Tenn. 599, 606 (1831) (concluding that Due Process Clause restrains legislatures from passing laws injuring rights of citizens "unless at the same time, the rights of all others in similar circumstances were equally affected by it").

158 *Cooper*, 10 Tenn. at 606.

159 See Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 54 (1993). Gillman powerfully demonstrates that the early police-power jurisprudence was animated primarily by a concern for equality:

> [W]hereas contemporary rights jurisprudence focuses on the identification and protection of special pockets of "liberty," constitutional jurisprudence in the nineteenth century tended to be organized around the core value of *equality* under the law—although it was assumed that this emphasis on equality would have as one of its residual benefits the protection of important individual liberties.

Id.

160 See Lochner v. New York, 198 U.S. 45, 62-63 (1905) (finding that weak link between work-hours legislation and public health "gives rise to at least a suspicion that there was some other motive dominating the legislature").

161 See generally Michael Les Benedict, Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 Law & Hist. Rev. 293 (1985) (discussing societal changes at turn of century).

old notion of equality in the representative bodies.[162] These concerns followed a declining confidence in the republican ideal of a single homogeneous people.[163]

Later, as the *Lochner* response to concerns about partiality in the law lost favor,[164] the Court, in a single opinion, abandoned liberty but salvaged equality.[165] The following Section briefly tracks changes in the dominant view of representation through the post-*Lochner* years, changes that support a new understanding of what the communion of interests requires for a modern understanding of representation.

Implicitly, the Court began to recognize that the Constitution requires more than simply that a representative tie his own self-interest to the interests of a *majority* of his constituency, embodied in the venerable principle that Madison had referred to as the communion of interests.[166] It now required, in addition, that the representative actually consider the interests of even political minorities.[167] This recognition of a representative obligation, even to those on the losing side of an issue, was implicit in the Supreme Court's opinions starting with the liberty cases of the *Lochner* era, but it was John Hart Ely who eventually made it explicit, in what I believe was his central insight and a significant contribution to the understanding of representation in this country.

The view of representation that recognizes obligations to all constituents does not hold "that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them."[168] There is an important distinction, then, between the duties of a representative and the outcome of legislative deliberation. The duty that attends representation derives from the original obligation of representatives to be bound by the laws they pass. While once the predominance of shared interests

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162 See Gillman, supra note 159, at 72-73 (describing two terms, "reasonable" and "arbitrary," used in *Lochner* era to characterize class-neutral policies advancing, respectively, public purpose and factional politics).

163 See Ely, supra note 23, at 81.

164 Barry Friedman argues that the *Lochner* approach ultimately failed because of public sentiment against it. See Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383, 1450-55 (2001). For my purposes, the reasons liberty became a disfavored value for judicial enforcement are less important than the clear fact that it did so.

165 See United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) (concluding that courts should presume validity of legislative judgments but suggesting that such deference would be "narrower" when laws result in "prejudice against discrete and insular minorities").

166 See infra text accompanying notes 172-191.

167 See Ely, supra note 23, at 82.

168 Id.

could guarantee serious consideration of the interests of all constituents vicariously, later when shared interests could no longer be assumed, a proxy became necessary to maintain the tie between the legislator's self-interest and the interests of a variety of different constituents. As Ely understood this capacious duty, it obliged representatives not to deny to political minorities "what Professor Dworkin has called 'equal concern and respect in the design and administration of the political institutions that govern them.'"[169] Thus, every citizen is entitled to equal recognition, even if outvoted on any given issue of public concern.[170] Representatives, accordingly, may not allow minority interests to be "left out of account or valued negatively in the lawmaking process."[171]

This portrait of the representative duty employs the familiar device of self-interest as a check on government overreaching. If lawmakers must live by their own rules, then they will have every incentive to rule reasonably. It fits well within a common constitutional strategy of tying the interests of those with political power to those of the powerless for the purpose of improving the quality of laws for all.[172] From the very early days of the Republic, the Supreme Court had shown a willingness to protect the interests of minorities by this technique of tying interests under an equality principle and to intervene to protect outsider interests when it appeared that no such structural protection was being provided.[173]

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169 Id. (quoting Ronald Dworkin, Taking Rights Seriously 180 (1977)). Dworkin has elaborated a bit on what he means by the phrase: "[G]overnment must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends . . . ." Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7-8 (1996).

170 A similar observation comes from D.D. Raphael, Problems of Political Philosophy 87 (2d ed. 1990):

> Democracy in practice has to mean following the view of the majority. Perhaps Lincoln's addition of "for the people" [in the Gettysburg Address] means, as in Rousseau's theory of the general will, that the decisive view, which for practical purposes must be that of the majority, should seek to serve the interests of all even though it does not have the agreement of all; otherwise there is the danger, so much feared by de Tocqueville and John Stuart Mill, that majority rule may become majority tyranny.

171 Ely, supra note 23, at 223 n.33. This understanding of representation finds support in several places, most explicitly in the Equal Protection Clause of the Fourteenth Amendment. It is also latent in the concept of representation that has existed "at the core of our Constitution from the beginning." Id. at 82. It also accords with consent theory of popular government, in that citizens who consent to government by majority do not necessarily consent to being discounted altogether in the development of public policy.

172 Others include the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

173 See Ely, supra note 23, at 83-85 (giving examples).

Once the representative process is sketched out in this form, it begins to suggest what a failure of representation would look like. The basic insight is that a malfunction of the representative process occurs when the representatives have failed to observe the obligation to "make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."[174] Further, even if that obligation is observed in some literal fashion, the representatives still fail if they allow a wedge between majority and minority constituents to drive them to "systematically disadvantag[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby deny[ ] that minority the protection afforded other groups by a representative system."[175] The failure can occur even when no one is denied a voice or a vote in the process, making clear that the obligation extends beyond general notions of procedural fairness and inclusion.

Failure is linked to motivation. A legislator's motive is illegitimate if it demonstrates a lack of interest in attending to the needs or wishes of some group,[176] or if it burdens a group "not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members."[177] The obligation of a representative, then, can be said to be to act *for good reasons*—defined as reasons legitimately supported by the common good.[178] The right of the represented to representation means not only a voice and a vote, but also the right not to be burdened by majority preferences that fail to accord "respect" to the burdened group as equal citizens. This imposes a restraint on the principle of majority rule, privileging it only as long as the majority had good reasons (not infected with animus) to vote as it did.[179]

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174 The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961).

175 Ely, supra note 23, at 103.

176 See id. at 151.

177 Id. at 153.

178 Note the echo of Lochnerian analysis, in which the Court used liberty rather than equality to enforce the states' obligation to act for the common good. See supra text accompanying notes 159-162.

179 Ely suggests that the malfunction can be remedied by increasing representatives' familiarity with constituents. Perhaps a bit idealistically, he contends that the societal antidote to such a malfunction is the increased cooperation that comes from empathy:

> Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype in ways that exaggerate the superiority of those groups to which we belong. The more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.

Ely, supra note 23, at 161 (footnote omitted). This prescription calls to mind the complaints of the American colonists, who assailed the fiction of representation under circum-

Malfunction means that the structural safeguard provided by the communion of interests is absent. In these circumstances, the incentive of self-interest is not available to assure us that legislators have balanced burdens and benefits reasonably. In these circumstances, the trust one would accord the democratic process is eroded because those who have made the laws have erected "a buffer to ensure that they and theirs will not effectively be subjected to them."[180] Extrinsic measures are needed to ensure the fair operation of the machinery of democratic government. In this situation, the representation-reinforcing judge can step in and give careful scrutiny to the resulting legislation, in search of state justifications for the burdens it has imposed. Confident of not imposing "fundamental values" on popular rule, this judge acts in a way that is "not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy."[181]

The representation-reinforcing theory of judicial protection of equality asks courts to look for particular indicators that a law may have been passed in violation of the obligation to give equal concern and respect to all constituents.[182] It focuses quite specifically on the goal of flushing out illegitimate motivations by considering the so-called "suspect" criteria.[183] These factors, which the courts now typically apply to equal protection claims, take on new significance when considered as means by which a court can ensure that the communion of interests has not been severed. In suspect-class doctrine, the factor of immutability of a classifying characteristic, for example, is important to the inquiry because it increases the likelihood of distorted generalization and lack of empathy.[184] But even an immutable characteristic can supply the basis of legitimate legislative generalization if a court can be satisfied that the reasons for it uphold the obligation provide an overriding social goal and thus do not indicate a severance of the communion of interests.[185] Thus, classifying on the basis of an immutable trait is merely evidence of a failure of represen-

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stances in which empathy and understanding of representatives for constituents were beyond reach because of the lack of familiarity. See supra text accompanying notes 116-124.

180 Ely, supra note 23, at 177.

181 Id. at 101-02.

182 See id. at 103.

183 See id. at 153-54.

184 Id. at 160.

185 Ely gives the example of a prohibition against blind people piloting airplanes. Although the characteristic is immutable, the offer of a respectable reason for the limitation satisfies him that unconstitutional motivation is not at work and thus that representation has not malfunctioned. See id. at 154-55.

tation; it is not itself illegitimate. Similarly, discreteness and insularity of a classified group are relevant to the judicial inquiry because they tend to increase the likelihood of hostility and negative stereotyping that often accompany unfamiliarity.[186] This raises the concern that the welfare of the group may have been valued negatively. The discussion of "suspectness" in constitutional jurisprudence searches for signs that a representative was unable to consider or perceive, through a lens undistorted by hostility or lack of empathy, the common ground that he or she might share even with those constituents who have different views. Whether consciously or not, the Supreme Court has employed an understanding of representation in its equal protection jurisprudence that places prime importance on the communion of interests.

The communion of interests is at work throughout the standard equal protection analysis as follows. If a state enacts some burdensome measure, but cannot show that the law serves an overriding social goal, then the inference arises that the state may have acted out of indifference or hostility to the interests of those burdened.[187] In the absence of some such illegitimate motive, we would not expect representatives to burden individuals or interests (which, by hypothesis, are shared by the representatives themselves) without some public need to do so. Thus, the motivation analysis serves to bring to light situations in which the communion of interests may have been severed, an example of we/they legislation. Thus, legislators cannot value the welfare of certain constituents negatively, or at zero, without compromising the structural requirement applicable to representation.[188]

The edifice of judicial equal protection doctrine reflects this reasoning[189] by placing motivation at the crux of every constitutional in-

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186 See id. at 161.

187 See N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 609 (1979) (White, J., dissenting) (stating that when classification is without any justification—"its irrationality and invidiousness thus uncovered"—Equal Protection Clause is violated).

188 See Ely, supra note 23, at 157 (

> [T]o disadvantage—in the perceived service of some overriding social goal—a thousand persons that a more individualized (but more costly) test or procedure would exclude, under the impression that only five hundred fit that description, is to deny the five hundred to whose existence you are oblivious *their* right to equal concern and respect, by valuing their welfare at zero.).

189 See Richard H. Fallon, Jr., The Supreme Court—1996 Term, Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 89-90 (1997) (noting that Ely's theory helps to explain central role of suspect-content tests in equal protection analysis). It is not a coincidence that equal protection doctrine reflects a strong representation-reinforcing inclination, for two reasons. First, Ely sought to explain existing case law when he developed his theory, relying on Court opinions to do so. See Ely, supra note 23, at 73-74, 105 (suggesting that his theory is descriptive of Warren Court's approach and that it "get[s] us to

quiry.[190] The different "tiers" of scrutiny of state action reflect a sense that there are different degrees of plausibility that a state indeed has a legitimate reason for its legislative classifications (and has not failed to accord the equal concern and respect required by the communion of interests). But these are only devices for searching out actual motivation, for if an illegitimate motive emerges at any level of scrutiny, the state's action will be considered invalid.[191] It is clearly the actual reasons underlying passage of the law that moved the Court in these cases.

To summarize, the theory of constitutional representation has traveled an intelligible journey: The Constitution evinced a commitment to a republican ideal of government in the interest of the whole people, implemented through the institution of representative government. This gave rise to an obligation that representatives act out of a communion of interests with their constituents. When a belief in an essentially homogeneous society could no longer be supported, however, further checks were necessary to protect against the problem of majority tyranny.

One way to accomplish this was to extend the theory of representation so as to ensure not only that the representative would follow the major part of his constituency and feel the burdens of legislation applicable to others—an obligation in place from the beginning—but also that he would not allow his own interests, aligned with those of the majority, to be severed from those of the rest. In practice, what this required of representatives was that they recognize an obligation to give equal concern and respect to the needs and interests of each individual—a simulation of actually feeling the burdens imposed by law even if the variable individual circumstances prevented a literal bearing of those burdens by all. This abstraction acts as a proxy for the requirement that legislators effectively feel the burden of laws that they would impose on others. It prevents representatives from leaving minority interests "out of account or valued negatively in the lawmaking process."[192]

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where the Court has gone"). Second, later Courts seemed to accept Ely's description of their prior work and carried forward the analysis into subsequent law.

190 See Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 428 (1997) (arguing that using strict scrutiny to overturn affirmative action legislation flies in face of otherwise unbroken line of analysis in which such scrutiny was used only to smoke out invidious legislative purposes).

191 See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442, 450 (1985) (invalidating city's action because it rested on "irrational prejudice" even though persons affected were not suspect class).

192 Ely, supra note 23, at 223 n.33.

The next step in the evolution of representation theory is the recognition that legislatures evince a failure of representation when they produce laws that burden political minorities (as groups) without the kind of reasons that would predictably lead representatives to place similar burdens on themselves.[193] Thus, courts bent on reinforcing democratic representation are justified in exercising the power of judicial review to police the institutional obligations and structural integrity of government. Judicial review in this situation does not undermine democracy, but rather facilitates it.

This theory, its share of criticism notwithstanding,[194] struck a chord with a Court and an academy already primed to accept judicial enforcement of equality norms. For those impaled on the horns of the countermajoritarian dilemma, it provided a welcome reconciliation between two conflicting ideals: respect for popular government and protection of individuals from denials of equal concern and respect. Government would proceed by majority rule, but the duty running from representative to represented would ensure against "oppressive measures."[195]

The challenge for constitutional theory is to consider how to carry forward the structural protection—the communion of interests integral to the Constitution's protection of liberty from its inception—to representation of an increasingly heterogeneous population for which there can be no serious contention that the interest of some is necessarily the interest of all.[196] The representation-reinforcement theory of judicial review has provided the beginning, but not the end, of an answer.

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193 See supra notes 172-91 and accompanying text.

194 See, e.g., Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1064 (1980) (contending that process-based constitutional theories like Ely's are "radically indeterminate and fundamentally incomplete" precisely because they lack "a full theory of substantive rights and values"); Mark Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 Yale L.J. 1037, 1038 (1980) (criticizing contradictions and substantive limitations of representation-reinforcing theories of judicial review).

195 The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961); see also Ely, supra note 23, at 86-87.

196 The increased heterogeneity of American society seems so obviously true as not to need empirical proof. See Robert C. Post, Democratic Constitutionalism and Cultural Heterogeneity, 25 Austl. J. of Legal Phil. 185, 185-87 (2000) ("Cultural heterogeneity has become an increasingly significant marker of postcolonial politics."). The inference is made even more clear when one takes account of changes in who is included in the polity and therefore worthy of consideration as a holder of "interests." It was relatively easy for pre–Revolutionary Parliament to claim a homogeneity of interests given how the interest-holders were counted. The same was true for America before the Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments significantly expanded the political community.

IV
THE FAILING OF MODERN THEORIES OF JUDICIAL REVIEW

Among theories of judicial review, representation-reinforcement may well be, like April among months, the "cruellest."[197] It promises a robust judicial role in policing the political process. It champions a substantive entitlement to equal concern and respect reaching every citizen. But, a creature of its own times, it stops short of its promise by limiting its protection to cases in which a state illegitimately classifies particular *groups* for unfavorable treatment.[198] Designed to respond to a world of increasing difference as compared with prior times, the theory bravely identifies a basis for courts to ferret out these intentional discriminatory motivations in law—a major societal issue before and during the Warren Court era, about which Ely wrote. But the times are still changing, and this theory, like the representation theories that it displaced, must adapt. It now ought to recognize that a quarter of a century later, with yet greater and more profound differences among people, as well as changes in the motivations that influence legislatures and in the way they express their motivations, the communion of interests central to representation faces new and different threats. These new threats to equality in representation demand of courts an expanding and increasingly flexible role in the reinforcement of the representative process.

Differences emerge in more complicated ways than simple classifications of groups based on group characteristics. That form of *de jure* classification, once common in this country, is no longer as prevalent in the codebooks of the twenty-first century, due, at least in part, to the successful efforts of the courts in constraining it.[199] Of additional concern today is prohibitory legislation which, due to the nature of differences in the population, still permits legislators to erect "a buffer to ensure that they and theirs will not effectively be subjected to" the laws they pass.[200] Such legislation is typically framed in nomi-

197 T.S. Eliot, The Wasteland, l.1 (1922), reprinted in T.S. Eliot: Collected Poems, 1909-1962, at 53 (1970).

198 See John Hart Ely, Democracy and the Right to Be Different, 56 N.Y.U. L. Rev. 397, 404-05 (1981) (denying that his theory provides constitutional remedy for right not to conform, which he trivializes as "upper middle class right" to "wear tattered clothes and let [one's] grooming go").

199 See Stephen M. Griffin, Judicial Supremacy and Equal Protection in a Democracy of Rights, 4 U. Pa. J. Const. L. 281, 281-84 (2002) (asserting that civil rights movement, including role of courts in recognizing equality of rights, reshaped American culture to extent that judicial protection of such rights is no longer needed).

200 See Ely, supra note 23, at 177.

nally evenhanded terms and thus avoids condemnation under Ely's approach.

There is a nearly infinite number of freedoms that most of us enjoy without ever worrying that they might be insecure. They range from the relatively important, like the right to marry and raise a family, to the relatively trivial, such as many activities that we engage in every day: planting petunias in our gardens, serving pasta on Tuesdays, or Ely's cynical examples of wearing tattered clothing and letting one's grooming go.[201] Notice that the Constitution has nothing to say expressly about any such freedoms, yet they marvelously appear not to be fragile, for the most part. People do not show any inclination to mount difficult political campaigns to amend the Constitution to provide explicit protection for the countless liberties that we simply assume we have. These freedoms are safe from incursion because most people value them as we do. It is the communion of interests at work: Legislators themselves would not want their liberties restricted unnecessarily, and so the rest of us are secure. Justice Jackson perspicaciously acknowledged this structural device for using equality to guard against arbitrariness or injustice. As it is always a mistake to seek to paraphrase Justice Jackson, I reproduce his thought in full:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[202]

More recently, Justice Scalia has also emphasized the importance of this structural constitutional protection against injustice.[203] Taking equality seriously is a way to ensure against oppressive laws. For most matters, where generality is possible, our trust in representative government is well placed and reflects the wisdom of the original representative system that the Constitution established. It protects most of our innumerable liberties.

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[201] See Ely, supra note 198, at 405.

[202] Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

[203] See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

Trust cannot indefinitely persist against the strain of difference, however. Increasingly, the shared sense of values does not exist for everything that all people value. Nor does it exist for the increasing, yet still small, number who may wish to enjoy common freedoms, but in ways that can be understood as distinguishable from the manner in which the many enjoy them. There is much common ground in the population, for example, regarding the importance of marriage. As a result, we would not expect legislatures to enact prohibitive general fees or widely applicable obstacles to marriage. What if the legislature were suddenly to outlaw marriage or to set forth specific qualifications for the selection of a spouse? Such a law would never pass, say the representation-reinforcement theorists. We do not need an explicit constitutional right to marry and courts should not step in to protect it under the rubric of a right to liberty because the process of representative government works so well to safeguard this right.

But what if it does not? What if marriage can be broken down into variations different enough to allow legislators to regulate others without touching on the lives of themselves and their friends? How can the communion of interests, a key to the constitutional protection of liberty, protect against malfunction when notions of the good life profoundly differ? Malfunction occurs when "those who make the laws . . . have provided a buffer to ensure that they and theirs will not effectively be subjected to them."[204] It indicates a severance of interest between individuals and their representatives. Consequently, malfunction occurs when either indifference or hostility to difference among constituents motivates legislators to burden others in ways that do not affect themselves and their majority constituents. At a high enough level of generality, we would never expect a ban on marriage, but at a lower level we have seen, throughout recent history, bans on specific types of marriage applicable to relatively small numbers of people. The communion of interests has not worked so well for them.

Consider the example with which Ely's *Democracy and Distrust* concludes. What ought one to do, asks the hypothetical critic, with a law that makes it a crime for any person to remove another person's gallbladder except to save that person's life?[205]

Under the representation-reinforcement theory of judicial review, such a law would not be unconstitutional, because it isolates no discernible groups, nor is there any indication that the law was a function of group prejudice or hostility. For this reason, it does not evince a failure of representation. The court, therefore, has no warrant to

[204] Ely, supra note 23, at 177.

[205] Id. at 183.

interfere with the gallbladder policy. A tongue-in-cheek dialogue plays out the dilemma of how one ought to respond to such a silly—but for Ely, clearly constitutional—law. The book concludes with the following observation:

> It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further. In fact it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can.[206]

That is the end of the book, a wonderful book as far as it goes. But consider more fully the trust that leads to the stunning confidence that such a law would never pass. If one does believe the gallbladder law could not be passed, it must be because one is confident that a majority of representatives would always share one's own belief that this is a silly law. (This confidence certainly could be misplaced, by the way, if suddenly a group opposed to all bodily invasion got control of a legislature. But let's proceed with the assumption that this law would never pass.) It is a very luxurious sense of confidence that what is important to us individually is equally important to those with the power to make the laws. It presupposes a shared set of values. Ely may have trust, but the hypothetical example begs to be altered by the substitution of "fetus" for "gallbladder" and immediately the point is clear. The eccentric, the marginalized, the different have no basis for expecting to enjoy the privilege of such protection by those wielding political power.

Should the gallbladder law raise a judicially cognizable claim? It is hard to analyze precisely *because* the communion of interests seems to be operative in this example; presumably legislators and their friends are just as likely as anyone else to need a gallbladder operation, and they would feel the pain, literally, of the law. If this law *were* passed, we would expect that either one of two things must be true. Either there is something quirky about gall bladders such that this restriction might, on further information, turn out to be a we/they law, or we would expect that there is a good reason for passing it, good enough to overcome the legislators' instinctive resistance to limiting their own health options. A judicial inquiry could easily determine which it is. The point of the inquiry would be to ensure that the motivation behind the law was not in violation of the representatives' obligation to provide equal concern and respect to all constituents. A good reason for the restriction supplies that necessary assurance.

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206 Id.

The greater the differences among people's notions of the good life, with correspondingly deeper differences about what specific activities are central to it, the more difficult it will be for even the most conscientious representatives to represent them all.[207] In order to avoid valuing the welfare of the affected constituents at zero, however, a representative must have some ability to consider hypothetically whether he or she would be willing to bear a similar burden under circumstances that applied to him or her. This inquiry, even in hypothetical form, necessarily brings in the question of reasons for imposing the burden at issue. No person, legislator or other, would be expected to agree voluntarily to assume a burden without a good reason. Yet, the responsible legislator might well agree to assume a burden (or, if circumstances dictate, impose a burden on others) in pursuit of a greater societal good.

It is by this process of analysis that the reason for which legislation is passed becomes a key element in the assessment of whether the obligation to represent has been satisfied. In an effort to determine whether all interests have been given their due consideration, the inquiry will turn to some judgment about whether the reasons offered are proportional to the burdens imposed. Starting out in a largely procedural posture, this analysis soon blurs the distinction between procedural and substantive when it incorporates a requirement of some sort of proportionality between the nature of the burden imposed and the legitimate public reasons for imposing the burden. Once the development of a theory designed to police the representative process has indicated this need to inquire into a relationship between restrictions and the reasons giving rise to them, a bridge between representation-reinforcement and the judicial protection of liberty under the Constitution has been created. The inquiry into state reasons provides the kernel of that protection.

It is in this way that one reaches the conclusion that, if courts are to ensure that legislators have satisfied their obligation to *represent*, they must be available to look at the reasons for which liberty-impairing legislation has been passed. Only by engaging in that initial examination can a court ascertain that the interests of those bearing the burden have not been valued negatively or at zero, a breach of the representatives' obligation under the Constitution. Thus, there is no theoretical warrant for limiting the reach of a representation-reinforcing judiciary to claims expressly invoking equality.

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[207] Cf. Robert C. Post, Between Democracy and Community: The Legal Constitution of Social Form, in Democratic Community 163 (John W. Chapman & Ian Shapiro eds., 1993) (characterizing crucial aspect of democratic community as its ability to respect citizens as independent and autonomous individuals even as it implements general will).

The meaningful judicial review of liberty-impairing legislation finds support from another unexpected quarter. The theory of judicial minimalism, another account of judicial review that appears to have resonated widely with the academy and courts,[208] uses the political theory of deliberative democracy to suggest a greatly curtailed role for courts in the protection of liberty, particularly on socially divisive moral issues.[209] I will argue, however, that it, too, mistakenly overlooks the role of equality which, when properly included in the analysis under judicial minimalism's own defining principles, in fact provides further support for the structural argument in favor of judicial review of liberty claims.

"Modest."[210] "Pruden[t]."[211] "Humble."[212] "Unambitious."[213] "Passive."[214] "Publicly silent."[215] These descriptions of a court that knows its place in democratic society—perhaps more evocative of a lady who knows her place in Victorian society—arise out of the theory referred to as judicial minimalism. Judicial minimalism reconceives the judiciary in a democracy as a body that leaves "as much as possible undecided."[216] This vision for the courts has many ramifications, both for the ways in which courts resolve issues and for the issues that they agree to resolve.[217] It is the latter aspect of judicial minimalism that dictates a very limited role for the courts in the enforcement of a constitutional right to liberty.[218] Yet the driving commitments underlying judicial minimalism ultimately do not support its conclusion.

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208 See generally Christopher J. Peters, Assessing the New Judicial Minimalism, 100 Colum. L. Rev. 1454, 1455-57 & nn.9-11 (2000) (documenting recent wide appeal and influence that theory of judicial minimalism has enjoyed in scholarly articles and judicial opinions).

209 See Cass R. Sunstein, One Case at a Time 4 (1999) ("[M]inimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions."); Sunstein, supra note 63, at 7 ("[M]inimalism can be democracy-forcing, not only in the sense that it leaves issues open for democratic deliberation, but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors.").

210 Sunstein, supra note 63, at 21.

211 Id. at 20.

212 Id. at 43.

213 Id. at 21.

214 Id. at 51.

215 Id. at 28.

216 Sunstein, supra note 209, at 3.

217 See Peters, supra note 208, at 1464-65 (distinguishing between "procedural" minimalism, which calls for narrow decisions addressing only necessary issues in particular cases, and "substantive" minimalism, which calls for judicial deference to political branches in deciding—or refusing to decide—necessary issues).

218 See Sunstein, supra note 209, at 76 ("[T]he Court should be wary of recognizing rights of this kind [i.e., liberty claims] amid complex issues of fact and value."); see also

Judicial minimalism rests on a vision of civic republicanism that strives to encourage deliberation in the political decisionmaking process.[219] As Cass Sunstein has proclaimed, "[t]here is a relationship between judicial minimalism and democratic deliberation."[220] He explains this connection as follows:

> [A] minimalist path usually . . . makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds). The complexity may result from a lack of information, from changing circumstances, or from (legally relevant) moral uncertainty. Minimalism makes sense first because courts may resolve those issues incorrectly, and second because courts may create serious problems even if their answers are right. Courts thus try to economize on moral disagreement by refusing to take on other people's deeply held moral commitments when it is not necessary for them to do so in order to decide a case. For this reason courts should usually attempt to issue rulings that leave things undecided and that, if possible, are catalytic rather than preclusive. They should indulge a presumption in favor of minimalism.[221]

The presumption in favor of minimalism, in application, means that a judge would be well advised to remain extremely wary of endorsing claims of liberty raised against democratically enacted laws. This reflects exactly the instincts that the Supreme Court has exhibited since before the New Deal.[222] In the minimalist view, for example, laws prohibiting abortion,[223] same-sex marriage,[224] consensual sexual acts of various sorts,[225] assisted suicide for the terminally ill,[226] and use of contraceptives (at least outside of marriage)[227] should not be disturbed as long as societal views differ on these moral issues. This subordinate posture of the courts to the dominant legislature seeks to foster debate, thoughtfulness, and accountability by forcing

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Peters, supra note 208, at 1465 (referring to courts' reluctance even to entertain liberty claims as "substantive minimalism").

219 See Steven G. Gey, The Unfortunate Revival of Civic Republicanism, 141 U. Pa. L. Rev. 801, 808, 833-41 (1993) (describing civic republicans' belief that debate and dialogue will ultimately produce social consensus on values and principles that are superior).

220 Sunstein, supra note 209, at 4. I am focusing on the form of minimalism Sunstein calls "democracy-permitting." Id. at 26.

221 Id. at 5-6.

222 See supra Part II. Even in cases recognizing liberty rights, the Court has been divided, ambivalent, and apologetic.

223 See Sunstein, supra note 209, at 75.

224 See id. at 53-54.

225 See id. at 67.

226 See id. at 99.

227 See id. at 75.

the elected institutions to engage the difficult issues. Minimalism claims to promote democracy by leaving issues open for public discussion and also by ensuring that "certain important decisions are made by democratically accountable actors."[228] Courts, then, have an obligation not to take contentious issues out of the realm of public debate by recognizing constitutional constraints on the power of government.

The theory of deliberative democracy, the explicit basis for minimalism, is a set of principles and commitments that seek to shape the popular consideration of policy and create constructive avenues for resolving or accommodating disagreement.[229] It places a premium on the giving of reasons for public decisions and on participation and control by the voters.

Notice that this description of deliberative democracy theory contains no mention of the judiciary. There may indeed be ways in which courts can contribute to the development or promotion of a deliberative ideal for the making of public policy, but principally the theory does not address itself to courts at all. Nonetheless, Sunstein has sought to transport the benefits and values of deliberative democracy to a society that includes both representative government and courts although it was designed for neither.[230] While this effort has been valuable to the constitutional debate, at times the participants appear to have lost sight of the metaphorical nature of the argument, occasionally overlooking structural differences that may be important in applying deliberative democracy principles to modern American constitutionalism.[231] It is not at all clear, for example, that rules for guiding courts in furthering the goals of deliberative democracy would necessarily be the same rules that have been developed for the conduct of public debate itself. One takes something of a leap by simply grasping the tenets of deliberative democracy—which require "politi-

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228 Id. at 5.

229 See Amy Gutmann & Dennis Thompson, Democracy and Disagreement 2 (1996) ("Deliberative democracy involves reasoning about politics . . . .").

230 See Sunstein, supra note 144, at 162 (arguing that commitment to deliberative democracy is promising source of extraconstitutional principles to guide interpretation of Constitution).

231 See Gey, supra note 219, at 815 (

> [B]y trying to recreate a modern version of the old model of direct democracy, the modern civic republicans end up preserving the bad things about the classical civic republican community—its conformism, inhospitality to dissent, and antidemocratic deference to some unassailable collective ideal such as "civic virtue"—while failing to recapture the old system's one real advantage—its homey, personal, face-to-face means of identifying and achieving common goals.).

cal actors to reflect critically on their own preferences"[232]—and applying them to courts, which are charged with a different mission entirely.

A case in point is the important tenet referred to as the "economy of moral disagreement" mentioned in the passage quoted above.[233] This tenet supplies a significant source of support for the theory of judicial minimalism and its call for judicial disregard of liberty claims.[234] Sunstein suggests that when moral issues divide the populace and one side of the debate challenges the resulting legislation, courts promote economy of moral disagreement by "refusing to rule off-limits certain deeply held moral commitments when it is not necessary to do this to resolve a case."[235] By staying out of such battles, the courts leave these questions outside the constitutional sphere and thus preserve some flexibility in the polity for dealing with them. Absence of constitutional involvement means debate is not stifled; change in legal status quo is less onerous. This argument is reminiscent of the rights-skeptical position advocated by Robert Bork,[236] yet it comes enriched with a civic republican promise that reason, not sheer power, will prevail in the deliberative debate on such issues if courts simply give it a chance to do so.[237] It is minimalism's strongest argument against judicial protection of liberty.

This appealing claim merits closer examination. Economy of moral disagreement is a principle that comes directly from the theory of deliberative democracy.[238] A leading work on that subject describes the principle as follows: "In justifying policies on moral grounds, citizens should seek the rationale that minimizes rejection of the position they oppose."[239] Citizens of a democracy should "try to accommodate the moral convictions of their opponents to the greatest extent possible, without compromising their own moral convictions."[240] This is the prescription for *citizens* to follow when they are

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232 H. Jefferson Powell, Reviving Republicanism, 97 Yale L.J. 1703, 1707 (1988).

233 See supra text accompanying note 221.

234 See Sunstein, supra note 209, at 26.

235 Id.

236 See Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.) ("[T]he choices of those put in authority by the electoral process . . . come before us not as suspect because majoritarian but as conclusively valid for that very reason."); Robert H. Bork, The Tempting of America 258-59 (1990) ("[A] judge has no authority to impose upon society even a correct moral hierarchy of gratifications. . . . It is [in the voting booth] that our differences about moral choices are to be decided . . . .").

237 See Sunstein, supra note 209, at 24-25 ("[I]n a deliberative democracy, a premium is also placed on the exchange of reasons by people with different information and diverse perspectives.").

238 See id. at 5.

239 Gutmann & Thompson, supra note 229, at 84-85.

240 Id. at 3.

dealing with one another in trying to reach common ground on disputed issues of public policy. It is a means for citizens to accord one another respect while narrowing the areas of intractable moral disagreement—a central objective of deliberative democracy itself.

It is not clear, however, that the same considerations ought to drive the behavior of *courts* when taking on the quite different task of determining whether legislation created by these competing groups of citizens is consistent with the Constitution. Indeed, the commitments of deliberative democracy suggest the opposite. The economy of moral disagreement, a method of crediting and valuing all legitimate points of view without unnecessarily trammeling one for the sake of others, is oblivious to the number or percentage of people who may hold each view. One thing that it most emphatically disavows, accordingly, is any obligation on one side of a moral dispute to compromise its own moral convictions solely for the sake of agreement.[241] Yet courts generally enter the scene only after this process has run its course, when a law or official action is in place. Judicial minimalism instructs courts to leave that law intact, with the losing side having been forced to acquiesce by the compulsion of majority rule. At this point in the process, the court is not economizing on moral disagreement at all, but rather backing a winner. The court's refusal to interfere simply enshrines the results of a power struggle ultimately resolved by majority rule.[242] This approach is inconsistent with the principles of deliberative democracy itself.

In transplanting the economy of moral disagreement into the theory of judicial minimalism, this argument has overlooked a critical qualification that deliberative democracy imposes on that economy principle. The obligation of respect embodied in the economy principle arises *only* if the beliefs being pressed on the opposing side satisfy a requirement known as "reciprocity."[243] Reciprocity, in turn, demands of citizens that they offer *reasons* that other similarly motivated citizens can accept, even while recognizing that they share only

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241 Sunstein has expressed the related concern that "the collective judgment must not be objectionable on moral grounds." Cass R. Sunstein, Preferences and Politics, 20 Phil. & Pub. Aff. 3, 19 (1991).

242 Another consequence of leaving these political outcomes alone is that, all else being equal, it tends to favor those moral belief systems that readily lend themselves to enactment into prohibitory law, disadvantaging other systems that may value tolerance and autonomy, which by their nature are not as susceptible of translation into positive law. Again, this points to the absence of moral neutrality in a court's deference to political outcomes.

243 Gutmann & Thompson, supra note 229, at 84-85 & 377 n.43.

some of one another's values.[244] The primary job of reciprocity is to regulate public reason, the terms in which citizens justify their claims to one another.[245] It is important to reciprocity that the moral claims made in public life be amenable to assessment and acceptance by people committed to a wide range of secular and religious belief systems.[246] What reciprocity requires is the offer of "reasons that can be justified to all parties who are motivated to find fair terms of social cooperation."[247] Thus, the tenets of deliberative democracy would not ask citizens to credit opposing moral views that are not supported by accessible reasons. For example, the economy of moral disagreement would not extend to legislation justified solely on religious grounds, on grounds that deny the fundamental equality of human beings, or on grounds that reflect contempt for fellow citizens.[248]

Reciprocity is an obligation derived from equality—the moral imperative to treat all individuals as equal persons, each with a life to shape and to lead. "When our deliberations about moral disagreements in politics are guided by reciprocity, citizens recognize and respect one another as moral agents, not merely as abstract objects of others' moral reasoning."[249] To ask another to accept a position without a justification that is open to reasoned debate is to fail in the obligation to respect the *equality* of others.[250]

As a consequence of the call for reasons, the theory of deliberative democracy rejects simple majority rule as the method for resolving all moral disagreement.[251] It sees the standard justification of

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[244] See generally Lawrence C. Becker, Reciprocity 73-144 (1986) (discussing reciprocity as part of general conception of morality).

[245] See Gutmann & Thompson, supra note 229, at 55.

[246] See id. at 57.

[247] Id. at 65.

[248] See Sunstein, supra note 209, at 25. Notice that these substantive limitations on the motivations and effects of laws echo the preceding discussion of the representation-reinforcing theory of judicial review and the types of legislative motivations that constitute malfunctions of the representative process under that theory. See supra text accompanying notes 172-191. Both theories, independently derived, yield the same substantive requirements on laws to meet their obligations to equality.

[249] Gutmann & Thompson, supra note 229, at 14.

[250] For example, it would violate reciprocity to impose a requirement on other citizens to adopt a particular religious viewpoint as the only means to gain access to the moral justifications offered for one's positions. See id. at 57.

[251] In prior work, Sunstein recognizes this important limitation on majority rule. See Sunstein, supra note 144, at 29 (emphasizing deliberative democracy's call for reasons supporting government action and noting that "the fact that a majority is in favor of a particular measure is not, standing alone, a sufficient reason for it"); see also Christopher L. Eisgruber, Constitutional Self-Government 54 (2001) ("[A] democratic government should aspire to be impartial rather than merely majoritarian: it should respond to the interests and opinions of all the people, rather than merely serving the majority, or some other fraction of the people.").

majority rule—that it is the manifestation of popular will, no matter what its basis—as illegitimate precisely because this justification lacks any sense of reciprocity.[252] On matters of acute moral disagreement, majority rule undermines the fundamental imperative of equality.

It is a strange claim, then, to suggest that deliberative democracy requires courts to defer to legislation that imposes one moral view on others for no reason other than that it is the moral view of a majority of voters.[253] It should be the opposite: Deliberative democracy, with its commitment to equal regard for the moral views of all citizens, should be understood to call for some means to police the substantive limits on majoritarian public policymaking. This is especially true when majoritarian public policymaking is designed specifically to silence the voice of the minority and end debate on a crucial issue.[254]

The only effective way in our system for legislatures to meet their obligation to provide accessible reasons for their actions, and thus to comply with the demand for reciprocity, is for courts to ask them to do so. Enforcement of the right to liberty in the courts serves exactly that function.[255] When a court receives a claim of a liberty violation, it must then ask the state to offer reasons for the restraint. But the popular cry of judicial minimalism has fueled a fear in courts even to ask the question meaningfully. This is not a fear that deliberative democracy should inspire. The judicial fear that deliberative democracy should animate is a fear of standing by while one side of a contested moral issue is permitted to prevail in its effort to press its vision of the good life into positive law by means of nothing more than numbers. This is an impairment of liberty, and, of even greater concern to deliberative democracy, it is a rejection of the equality of all citizens.

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252 See Gutmann & Thompson, supra note 229, at 30.

253 But cf. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (concluding that moral view of majority of electorate is sufficient justification for restricting sexual liberty).

254 See, e.g., Romer v. Evans, 517 U.S. 620 (1996). In *Romer*, support for gay rights was building in many municipalities and in the state legislature. In response, the citizens of Colorado, by referendum, amended the state constitution to prohibit any legislation from outlawing discrimination based on sexual orientation. If the Court had applied a theory of judicial minimalism, it would have acceded to the majority's effort to end years of democratic deliberation and political evolution across the state.

255 See John Rawls, Political Liberalism 231-40 (1993) (arguing that purpose of judicial review is to ensure that laws are supported by "public reason," not simple majoritarianism). Interestingly, even Sunstein concedes that requiring legislatures to provide reasons for their actions is one of the "democracy-promoting" measures that a minimalist court should take: "A court might attempt to ensure that all decisions are supported by public-regarding justifications rather than by power and self-interest; it might in this way both model and police the system of public reason." Sunstein, supra note 209, at 27. But this apparent statement of support for the courts' role in policing constitutional constraints on public actions is perplexingly inconsistent with the general call for minimalism.

It is not surprising that both representation-reinforcement theory and deliberative democracy theory, when carefully brought to bear upon current societal conditions, come full circle to demand the same thing of representative government. They both require that majoritarian policymaking bodies offer legitimate reasons for their laws restricting liberty. This call for reasons, deriving from separate theoretical sources, is not a coincidence—both theories independently recognize that equality is the source from which principles for governing a free society emerge. Both theories rest upon a foundation of equality: Representation-reinforcement enshrines equality by requiring representatives to give due regard to all constituents and burden minorities only as they would burden themselves. Deliberative democracy employs a principle of equality to ensure that the moral views of all are accorded the respect they deserve equally with all others. Both of these approaches conscript a basic equality as a means toward another end—liberty. But neither can achieve its goal in our system without the help of courts. It is the courts that must give content to the call for reasons.

V
FROM EQUALITY TO LIBERTY

Equality and liberty are not as different as their histories in the case law have made them out to appear. The key to a structural jurisprudence of liberty is the recognition that the outdated antinomy of liberty and equality is not helpful in ferreting out the kinds of concerns that ought to animate a democracy-enhancing court.[256] This Part explores what those concerns might look like in a less categorical jurisprudence.

A starting place is the fundamental rights strand of equal protection jurisprudence. I begin there, not because it supplies the best approach to addressing liberty issues, but because it is a significant exemplar of an unusual doctrinal treatment of a constitutional claim by the Supreme Court and one that reveals an instinctive agreement with the call for liberty protection.

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[256] Dworkin explained the interconnection as follows:

> [L]iberty is necessary to [distributional] equality . . . because liberty . . . is essential to any process in which equality is defined and secured. That does not make liberty instrumental to distributional equality any more than it makes the latter instrumental to liberty: the two ideas rather merge in a fuller account of when the law governing the distribution and use of resources treats everyone with equal concern.

Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 122-23 (2000).

I suggested earlier that the Supreme Court's creation of a fundamental rights strand of equal protection revealed a sense it must have had that even general, apparently evenhanded legal constraints can raise concerns grounded in equality. In order to appreciate the inequality occasioned by these generally applicable laws, however, one must look beyond the facial neutrality of the law and take into account the individual circumstances of those whom it burdens.[257] That is the unusual contribution of the fundamental rights strand of equal protection analysis.

Ordinarily, that kind of contextual analysis, especially of equality claims, is anathema to constitutional law. As long as the law does not explicitly classify, we generally do not consider any resulting inequality to be of constitutional concern.[258] A law saying that "no one may drive over fifty-five miles per hour," for example, is not viewed as raising equality issues even though, due to different capacities of cars, different utility functions of drivers, different road conditions and the like, this restriction is probably quite unequal in the actual burdens it imposes. The leisurely, country Sunday driver will not feel the sting of the restriction nearly as much as the stressed-out business executive in the brand new sports car on the highway, late for a meeting. It would strain the nobility of the equality principle, not to mention the resources of the federal judiciary, if every such inequality of impact were cognizable based on the different ways that a general law might fall on different people.[259]

Yet the Supreme Court has shown us that there are situations in which exactly that analysis is appropriate. A poll tax, for example, imposes one single fee on all voters and thus appears to raise no equality concerns. When the Court considered the constitutionality of such a law, however, it noticed that, because of differences in circumstances of individuals that bear on their ability to pay the tax, this restriction could be expected to inhibit the opportunity to vote—for some, but not for others. Thus, the opportunity to vote was not, in

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257 See supra text accompanying notes 86-101.

258 See Washington v. Davis, 426 U.S. 229, 248 (1976) (finding that any other approach would call into question "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor").

259 The Supreme Court has been wary of any suggestion that its contextual approach should be extended, and has used an "intent" requirement to prevent impact claims from gaining constitutional momentum in other areas. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (concluding that First Amendment is not offended by general law for which there is rational basis even though law incidentally burdens free exercise of religion); *Davis*, 426 U.S. at 246-47 (finding that Due Process Clause is satisfied, despite disparate racial impact of general law, when law is supported by rational basis and disparate impact was unintended).

fact, equally distributed when the law was considered in context. A particular activity, voting, was being rationed by the government through an evenhanded, generally applicable law. In that case, several factors may have led the Court to look beyond this evenhanded face of the law, but the only ones that it mentioned were the fundamental nature of the right to vote and the irrelevance of wealth to the act of voting.[260] (Of course wealth is irrelevant to the ability to drive, or use a park, but those fees do not invoke serious scrutiny.)[261] As the dissenters realized, this was a liberty claim,[262] but the Court perceived something in the claim that triggered treatment as an inequality.[263]

The question to be considered, then, in seeking a more comprehensive approach to liberty claims, is not *whether*, but *when* the Constitution demands that a law be examined according to the consequences of its application rather than merely on its face. Put another way, there must be a principled way to distinguish between the poll tax and the speeding law. The Supreme Court's fundamental rights analysis under the Equal Protection Clause has been less than a doctrinal success because it has lacked a theory to explain, first, which issues should be understood as equality issues; second, why these issues trigger the unique contextual, or impact, analysis that has been rejected in virtually every other area of constitutional law; and, third, how the issues interrelate, if at all, with the so-called fundamental rights under the Due Process Clause. Even more importantly, these cases fail to recognize that there may not be uniformity on the question of what is fundamental to a human life well led.

One thing these cases do demonstrate is that the dichotomy between the classic liberty paradigm (general restrictions applicable to all) and the classic equality paradigm (classificatory legislation) does not always provide a helpful distinction to assist in determining the

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260 See Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966). One thing the Court did not mention was any racially disparate impact of the poll tax in Virginia in 1966. The district court had found no racial discrimination in the law's application. See Harper v. Va. State Bd. of Elections, 240 F. Supp. 270, 271 (E.D. Va. 1964).

261 See generally William H. Clune III, The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment, 1975 Sup. Ct. Rev. 289 (discussing Supreme Court's unwillingness to respond to claims of wealth discrimination in public programs).

262 See *Harper*, 383 U.S. at 675 (Black, J., dissenting) (chiding Court for "using the old 'natural-law-due-process formula'"); id. at 686 (Harlan, J., with Stewart, J., dissenting) (recalling that "Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the laissez-faire theory of society").

263 See id. at 669 ("Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."). Laurence Tribe perceives in these cases a vision of the Warren Court: "equal justice for rich and poor alike." Tribe, supra note 2, at 1627. This vision was limited, however, to ensuring access to the political and judicial processes. Id. at 1628 n.4.

need for judicial review of a constitutional claim. In light of my argument that judicial review is needed to reinforce representation no matter what the form of a law, what is needed is a way to determine whether a law has failed to conform to the basic equality requirements implicit in the concept of representation under the Constitution. If it appears to have failed in this regard, then the representation-reinforcing argument would suggest that courts take the first step of judicial intervention, asking the government to justify its law, thus offering it the opportunity to dispel fears that the law is the product of an actual malfunction of the representative process and hence needs to be invalidated.

A. The Framework

The first task is to identify claims that may involve a failure of representation. Evenhanded, nonclassificatory legislation can undermine the promise of equality in two relevant ways: in its imposition of burdens and in its offer of justifications. The representative obligation implicit in the constitutional scheme assumes that legislators will evaluate both the burdens that the laws they pass inflict and their reasons for inflicting them. Representatives are expected to consider both aspects of this balancing inquiry by reference to the shared societal values that they represent, according at least a minimal concern to the interests of all constituents. If the representative fails in the obligation to accord this minimal concern to the interests of those bearing the burdens, then the law is we/they legislation, despite its neutral form. Similarly, if the legislature imposes burdens on all, but for reasons that can be accepted as legitimate only by some, then a compromise of equality has occurred on the other side of the balance. I will discuss each in turn.

The first type of failure of representation is reflected in a law that is facially neutral but operates as we/they legislation.[264] This occurs when legislation exploits significant situational differences among constituent populations. Lawmakers might select legislative criteria that appear neutral but effectively burden the outsiders while not affecting the insiders. Resulting legislation is captured by the maxim that treating similarly those who are unlike is as unequal as treating differently those who are alike. For example, there was once a time when some

264 The Virginia poll tax case, *Harper v. Virginia Board of Elections*, appears to involve just such a law. The State in that case defended its poll tax on the theory that poor people should not vote. See *Harper*, 383 U.S. at 674 (Black, J., dissenting). Indeed, the "whole *point* of the poll tax was to prevent the very poor from voting, viewing poverty as evidence of a complete lack of prudence about how to manage one's affairs." Tribe, supra note 2, at 1642.

states, prevented from drawing explicit racial lines, would intentionally seek out "neutral" criteria to exploit historical or situational differences to accomplish the same result, but without obvious discrimination.[265]

In more contemporary settings, this type of we/they legislation can occur, either intentionally or merely negligently, when a law takes advantage, not of group characteristics, but of society's diverse visions of what is necessary to lead a good and fulfilling life. Circumstances of important difference make possible a differential treatment without the need for explicit classification. Sometimes the deeply different personal commitments correspond to different religious practices. When they do, the First Amendment—itself an amalgam of liberty and equality concerns—offers an explicit limitation on the state's ability to treat unlikes alike.[266] For example, a law requiring all workers to work on Saturday is a neutral law, applicable to all, but it carries significant differences in impact based on the situations (in this case religious beliefs) of the constituents, the day being a religious Sabbath for some.[267] Yet when the differences of personal conviction do not happen to correspond to recognized religious practices, there is no explicit constitutional basis for protection against this type of disregard.

A ban on sodomy is a good example. This law prohibits conduct that would not play a significant role in most people's lives. Thus, any reason at all, or any modicum of political pressure, could be enough to outweigh the legislators' own assessment of the trivial burdens of such a law, were they considering only their own lives and those of most of the people they know and represent.

This is where the communion of interests becomes essential. We rely on our legislators to assess the burdens of the laws accurately and to be willing to endure them along with everyone else. Recall that,

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[265] See Guinn v. United States, 238 U.S. 347, 364-65 (1915) (invalidating "grandfather clause" that exempted from state's literacy test for suffrage those who were descendants of someone who could vote on January 1, 1866); see also Lane v. Wilson, 307 U.S. 268, 275 (1939) (noting that Fifteenth Amendment condemns "sophisticated as well as simple-minded modes of discrimination" in voting laws).

[266] Cf. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1285 (1994) (advocating "equal regard" approach to religious liberty claims, which asks courts to consider whether claimant of religious exemption can show that, had legislature given her religious concerns same regard as that enjoyed by fundamental concerns of citizens generally, it would have exempted her from burdens of applicable law).

[267] Cf. Sherbert v. Verner, 374 U.S. 398, 410 (1963) (striking down, on First Amendment grounds, state practice of not considering Saturday Sabbath observance an excused absence for purposes of eligibility for unemployment benefits). But see Employment Div. v. Smith, 494 U.S. 872, 890 (holding that state may deny unemployment benefits to persons fired for violating, in course of their religious practice, generally applicable drug laws).

historically, the protection of liberty rested on the existence of shared values and a confidence in the legislator's ability to evaluate burdens and benefits of social legislation against a backdrop of a representative view of what those shared values are. Absence of this ability constituted a fatal flaw in the representation afforded the American colonies by Parliament. "Our salvation," says Justice Scalia, "is [that] the democratic majority [are required] to accept for themselves and their loved ones what they impose on you and me."[268]

But what kind of salvation is it if a lack of shared values makes it possible for one group to decide that something deeply valued only by another is not worth protecting? This is the failure that judicial review can alleviate.

It is significant that even this example is not, in fact, utterly lacking in shared values. Any legislator would understand the human need for sexuality, privacy, and sexual intimacy with a partner of one's choice. The importance of such matters is still a matter of common experience in this society. The problem is that, in the sodomy law example, the legislators have been permitted to whittle away the common ground that provides the basis for democratic representation. They have chosen to legislate at such a low level of generality as to defeat the commonality of shared values that does exist on this topic. The antidote, then, would be for a court examining this law for a failure of representation to adjust the level of generality at which the restriction is imposed in an effort to test the legislators' true willingness to live under the laws that they pass.[269] The question to consider, hypothetically, would be whether it is likely that the legislators would restrict the sexual behavior that constitutes the same principal source of sexual intimacy for themselves and their friends that the banned activity supplies for a minority of the affected population. That inquiry sounds much more like the "salvation" to which Justice Scalia referred.

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268 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

269 One might object, questioning how the Court should determine the appropriate level of generality. While this is not an easy question to answer precisely, framing the issue as the right to engage in same-sex sodomy is *not* appropriate. First, framing the right in such a limited manner suggests an intent to destroy possible common ground, or at least a refusal to consider the larger implications for the minority. Second, virtually no rights discourse operates at such a narrow level. For example, when we uphold free speech rights, we do not talk about creating the right to wear a jacket with obscene language on it, nor the right for white supremacists to burn crosses. Cf. Cohen v. California, 403 U.S. 15 (1971); Brandenberg v. Ohio, 395 U.S. 444 (1969). There may be no absolutely correct level of generality for describing a right, but, at a minimum, legislatures should make a good faith effort to characterize it in a reasonable way that maximizes, rather than minimizes, the possibility for empathy that the Constitution envisions.

It is salutary because this approach to testing impairments of liberty, based as it is on the communion of interests, rests on a recognition of shared societal values. The courts are not asked to create societal values or even to rank them in some sort of hierarchy, exercises for which courts have been amply criticized. Rather, I am suggesting that courts put laws to the test against the legislators' own values in their representative capacity by determining, hypothetically, whether they would have subjected themselves and their friends to the burdens of the law in question because of the pressing public need offered to justify its imposition on others. This is a second-best effort to recapture a check that the Constitution had imposed from the start: avoiding we/they legislation even in a diverse society by conscripting equality in the service of liberty.

To summarize, we/they legislation can occur as a result of deep differences among people in a society. When this happens, the usual checks that operate to protect liberty have broken down and some judicial inquiry is needed to reinforce the representative obligations. I will return to the nature of that inquiry after describing the second type of breakdown in the representative process that can raise the need for judicial involvement.

A second failure of representation can occur in the state's provision of reasons to justify imposing a burden through law. Like the first type of failure, it is grounded in a deep notion of equality of all constituents. Even if one has become satisfied that the enacting legislators would indeed be willing to suffer the burdens of a law, it is important also to ensure that the reasons that drive them to do so are reasons that are accessible to all in a meaningful sense. This means that their reasons must have some public and secular component to them and may not rest entirely on personal moral belief systems not universally shared. It is not respectful of the equality of all citizens as individual moral agents to make it necessary for them to subscribe to an alien religious or moral code in order to be able to appreciate the reasons for which their government has restricted their liberty. It is respectful of the equality of all citizens to justify restrictions on the liberty of some to protect, for example, the safety of others.

A ban on assisted suicide provides an example. It may well be that those who would outlaw assisted suicide would be willing to suffer the same burden, that is, the denial of the opportunity for themselves or their loved ones to gain medical assistance in accelerating death in the event of a devastating terminal illness. This law, then, satisfies the first inquiry: whether the legislators would themselves accept the burden they are imposing on others.

The obligation to equality, however, is not yet fulfilled. It is possible that the communion of interests has still been compromised, even if the burdens are acceptable to the majority, if their reasons for shouldering this burden are accessible only to that same majority. This occurs when the sole public justification for the imposition of burdens resounds in a contested moral belief. A major contribution of deliberative democracy theory to constitutional theory is its insight that a commitment to equality of all citizens gives rise to an obligation to justify laws with reasons that are accessible to all.[270] This does not mean that all persons must agree with the policy justifying every law, of course. Rather, it means that, just as the evaluation of burdens must reflect a concern and respect for profound differences in the population, so must the giving of state reasons also reflect that same concern and respect for differences. It does so by offering reasons that reflect the public good.

Returning to the assisted-suicide example, a state could ban that act, with legislators satisfying the obligation to suffer the same burden as everyone else, solely because they believe that suicide is immoral. If they did so, they would not create the type of we/they law in which the legislators escape the operation of the law, but they still would have erected a we/they divide by justifying this restriction on all persons' liberty with reasons that are highly personal and contested in the society. The society is divided on whether suicide under such extremely traumatic conditions is moral or immoral.[271] Therefore, the legislature fails in its representative duty if it succumbs to majority resolution of the divisive moral issue. If, however, the legislature enacts the same ban out of demonstrable and reasonable concern over abuse, overbearing of vulnerable patients, or the difficulty of ensuring informed consent under stressful circumstances, then the duty may be satisfied. Those reasons, while perhaps controversial from a policy perspective, provide publicly accessible discussion points on which reasoned debate is possible, and that is all that the principle of political equality requires of representative government.

Thus far, I have argued that liberty-restricting laws can breach the promise of equality in either of two ways, both of which exploit differences in constituent value structures: either by operating as we/they prohibitions or by resting entirely on justifications arising out of con-

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270 See supra text accompanying notes 243-248.

271 In a 1997 Gallup poll, respondents were asked, "When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should be allowed by law to assist the patient to commit suicide if the patient requests it, or not?" Fifty-eight percent said "yes," and thirty-seven percent said "no." See Gallup, supra note 34, at 204.

tested moral conviction.[272] In both situations, the structural protections afforded by the communion of interests, built into representative government under the Constitution, are unavailable. These are situations, therefore, in which the intervention of courts is needed to reinforce the representative process in the name of democracy.

The problems with both types of statutes can be alleviated by offering reasons to support the legislation. Returning to the first case, the antisodomy law, I argued that the important inquiry should be whether it seemed plausible that, raising the level of generality so as to tap into a level at which values are indeed shared across the population, the legislators would have passed this restriction with regard to their own acts of sexual intimacy. When the question is asked this way, it seems unlikely that the answer would be in the affirmative—in the absence of some overwhelmingly, almost unimaginably, strong public need.

It is that final qualification—in the absence of strong need—that explains the role of reasons in the liberty analysis. Legislators doing their job to represent their constituencies, giving adequate concern and respect to all their interests, will be expected to balance burdens of legislation against the need for it.[273] The values and, in John Adams's words, "sympathies" that the legislators hold will help them reach a balance that is respectful of the liberty interests of individuals, while still allowing for the creation of desired public policy. This is the promise of representative democracy, the "ordered liberty" of Justices Cardozo and Harlan.[274] When a representative is receptive to the idea of imposing a burden of any kind, a burden that he or she would personally shoulder, we would expect there to be a good reason for it, as the communion of interests assumes.

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272 One could argue that the second is actually a variant of the first, in that the legislator in the second category is sharing in a state-imposed burden already dictated by his or her own conscience, which is not true of the population generally. If there is significance in the liberty to conform one's own behavior to one's own moral code, except where necessary to achieve societal order, then the "burden" of such a law is not uniformly felt as between those who subscribe and those who do not subscribe to the dominant moral view. In this way it is possible (if awkward) to understand the law of the second type as a variant of the we/they malfunction.

273 Obviously, any protection of potential victims would supply a public-regarding justification for restricting nonconsensual sexual acts of all kinds.

274 See Palko v. Connecticut, 302 U.S. 319, 325 (1937) (observing that Fourteenth Amendment makes applicable to states those amendments determined to be "implicit in the concept of ordered liberty"); see also Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (noting that due process "has represented 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").

When it is not evident, however, that the representative is personally able to experience the burden of a law, then it is not automatically clear whether the legislation has impermissibly disregarded the interests of those burdened in violation of the representative duty. Of course, it is possible that the choice to impose a burden simply reflects the sincere and good faith belief of the legislators that the burden is outweighed by the public need for the law. In this second scenario, legislators are engaging in exactly the calculus that fulfills their representative duty. Some mechanism is needed to distinguish the two. The only way to tell the difference between the valid and invalid legislative acts is to examine the reasons for which the state claims to have passed the law. The reasons should shed light on the fundamental question at the heart of this inquiry: whether the same balance would likely have been struck even if the legislators themselves had been subject to the burdens imposed by the law. Presumably a legislator would not willingly suffer an impairment of liberty without a reason sufficient to outweigh the freedom forgone.

Similarly, the state's offer of reasons is also helpful in exploring the second type of failed representation, illustrated by the assisted-suicide example. In that second category, the failure is itself caused by the inappropriateness of the reasons offered. Naturally, then, reasons can also save such a law. A court would be asked to look for reasons that accord equal respect to all members of the society, which requires public justifications not dependent on acceptance of a particular moral belief system. Once the public-regarding reasons were offered, then the same hypothetical inquiry would test whether these reasons would have been sufficient to induce legislators, not motivated by personal moral conviction, to suffer the same restrictions.

B. Application

It is now possible to address the challenge posed at the outset of this discussion: how to articulate a principled distinction between the poll tax and the speeding law. More broadly, the question is how does the representation-reinforcing court know when it should examine the effects of a law according to the circumstances of the individual and when it should not.

My response is quite simple. The examination of circumstances is a device designed to reveal inequalities. Inequalities exist all around us in all aspects of public life. It is not my aim to charge courts with curing them all—just the ones that result in the impairment of important liberties.

It is in meeting this challenge that the hypothetical inquiry of legislators becomes helpful. Would they require themselves to pay so much for the privilege of voting that it would strain their ability to feed their children? Of course a court cannot answer that question definitively. But asking the question focuses the inquiry on the right issue: the reasons for passing the law. In this particular example of the poll tax, it seemed that the reasons, even the avowed reasons,[275] had to do with screening people out who would not be responsible voters (a goal the Court had upheld as a valid state interest).[276] It is difficult to extrapolate some similar barrier that would keep the legislators themselves out. Indeed, the reasons offered reveal this apparently neutral law to be, beyond dispute, we/they legislation.[277] It was appropriate to examine the effect of the law, because without that, the we/they nature of the legislation could not come to light.

Turning to the speeding law, it, too, is a restriction on liberty, for it also falls unequally on people depending on their circumstances. But there are at least two important features of this law that make it distinguishable from the poll tax. First, there is no obvious reason to assume that representatives are systematically situated differently from others with regard to experiencing the burden of the law. There is no reason to expect that those in power, elected by majoritarian political processes, would be more or less likely than any other subsection of the population to want to drive fast. This distinguishes the example from the poll tax example, which involved fees and therefore carried the implication that legislators as a class would be situated differently from those feeling an excessive burden from the law.

This distinction is important because it directly implicates the communion of interests—the confidence that legislators will not erect a buffer to protect themselves from the burden of the law. If the topic of the law does not implicate a matter on which we might expect a divide separating legislators and their majority constituents, on the one hand, from minority constituents, on the other, then already the concern that this is we/they legislation is somewhat abated.

The concern is further abated by the comparison of reasons underlying the laws. The poll tax was supported by a state reason (pov-

275 See Harper v. Va. Bd. of Elections, 383 U.S. 663, 674 (1966) (Black, J., dissenting) (arguing that poll tax legislation was reasonably supported by state's "belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote").

276 See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52, 54 (1959) (upholding literacy test as rationally related to State's desire "to raise the standards for people of all races who cast the ballot").

277 The State argued that the poll tax was an "objective intelligence test." Appellee's Brief at 38, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (No. 48).

erty implies lack of intelligence) that itself rested on the lack of empathy that is the hallmark of even more traditional equal protection analysis.[278] The speeding law, on the other hand, can be supported by many straightforward public-regarding justifications, most obviously safety. Thus, one can easily imagine that even if a legislator, or a majority of legislators, loved to drive fast, they might well still choose to undergo the limitation on speed because of the obvious societal benefits to be had by such a law. Thus, the speeding law bears neither indicium of a breakdown of the representative process: It does not appear to create a de facto we/they classification, nor is it lacking in public-regarding reasons to support it. Thus, we need not worry that the interests of fast-driving constituents have not been adequately taken into account.

Buried in the argument about the speeding law is the question of how important the activity is. The evaluation of the importance of liberty interests is a problem that has given rise to many irksome developments in constitutional law, in my view, not the least of which is the two-tiered approach to liberty claims.[279] One of the attractive features of the representation-reinforcing argument for the protection of liberty is that it does not require an explicit judicial evaluation of the importance of a liberty interest, as the Court's current due process doctrine does.[280] Rather, the importance of an interest becomes relevant indirectly in the analysis of state reasons as the court seeks to determine whether the legislators would have been willing to pass the same law at a high enough level of generality to draw themselves into the law's sweep for the reasons they have articulated in support of the law.

In the speeding law example, public safety seemed to be a quite satisfactory reason to support the restriction on liberty and dispel the inference that the law was passed in derogation of the representative obligation to any constituents. Had there been some hint that the liberty at stake (driving fast) played an essential role in the pursuit of a meaningful human life, however, then the reasons that one would expect a legislator to require before limiting such a significant activity for himself and his friends would have to be appropriately more weighty as well. There would also be expectations that the conscientious legislator would not restrict liberties more severely than neces-

278 See Ely, supra note 23, at 156-61 (noting that legislation based on negative stereotypes, arising out of lack of familiarity, suggests representative malfunction).

279 See supra text accompanying notes 58-61 (describing two-tiered analysis).

280 See Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (observing that before court can apply more exacting scrutiny than mere rational basis review it must determine that claimant raises "fundamental right" under Due Process Clause).

sary to achieve the public goals, giving rise to a loose version of means analysis.

No formal categorizing is needed. What a court must do is try to place the legislators in the shoes of those most burdened by the law, consider the reasons offered to support the law, and seek to determine whether it would be reasonable to believe that the legislators would have subjected themselves to the law for these reasons. This is a counterfactual thought experiment designed to enforce the representative obligation that the Constitution imposes.

This analysis does not make the hard cases any less hard. They are hard cases because the balance that produces ordered liberty is not always easy to strike and will require considered judgment from conscientious judges. The hardest cases under existing law will still be the hardest cases under this new approach to liberty claims. But the theory does explain why they are so hard, and it does bring a focus to the particular questions that make them hard.[281]

The representation-reinforcing approach to liberty claims should provide assistance with liberty claims of all kinds. The so-called "economic" interests that have fared so poorly with the Supreme Court since the New Deal would have a chance for consideration under this analysis.[282] There would be no automatic, categorical dismissal of certain interests as unprotected or unimportant. But I would expect that the hypothetical inquiry, in which a court determines a conscientious

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[281] Abortion is particularly hard because the key feature that would distinguish, under my analysis, between an invalid, moral reason for restrictions and a valid, safety-protecting reason for the same restrictions is the radically uncertain status of the fetus. Cf. David A. Strauss, Abortion, Toleration, and Moral Uncertainty, 1992 Sup. Ct. Rev. 1, 18-20 (analogizing uncertainty in abortion debate to uncertainty of religious truth, both being inappropriate for state resolution). At the current time, it is still impossible to resolve that dispositive issue without asking citizens to adopt a government-dictated moral or religious belief system, and, therefore, the law would at the present time fail the equality-based standard for valid legislation.

[282] Judicial review of "economic" issues, like in *Lochner*, may be the most controversial aspect of my theory. In most cases, however, the legislature would be able to show sufficient basis for their policy.

The issue becomes more complex when economic policy mixes with other important social issues, like education. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (involving equal protection challenge to Texas's system for funding public schools through property taxes). Compare id. at 50-55, 58 (Powell, J.) (acknowledging inequities in Texas system but concluding that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them"), with id. at 71 (Marshall, J., dissenting) (advocating for "the right of every American to an equal start in life" through education, and expressing skepticism with "the vagaries of the political process which . . . has proved singularly unsuited to the task of providing a remedy for this discrimination"). The fact a case like this one is not resolved by my approach does not indicate a defect in the theory. In fact, in line with deliberative democracy, such hard cases probably *should not be* so easily resolved.

legislator's assessment of both burdens and justifications for laws, would reflect popular conceptions of what types of burdens we expect people or business interests to bear in a free society such as ours. If economic regulations were frequently upheld under this approach, it would be because the state was able to supply persuasive reasons of legitimate public need commensurate with the restrictions imposed. It is often easier for a state to show a legitimate public interest in regulating behavior in the marketplace than private behavior in the home. This approach would require the courts to develop a more refined notion of what the public interest entails, and how it changes over time.[283]

C. *New Markers of Suspect Legislation*

The representation-reinforcing approach to liberty protection searches for failures of the representative process that permit representatives to drive a wedge between themselves and some of their constituents by means of laws that operate primarily on the "outs" and not on the "ins." The safeguards built into the legislative process serve to protect against this kind of failure in the vast majority of situations. Those protections, however, can break down.

The protection afforded by the communion of interests is most likely to break down when the representative is unable to appreciate, recognize, or value the interests of some constituents, much as the American colonists felt their representation was invalid because of the absence of empathy in Parliament. The fear is that deep differences in important values can lead to a lack of empathy and destroy the broadest protection of liberty that our democracy provides. The most likely place to find this environment, ripe for malfunction, would be in connection with legislation restricting some type of behavior that is both important to at least some people and socially divisive. There is a particular likelihood of a problem when the issue that divides the people is the very question of how important the behavior is to the flourishing of a human life. The type of issue to which these criteria would apply is not so hard to spot. Justice O'Connor recently began a

283 The role of interest-group pressure on legislation is particularly problematic for any theory of liberty protection. Cf. Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 227 (1986) (suggesting that best way to deal with interest-group legislation is not to strike it down but rather to interpret it so that it furthers public interest). I see no justification for the absolute abdication of the inquiry that we have seen from the Court, but I do believe that the Court would have to adopt a relatively capacious understanding of what kinds of reasons might in fact serve the common good. See Rebecca L. Brown, Activism Is Not a Four-Letter Word, 73 U. Colo. L. Rev. (forthcoming 2002) (arguing that principal mistake of *Lochner* was impoverished understanding of what public good requires).

separate opinion with the observation that "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve 'virtually irreconcilable points of view.'"[284] Chief Justice Rehnquist acknowledged, in a similar vein, that "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[285] These types of debates, characterized by irreconcilable and unyielding positions based on fundamentally different moral belief systems, should alert the Court to the possible inability of legislators to "represent" all of their constituents as it is constitutionally imperative for them to do.[286]

Some theorists, including several members of the Supreme Court, claim that this type of moral divisiveness supports the opposite outcome.[287] They insist that these divisive matters, for the very reason that they do inspire moral disagreement, should be left to "the people"[288] for resolution in the democratic process.[289] This approach to claims of liberty praises the modest court of judicial minimalism for not taking these important policy issues away from the public forum.[290] Further, it claims for itself the moral high ground by leaving

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284 Stenberg v. Carhart, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring) (quoting id. at 921 (Breyer, J.)).

285 Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

286 See Edward L. Rubin, Getting Past Democracy, 149 U. Pa. L. Rev. 711, 750-51 (2001) (

> Modern social science teaches us that people in a given society often have genuinely incompatible views, based on both their interests and their ideology, that these views are generated by, and generate, intense emotional responses, and that the resulting conflicts are resolved by compromise or suppression, rather than persuasion. . . . We need not despair, however, about the inextricably emotional character of the political realm. The whole point of a representative, electoral regime is to translate people's intensely felt political beliefs into an orderly, responsive, governmental process.).

The test of whether this regime has succeeded is its ability to provide reasons for its actions.

287 See, e.g., *Glucksberg*, 521 U.S. at 735 ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."); Fallon, supra note 189, at 88-89 (arguing that judicial deference to political branches is particularly appropriate in areas characterized by "reasonable disagreement").

288 *Carhart*, 530 U.S. at 956 (Scalia, J., dissenting) ("[T]he Court should return this matter to the people."); see also Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., joined by Rehnquist, C.J., White & Thomas, J.J., concurring in part and dissenting in part) ("We should get out of this area, where we have no right to be . . . .").

289 See Sunstein, supra note 209, at 4.

290 See Cass R. Sunstein, Dred Scott v. Sandford and Its Legacy, in Great Cases in Constitutional Law 81 (Robert P. George ed., 2000) (lamenting judicial decisions that "fore-

the issues to be worked out in the political process and thus ostensibly fostering respect for all points of view.[291] Those taking this approach deny judicial scrutiny and send the claimant to the political process for any recourse.

That might be a good answer if the representative process were representing as the Constitution envisioned it would. But we have seen that malfunctions of the political process arise when representatives cannot accord even minimal value to certain groups or interests.[292] Just as the Court did not send Mr. Strauder back to the political process to try to get African Americans put on his jury in 1879,[293] or young Linda Brown back to the political process to try to achieve an integrated education in 1954,[294] it cannot be the right answer for the Court to relegate the person whose liberty interest has not been constitutionally represented in the political process back to that process with no hope of prevailing. As in those cases, it would compromise democratic equality to do so. Thus the Supreme Court's glib dismissal of most liberty claims as matters best left to the "democratic process" begs the question whether the democratic process, including the representative obligation to give equal concern and respect to all constituents, has malfunctioned. If it has, then the Court does no favors to democracy by looking the other way. Rather, it has an obligation to reinforce the representation that is the core of democracy.

To give scrutiny to liberty claims need not by any means signal victory for the claimant or defeat for the state. There is no need to anticipate wholesale invalidation of a large class of laws. This scrutiny would mean only that, once the newly defined "suspect" factors were identified, such that there is reason to worry that representation has failed, the state would be called upon to give a public-regarding reason for its infringement of this individual's liberty. When the matter is one of contested moral entitlement rather than more routine policy preferences, it seems quite appropriate that the political winner would be asked to justify its victory to the loser on some ground found satisfactory to an outside arbiter. The existence of that reason ensures that

close . . . democratic debate" on issues they address). But see Eisgruber, supra note 251, at 96-100 (suggesting that anyone who contends *Roe v. Wade* took abortion off table as matter of public deliberation, argument, interest, and debate is palpably wrong). Similarly, it seems strange to argue that the real problem with *Dred Scott* was its attempt to end debate over slavery, rather than simply its attempt to entrench slavery.

291 See Sunstein, supra note 209, at 26-27.

292 See supra text accompanying notes 174-91.

293 See Strauder v. West Virginia, 100 U.S. 303 (1879).

294 See Brown v. Bd. of Educ., 347 U.S. 483 (1954).

the representatives have not overlooked their obligation to accord equal concern and respect.

The important question, then, is whether the representative process is malfunctioning. If it is, then the Court should not send the political "losers" back to try in vain to win in the political arena. If it is not malfunctioning, then all agree there is no need for the Court to step in; the legislature can make policy for all and live up to our trust in its ability to represent all. But only the judiciary can sort out the two. As an increasingly diverse population increases the scarcity of shared values, the structural constraints of the Constitution suggest a correspondingly greater role for the courts in guarding against representative malfunction.

CONCLUSION

The challenge for constitutional jurisprudence is to preserve the structural protections traditionally afforded by the Constitution in the face of changes that increasingly detract from the paradigm of a "unitary homogeneous order with a fundamental common interest."[295] The first steps have been taken and are now part of the law of equal protection. They enable the courts to reinforce representation when group prejudice undermines the trust we would otherwise have in the political process. Where animus lives, that trust cannot survive.

Trust is undermined by other differences as well. The Constitution explicitly protects only a tiny fraction of the liberties that we take for granted. For the rest, we must trust our legislators to respect them as we do. The Constitution supports us in this expectation by imposing on representatives a communion of interests—an obligation to be bound by the laws they pass. For the most part our trust is well placed. But that trust is a luxury, born of shared values. As soon as the luxury of shared values is no longer enjoyed, it becomes possible for the legislators to sever the interests that tie them to their constituents, legislating for the benefit of some while not taking into account at all the interests of others. At that point the trust disappears and judicial review is needed.

The breakdown of the representative structure, characterized by we/they thinking, can take the form of either equality violations or liberty violations. Courts have felt more comfortable identifying equality violations because they have developed a series of objective indicators to assist them in this inquiry. They have, so far, not thought about what objective markers might signal the same breakdown when it emerges as a violation of liberty.

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[295] Wood, supra note 108, at 174 (referring to Great Britain).

It is true that the markers may be somewhat more difficult to identify in the liberty context because the initial trigger of a facial statutory classification will not be there to start the inquiry. Instead, courts will have to look for signs of intractable moral disagreement and an unequal impairment of an important human activity. But this distinction does not justify the gross difference in treatment that has been employed in equality and liberty cases, with liberty barely even cognizable as a constitutional claim today. The trend, indeed, should be the other way. With fifty years of training in how to require legislators to enact evenhanded laws, the courts should now be ready to ensure that when lawmakers do pass nominally evenhanded laws, they do so with due regard for the interests of all people.

A structural case for the right to liberty begins and ends with equality. Equality between legislators and their constituents begins the story, with the Founders and their expectations for representation. Equality across all constituent groups provides the middle of the story, as John Hart Ely paved the way for the courts to prevent de jure distinctions based on group prejudice. Equality among all individuals brings us to the present, the entitlement of each constituent to have his or her interest taken into account, on equal footing with those of all others.

The offer of equality as a protector of liberty is a profoundly optimistic move. It suggests that, no matter how diverse our society becomes, there will be enough common ground between majorities and minorities that a meaningful rule of generality will take care of the most important things to human flourishing generally. Perhaps there is more to liberty than what lies in this common ground. But if courts would begin to protect even those values we all hold in common, unapologetically and thoughtfully, they would take a large step forward in the continuing evolution of ordered liberty. We could worry about the rest in the next century.