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Interest Groups in American Public Law

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The bicentennial of the Constitution is approaching in a time of considerable dissatisfaction with the American scheme of governance. The dissatisfaction takes various forms, but many of the concerns have a common root in the problems produced by the existence of interest groups, or "factions," and their influence over the political process. The scheme is challenged on the grounds that it allows powerful private organizations to block necessary government action;[1] that the lawmaking process has been transformed into a series of accommodations among competing elites;[2] and that the rise of a large bureaucracy exercising broad discretionary power has undermined original constitutional goals by circumventing the safeguards of separation of powers and electoral accountability.[3]

The problem of faction has been a central concern of constitutional law and theory since the time of the American Revolution. Madison made control of factions the centerpiece of his defense of the proposed Constitution. His antifederalist opponents objected on the ground that his solution was a false one, addressing only a symptom of the underlying problem. This de-

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1. *See, e.g.*, T. LOWI, THE END OF LIBERALISM (2d ed. 1979).

2. *See, e.g.*, THE BIAS OF PLURALISM (W. Connolly ed. 1969); FRONTIERS OF DEMOCRATIC THEORY (H. Kariel ed. 1970).

3. *See, e.g.*, J. FREEDMAN, CRISIS AND LEGITIMACY (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

bate has been recapitulated in various forms throughout constitutional history.

The central purpose of this article is to link three seemingly disparate areas of public law theory. The first area is the Madisonian understanding[4] of politics and the role of representatives in counteracting the problems posed by the existence of factions. The second is legal doctrine interpreting a number of constitutional provisions, particularly the equal protection clause. That doctrine is best understood as an attempt to impose on government a particular conception of politics, with powerful Madisonian overtones. The third area is judge-made doctrine under the Administrative Procedure Act[5] and other statutes governing the conduct of regulatory agencies. Much of administrative law doctrine is also intended to respond to the problem of faction by ensuring a particular sort of behavior from public officials. All three areas reflect the same basic conception of politics and of the proper role of national representatives. That conception repudiates some of the most prominent current theories about how government does and should operate.[6]

At the normative level, the purpose of this article is to help revive[7] aspects of an attractive conception of governance—we may call it republican[8]—to point out its often neglected but

4. As indicated below, the term "Madisonian" is used in a distinct sense; it does not refer to the now well-established (but in my view erroneous) pluralist understanding. *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

5. 5 U.S.C. §§ 551–59, 701–06 (1982).

6. The most important such theory is pluralism. *See, e.g.*, R. DAHL, *supra* note 4; Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971).

7. The republican understanding is in the midst of a general revival in various disciplines. In history, *see, e.g.*, J. POCOCK, THE MACHIAVELLIAN MOMENT (1975); Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 POL. THEORY 353 (1981); in political theory, *see, e.g.*, A. MACINTYRE, AFTER VIRTUE (2d ed. 1984); LIBERALISM AND ITS CRITICS (M. Sandel ed. 1984); Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985); in sociology, *see* M. JANOWITZ, THE RECONSTITUTION OF PATRIOTISM: EDUCATION FOR CIVIC CONSCIOUSNESS (1983); R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER, & S. TIPTON, HABITS OF THE HEART (1985); in law, *see* Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1980); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983). This revival may be a part of more general trends. For overviews, *see* R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983); F. DALLMAYR, POLIS AND PRAXIS (1984).

8. For present purposes, it is unnecessary to distinguish among the various kinds of republican thought, though the differences are important and considerable. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 7. Moreover, elements of traditional republican thought are quite unattractive—especially its militarism and its acceptance of class hierarchies, manifested by the limited classes of people entitled to wield political influence. See Pitkin, *Justice:*

nonetheless prominent place in the thought of the framers, and to suggest its availability as a foundation from which judges and others might evaluate political processes and outcomes. Despite the ascendancy of other approaches, this conception has continued to influence the judicial mind, even in circumstances in which it seems utopian.[9] The central commitments of the republican conception are far from anachronistic, and in its belief in a deliberative conception of democracy, it provides a basis for evaluating administrative and legislative action that has both powerful historical roots and considerable contemporary appeal.

I. INTRODUCTION: VIRTUE, FACTION, AND CORRUPTION

When the proposed Constitution was debated, the country faced a choice between two different conceptions of politics. The first conception was republican. Its animating principle was civic virtue. To the republicans, the prerequisite of sound government was the willingness of citizens to subordinate their private interests to the general good.[10] Politics consisted of self-rule by the people; but it was not a scheme in which people impressed their private preferences on the government. It was instead a system in which the selection of preferences was the object of the governmental process. Preferences were not to be taken as exogenous, but to be developed and shaped through politics.

To the republicans, the role of politics was above all deliberative. Dialogue and discussion among the citizenry were critical features in the governmental process. Political participation was not limited to voting or other simple statements of preference. The ideal model for governance was the town meeting, a metaphor that played an explicit role in the republican understanding of politics.[11]

The republican conception carries with it a particular view of human nature; it assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good. In this respect, political ordering is distinct from market ordering. Moreover, this conception re-

Relating Public to Private, 9 POL. THEORY 327 (1981) (discussing exclusion of women). A revival of republicanism must attempt to eliminate these elements. *See* text accompanying notes 112–126, 186–194 *infra*.

9. *See* text accompanying notes 84–91 *infra*.

10. *See* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19–23 (1981).

11. *See, e.g.*, 5 THE COMPLETE ANTI-FEDERALIST 67–69 (H. Storing ed. 1981).

flects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that "practical reason" can be used to settle social issues.[12]

With this understanding, the problem of faction assumes a distinct form and has a distinct solution. The problem is rooted in corruption: the elimination of civic virtue and the pursuit of self-interest by political actors. If corruption occurs, groups seeking to use government power to promote their own private ends might come to dominate the political process. If private groups were permitted to subvert government in this way, political power would supplant political discussion and debate. Corruption thus threatens to undermine the republican conception of politics. The traditional solution is to instill principles of virtue in the hope of ensuring that the spirit of faction will not develop.[13] Education and prevailing morality therefore provide the principal lines of defense against the dangers of faction.

Distinct from the republican understanding of government is a competing conception that might be called pluralist.[14] Under the pluralist view, politics mediates the struggle among self-interested groups for scarce social resources. Only nominally deliberative, politics is a process of conflict and compromise among various social interests. Under the pluralist conception, people come to the political process with preselected interests that they seek to promote through political conflict and compromise. Preferences are not shaped through governance, but enter into the process as exogenous variables.

The pluralist conception treats the republican notion of a separate common good as incoherent, potentially totalitarian, or both.[15] The common good consists of uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in political outcomes. The com-

12. *See* note 124 *infra* on the subject of "practical reason"; *cf.* J. ELSTER, SOUR GRAPES 35–42 (1983) (discussing preference-transforming function of politics).

13. See, for example, Jefferson's view: "Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day." 14 THE WRITINGS OF THOMAS JEFFERSON 491 (A. Lipscomb & A. Bergh eds. 1903).

14. *See, e.g.*, A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); R. DAHL, *supra* note 4; D. TRUMAN, THE GOVERNMENTAL PROCESS (1963). For the economic view, see Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Stigler, *supra* note 6.

15. See J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1950). *Cf.* THE FEDERALIST No. 10 (J. Madison) (suggesting that an effort to extirpate factions through removing their cause is a cure worse than the disease) (P. Ford ed. 1898).

mon good amounts to an aggregation of individual preferences. Moreover, efforts to alter or shape preferences—through, for example, the education so prized by the republican tradition—may assume the status of tyranny.

Under the pluralist conception, the problem of faction arises from the possibility that one group, or an alliance of groups, will dominate the legislative or executive process and subvert the bargaining and compromise on which the model is based. Factional domination effectively deprives other groups of the opportunity to assert their views. If it were permitted to occur, the political process would be undermined and freedom would be at risk.

There are several possible solutions to the problem of faction. One response would be to create a shield of "rights"—spheres of individual autonomy into which government may not enter.[16] Such a solution would deflect factional tyranny, whether by a majority or by a minority, by declaring certain areas to be off limits to legislators. This shield of autonomy could protect a number of different interests, ranging from rights of traditional private property to protection against discrimination on the basis of race or gender. But whatever its coverage, the shield would apply regardless of the legitimacy of governmental ends.[17]

Another response would be to accept the pluralist conception of politics as descriptively accurate, but conclude that it is no cause for alarm. This view would allow politics to consist of uninhibited interest-group struggle in the expectation that the struggle will promote social welfare better than any alternative system.[18] Political ordering is, in this view, assimilated to market ordering. Both the variety and the intensity of preferences would be factored into the political pressures imposed on representa-

16. This approach has played a prominent role in both private and public law. In private law, the common law system may be understood as an effort to recognize and protect a realm of private autonomy. *See, e.g.*, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). The Lochner era is the public law analogue: rights of property and contract were employed as a shield against pluralist invasion. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) and, especially, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), may be understood as efforts to adapt rights-based understandings to the modern regulatory state. For critiques, see A. BUCHANAN, MARX AND JUSTICE (1982); Hardwig, *Should Women Think in Terms of Rights?*, 94 ETHICS 441 (1984); *Symposium: A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).

17. See the discussion of the police power in R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN 107-45 (1985). Of course, such rights can be invaded if the government is able to generate a sufficiently powerful justification.

18. *See* Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

tives. The representatives would be expected to respond rather mechanically to those pressures.[19] This market-like mechanism would promote aggregate social welfare through an "invisible hand" like that found in other markets.[20] In the view of many, this understanding lies at the core of majority rule.[21] By denying that the existence of factions poses a problem for democratic theory, this approach accepts the pluralist model not only descriptively, but normatively as well.

A third possible response to the problem of faction would modify the second by accepting large elements of the pluralist conception and incorporating the concern that certain groups are effectively "fenced out" of the pluralist process[22] because they are unable to participate in political bargaining. Sometimes this disability is attributed to the "discreteness and insularity" of the excluded groups.[23] The attribution is questionable, for discreteness and insularity may increase rather than impair the opportunities for the exercise of political power.[24] Disability is also attributed to dispersion and lack of political organization.[25] The critical point is that it may be possible to accept many of the elements of the pluralist model, while also concluding that steps must be taken to protect certain disadvantaged groups.

Yet another response to the problem of faction would structure the processes of representation to ensure against the likelihood of factional tyranny. The structural mechanisms would insulate representatives, to a greater or lesser degree, from constituent pressures, in the hope that they will deliberate more effectively on the public good. Unlike the alternative solutions, the structural response represents a repudiation of the premises of

19. This is a familiar if controversial view of representation. *See* H. PITKIN, THE CONCEPT OF REPRESENTATION 198–208 (1967).

20. This understanding, prominent among modern pluralists, has been attributed to Madison himself. *See, e.g.*, Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (1951); Note, *A Madisonian Interpretation of the Equal Protection Clause*, 93 YALE L.J. (1984). For general discussion, see Bourke, *The Pluralist Reading of James Madison's Tenth Federalist*, 9 PERSP. AM. HIST. 269 (1975).

21. *See* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

22. This approach accounts for large areas of modern constitutional law. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see generally* J. ELY, DEMOCRACY AND DISTRUST (1980) (attempting to use this principle as the basis for a conception of politics and of the proper judicial role).

23. For the classic formulation, see *Carolene Products*, 304 U.S. at 152 n.4.

24. *See* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (suggesting that diffuseness is sometimes more likely to weaken political influence than "discreteness").

25. *See* R. HARDIN, COLLECTIVE ACTION (1982).

pluralism and, as discussed below, might be understood as a variation on the republican understanding as it has been defined here.

II. The Historical Articulation: Federalists, Antifederalists

It should come as no surprise that many of these ideas played a central role in the debates over the framing and ratification of the Constitution. In particular, the debate between the federalists and the antifederalists focused on the respective roles of civic virtue, interest groups, and political pressure in the process of governance. In tracing these themes, I make no claim to special originality,[26] though the account offered here differs from some prominent readings in significant ways.[27] Moreover, it will be necessary to paint with a broad brush, avoiding detailed discussion of the significant differences among both the antifederalists and the framers.[28] The major purpose is to suggest the nature and origins of the federalist understanding of politics and representation, an understanding that has played an important role in judge-made public law ever since.

A. *The Antifederalist Case*

In recent years, there has been a resurgence of enthusiasm for the arguments of the antifederalists—opponents of the proposed Constitution who claimed that the document amounted to a betrayal of the principles underlying the Revolution.[29] The animating principle of the antifederalists was civic virtue or "public

26. For similar views, see D. Epstein, The Political Theory of the Federalist (1984); Bessette, *Deliberative Democracy: The Majority Principle in Republican Government,* in How Democratic is the Constitution? 102 (R. Goldwin & W. Schambra eds. 1980); Morgan, *Madison's Theory of Representation in the Tenth Federalist,* 36 J. Pol. 852 (1974).

27. *See, e.g.,* J. Diggins, The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism (1984); H. Pitkin, The Concept of Representation 191–96 (1967); Adair, *supra* note 20; Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 Yale L.J. 1013 (1984); Diamond, *Ethics and Politics: The American Way,* in The Moral Foundations of the American Republic 39 (R. Horwitz 2d ed. 1979).

28. *See* note 42 *infra.*

29. For general discussion, see J.T. Main, The Antifederalists (1961); H. Storing, *supra* note 10; The Complete Anti-Federalist, *supra* note 11; Kenyon, *Men of Little Faith: The Anti-federalists on the Nature of Representative Government,* 12 Wm. & Mary Q. 3 (1955).

The position of the antifederalists was hardly monolithic; there were many disagreements among them. For an overview, see Finkelman, Book Review, 70 Cornell L. Rev. 182 (1984). In outlining the antifederalist position, it is necessary to overlook those differences and to speak of general tendencies.

happiness." Governmental outcomes were, in this view, to be determined by citizens devoted to a public good separate from the struggle of private interests; and government's first task was to ensure the flourishing of the necessary public-spiritedness. Moreover, the antifederalists believed in decentralization. Only in small communities would it be possible to find and develop the unselfishness and devotion to the public good on which genuine freedom depends. Participation in government was a positive good, providing a kind of "happiness" that could be found nowhere else.[30] In these respects, the antifederalists echoed traditional republican theory.

The antifederalists were therefore hostile to the idea of a dramatic expansion in the powers of the national government. Only a decentralized society would allow the homogeneity and dedication to the public good that would prevent the government from degenerating into a clash of private interests. A powerful national government would create heterogeneity and distance from the sphere of power and thereby undermine the public's willingness to participate in politics as citizens.

Adhering to the traditional republican view, the antifederalists argued that civil society should operate as an educator, and not merely as a regulator of private conduct.[31] Government bore the responsibility of inculcating attitudes that would incline the citizenry away from the pursuit of self-interest, at least in the political realm. Closely connected to this vision was the antifederalists' desire to avoid extreme disparities in wealth, education, or power. Such disparities would poison the spirit of civic virtue and prevent achievement of the homogeneity of a simple and virtuous people.[32]

It is not difficult to see why the antifederalists had an ambiva-

30. This is the foundation for Hannah Arendt's reading of the American Revolution and its aftermath, see H. ARENDT, ON REVOLUTION (1963).

31. Similarities between the antifederalists' views and those of Rousseau are readily apparent. Surprisingly, however, Rousseau's name seldom appeared in the antifederalist literature and is mentioned only once in THE COMPLETE ANTI-FEDERALIST, *supra* note 11, *see* 4 *id.* at 251–52 (Essay by a Newport Man, describing Rousseau as "a republican by birth and education, one of the most exalted geniuses and one of the greatest writers of his age, or perhaps any age" and referring especially to Rousseau's suggestion "that the people should examine and determine every public act themselves"). *See generally* SPURLIN, ROUSSEAU IN AMERICA, 1760–1809 (1969).

32. *See* Krouse, *"Classical" Images of Democracy in America: Madison and Tocqueville,* in DEMOCRATIC THEORY AND PRACTICE 58 (G. Duncan ed. 1983). *See also* C. MONTESQUIEU, THE SPIRIT OF THE LAWS, book V (1748) (especially chapters 2–7).

lent attitude toward a system in which decisions were made by representatives of the people rather than by the people themselves. In their ideal world, all decisions would be made during a face-to-face process of deliberation and debate. Such a process would inculcate civic virtue in the public at large, virtue from which the process itself would simultaneously benefit. The result would be "public happiness"[33]—the happiness that derives from active participation in the world of governance.[34] Thus Jefferson proposed that the Constitution should be amended every generation, partly to promote general attention to public affairs.[35]

But the antifederalists acknowledged that representation was necessary at both the state and national levels. They recognized that the size of government made it impossible to conduct political affairs on the model of the town meeting.[36] For them, representation was a necessary evil brought about by the impracticability of direct self-governance by the people.[37]

From this perspective, the grounds on which the antifederalists based their opposition to the proposed Constitution should be clear. They believed that the Constitution would destroy the system of decentralization on which true liberty depended. The citizens would lose effective control over their representatives; they would also be deprived of the opportunity to participate in public affairs, and thus the principle of civic virtue would be undermined.[38] Rule by remote national leaders would attenuate the scheme of representation, rupturing the alliance of interests between the rulers and the ruled.[39] The antifederalists foresaw a system that would effectively exclude the people from the realm

33. *See* H. ARENDT, *supra* note 30, at 111–37.

34. *See id.*

35. Letter to Samuel Kercheval, July 12, 1816, in THE PORTABLE THOMAS JEFFERSON 553–58 (M. Peterson ed. 1975). Views closely akin to those of Jefferson can be found in recent suggestions that the distinction between "routine" and "revolution" ought to be broken down. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); R. Unger, The Conditions of Public Life (1985) (unpublished manuscript on file with the *Stanford Law Review*). *See also* P. Brest, The Constitution of Democracy (1984) (unpublished manuscript).

36. *See, e.g.*, H. STORING, *supra* note 10, at 43–45.

37. *See id.* at 17–18.

38. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 73, 110–111; 4 *id.* at 94–95; 6 *id.* at 160–161. *See also* Barber, *The Compromised Republic: Public Purposelessness in America*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 19 (R. Horwitz ed. 1977) (suggesting that exclusion of the citizenry from the processes of government was an important goal of the framers).

39. *See* Barber, *supra* note 38.

of public affairs, and provide weakly accountable national leaders with enormous discretion to make law.

The antifederalists were also skeptical of the emerging interest in commercial development that had played such a prominent role in the decision to abandon the Articles of Confederation in favor of the new Constitution.[40] In the antifederalists' view, commerce was a threat to the principles underlying the Revolution because it gave rise to ambition, avarice, and the dissolution of communal bonds.[41] Insofar as the proposed Constitution might be understood as an effort to promote commerce and commercial mores, it would undermine the purposes of the Revolution.

In sum, the antifederalists attacked the proposed Constitution as inconsistent with the underlying principles of republicanism. The removal of the people from the political process, the creation of a powerful and remote national government, the new emphasis on commerce—all threatened to eliminate the "public happiness" for which the Revolution had, in part, been fought.

B. *The Federalist Response*

The antifederalist objections to the proposed Constitution provoked a theoretical response that amounted to a new conception of politics—indeed, a "political theory worthy of a prominent place in the history of Western thought."[42] This conception reformulated the principles of republicanism in an attempt to

40. On the need for commercial development, see THE FEDERALIST Nos. 6 & 11 (A. Hamilton). For the antifederalist response, see 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 201.

41. *See* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 201 (comparing "independent feelings of ancient republics, whose prime object was the welfare and happiness of their country" with "peculation, . . . usurious contracts, . . . illegal and dishonest projects, and . . . every private vice" which might "support the factitious appearances of grandeur and wealth").

42. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 615 (1969).

Federalist thought is an amalgam of the ideas of numerous thinkers, many of whom disagreed with each other. There are significant differences among, for example, Morris, Madison, Hamilton, Wilson, Adams, and Jefferson, and perhaps the latter should not be characterized as a federalist at all. Some of the differences are explored in J. HOWE, THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS (1966); G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT (1970); G. WOOD, *supra*; Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976); J. Nedelsky, Property and the American Conception of Limited Government (1984) (unpublished manuscript). In the text, Madison's views are used as the principal source of the theory underlying the Constitution. This simplification is not intended to suggest that there was substantial consensus among the Founders.

synthesize elements of traditional republicanism and its emerging pluralist competition.

Madison's discussion in *The Federalist No. 10* is sometimes thought to be a conventional pluralist document,[43] and there are indeed traces of pluralism in the analysis. To Madison, the primary problem of governance was the control of faction, understood in his famous formulation as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[44] The antifederalists rooted the problem of faction in that of corruption; their solution was to control the factional spirit and limit the power of elected representatives. In their view, those close to the people, chosen locally, would not stray from the people's interests. The civic virtue of the citizenry and of its representatives would work as a safeguard against factional tyranny.

Madison and other federalists transformed the question of corruption into that of faction. They saw the "corruption" that created factions as a natural, though undesirable, product of liberty and inequality in human faculties. This redefinition meant that the basic problem of governance could not be solved by the traditional republican means of education and inculcation of virtue. Moreover, the problem of faction was likely to be most, not least, severe in a small republic. In a small republic, a self-interested private group could easily seize political power and distribute wealth or opportunities in its favor. Indeed, in the view of the federalists, this was precisely what had happened in the years since the Revolution. During that period, factions had usurped the processes of state government, putting both liberty and property at risk.[45] This evidence helped account for Madison's rejection of Jefferson's proposal for regular constitutional amendment on the grounds that such a proposal would produce "the most violent struggles . . . between the parties interested in reviving, and those interested in reforming the antecedent state of property."[46] Jefferson, by contrast, saw turbulence as "productive of

43. *See* note 20 *supra*; *see also* Diamond, *supra* note 27.

44. THE FEDERALIST No. 10, at 56 (J. Madison) (P. Ford ed. 1898).

45. *See generally* J. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS (1979); G. WOOD, *supra* note 42.

46. *See* Letter to Jefferson (Feb. 14, 1790), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 232 (M. Meyers rev. ed. 1981).

good. It prevents the degeneracy of government, and nourishes a general attention to . . . public affairs. I hold . . . that a little rebellion now and then is a good thing."[47]

Madison viewed the recent history as sufficient evidence that sound governance could not rely on traditional conceptions of civic virtue and public education to guard against factional tyranny. Such devices would be unable to overcome the natural self-interest of men and women, even in their capacity as political actors.[48] Self-interest, in Madison's view, would inevitably result from differences in natural talents and property ownership.[49] To this point, Madison added the familiar idea that attempting to overcome self-interest would carry a risk of tyranny of its own.[50] Conscious preference-shaping by government would not promote liberty but instead destroy it.[51]

All this justified rejection of the antifederalist belief that the problem of faction could be overcome, but it supplied no positive solution to the problem. In developing a solution Madison was particularly original. He began with the notion that the problem posed by factions is especially acute in a direct democracy, for a "common passion or interest will, in almost every case, be felt by a majority of the whole," and there will be no protection for the minority.[52] But a large republic would provide safeguards. There, the diversity of interests would ensure against the possibility that sufficient numbers of people would feel a common desire to oppress minorities.[53] A large republic thus contained a built-in check against the likelihood of factional tyranny.

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47. Letter to Madison (Jan. 30, 1798), *reprinted in* THE PORTABLE THOMAS JEFFERSON 882 (M. Peterson ed. 1975).

48. *See* THE FEDERALIST No. 10 (J. Madison); THE FEDERALIST No. 6, at 28 (A. Hamilton) (P. Ford ed. 1898) ("men are ambitious, vindicative, and rapacious").

49. *See* THE FEDERALIST No. 10, at 56–57 (J. Madison) (P. Ford ed. 1898).

50. *See id.*

51. *See id. Compare* Benjamin Rush's suggestion that each citizen should

> be taught that he does not belong to himself, but that he is public property. Let him be taught to love his family, but let him be taught at the same time that he must forsake and even forget them when the welfare of his country requires it . . . . From the observations that have been made it is plain that I consider it as possible to convert men into republican machines. This must be done if we expect them to perform their parts properly in the great machine of the government of the state.

Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania* (Philadelphia 1786), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 684, 687 (C. Hyneman & D. Lutz eds. 1983). *See also* Stewart, *supra* note 7.

52. THE FEDERALIST No. 10, *supra* note 15, at 59–60.

53. *Id.* at 62.

This was not the only virtue of size. In a large republic, the principle of representation might substantially solve the problem of faction. In a critical passage, Madison wrote that representation would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[54] A large republic would also reduce the danger that representatives would acquire undue attachment to local interests.

This conception of representation appears throughout *The Federalist*. No. 57 urges that:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.[55]

Elsewhere, Hamilton suggests that wisdom and virtue would characterize national representatives.[56] Whereas the antifederalists accepted representation as a necessary evil, Madison regarded it as an opportunity for achieving governance by officials devoted to a public good distinct from the struggle of private interests. Representatives would have the time and temperament to engage in a form of collective reasoning. The hope was for a genuinely national politics. The representatives of the people would be free to engage in the process of discussion and debate from which the common good would emerge. This understanding is surprisingly close to the Burkean conception of

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54. *Id.* at 60. Madison continued: "Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." *Id.*

55. THE FEDERALIST No. 57, at 377 (A. Hamilton) (P. Ford ed. 1898).

56. THE FEDERALIST No. 63 (A. Hamilton). *See also* Madison's suggestion that:

> An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.

J. MADISON, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 357 (R. Rutland & W. Rachal eds. 1975); *see also* THE FEDERALIST No. 3 (J. Jay).

For a general discussion of Madisonian representation that stresses the antipluralist thrust but that substantially understates its skeptical elements, see G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 177–264 (1981).

representation.[57]

In important respects, the departure from traditional republicanism could not have been greater. Madison willingly abandoned the classical republican understanding that citizens generally should participate directly in the processes of government.[58] Far from being a threat to freedom, a large republic could help to guarantee it. At the same time, Madison's understanding was sharply distinct from that of the modern pluralists. He hoped that national representatives, operating above the fray, would be able to disentangle themselves from local pressures and deliberate on and bring about something like an objective public good. Those representatives would have the virtue associated with classical republican citizens.

To be sure, Madison's sensitivity to the pressures imposed by interest groups—the problem of faction— made him unwilling to accept the antifederalist conception of politics. In his view, that conception would lead to the domination of politics by factions under the guise of civic virtue. But his solution was hardly to accept the interest-group struggle as a desirable part of politics

57. *See, e.g.,* Speech to the Electors (Nov. 3, 1774), *reprinted in* BURKE'S POLITICS 116 (R. Hoffman & P. Levack eds. 1949) ("Parliament is a deliberative assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole"). *See* Barber, *supra* note 38; S. MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS (1983) (discussing the Burkean elements in Madison's conception of representation).

See also THE FEDERALIST No. 37, at 236 (J. Madison) (P. Ford ed. 1898) (referring to the framers' "deep conviction of the necessity of sacrificing private opinions and partial interests to the public good"); THE FEDERALIST Nos. 63 & 71 (A. Hamilton). Note in this regard that Madison attacked Congress in 1787 as "advocates for the respective interests of their constituents." Letter to Jefferson (Oct. 3, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 56, at 374. In his view, "[t]he evil is fully displayed in the County representations, the members of which are everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents." *Remarks on Mr. Jefferson's Draft of a Constitution,* in THE MIND OF THE FOUNDER, *supra* note 46, at 35. Madison's preference for large election districts, *see* Speech in the Virginia Ratifying Convention (June 11, 1788), in 5 THE WRITINGS OF JAMES MADISON 158 (G. Hunt ed. 1904), fits well with this view. So too with his preference for length of service: "The tendency of longer period of service would be, to render the Body more stable in its policy, and more capable of stemming popular currents taking a wrong direction, til reason and justice could regain their ascendency." Meyers, *supra,* at 508.

58. This view can be found in the literature of the antifederalists, relying largely on Montesquieu. The federalist exclusion of the citizenry from politics, *see, e.g.,* THE FEDERALIST No. 63, at 493 (A. Hamilton) (P. Ford ed. 1898) (referring to the "total exclusion of the people in their collective capacity"), is stressed and deplored in R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION (1948); J. Nedelsky, *supra* note 42. *Cf.* Ackerman, *supra* note 27 (stressing the role of citizen participation, in the federalist conception, during rare but important moments of constitutional creation).

that would promote social welfare.[59] Instead, he aimed to ensure against such a struggle through the mechanism of representation. The federalists rejected the notion that political actions were inevitably self-interested: "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence."[60]

This was not, however, the entire story. The structural provisions of the Constitution attempted to bring about public-spirited representation, to provide safeguards in its absence, and to ensure an important measure of popular control. Bicameralism thus attempted to ensure that some representatives would be relatively isolated while others would be relatively close to the people.[61] Indirect election of representatives played a far more important role at the time of ratification than it does today; the fact that state legislatures chose senators ensured that one house of the national legislature would have additional insulation from political pressure. The electoral college is another important example; it was to be a deliberative body standing apart from constituent pressures.[62]

Perhaps most important, the separation of powers scheme was designed with the recognition that even national representatives may be prone to the influence of "interests" that are inconsistent with the public welfare. In *The Federalist No. 10*, Madison noted that "enlightened statesmen will not always be at the helm."[63] *The Federalist No. 51*, moreover, has a much different

59. *See* Meyers, *Introduction* to THE MIND OF THE FOUNDER, *supra* note 46, at xxiv–xxxiii; *cf.* Ackerman, *supra* note 27 (arguing that the framers recognized pluralist bargaining as an acceptable, ordinary element of politics).

60. THE FEDERALIST No. 55, at 371 (A. Hamilton) (P. Ford ed. 1898).

61. *See* THE FEDERALIST Nos. 62 & 63 (A. Hamilton). *See also* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422–23 (M. Farrand ed. 1911) (where Madison defends the Senate on this ground).

62. *See* THE FEDERALIST No. 68, at 452 (A. Hamilton) (P. Ford ed. 1898) ("the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice").

According to Dean Ely, the increasingly "democratic" quality of American politics argues against an expansive judicial role. *See* J. ELY, *supra* note 22, at 7. From the framers' point of view, however, the opposite inference might be drawn: Increasing responsiveness to constituent pressures and diminishing deliberation and "refinement" of the public view argue in favor of ensuring that some part of government take a "sober second look" at political outcomes. *See* note 73 *infra*. This perception plays a prominent role in modern public law.

63. *See* THE FEDERALIST No. 10, at 58 (J. Madison) (P. Ford ed. 1898).

emphasis from Madison's other work, relying on the celebrated "policy of supplying, by opposite and rival interests, the defect of better motives."[64] "Ambition," in the classic formulation, "must be made to counteract ambition."[65] The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities. If a private group were able to achieve dominance over a certain part of the national government, or if a segment of rulers obtained interests that diverged from those of the people, other national officials would have both the incentive and the means to resist.

The federal system would also act as an important safeguard. The "different governments will control each other" and ensure stalemate rather than action at the behest of particular private interests.[66] The jealousy of state governments and the attachment of the citizenry to local interests would provide additional protection against the aggrandizement of power in national institutions.

The result is a complex system of checks: national representation, bicameralism, indirect election, distribution of powers, and the federal-state relationship would operate in concert to counteract the effects of faction despite the inevitability of the factional spirit. And the Constitution itself, enforced by disinterested judges and adopted in a moment in which the factional spirit had been perhaps temporarily extinguished,[67] would prevent both majorities and minorities from usurping government power to distribute wealth or opportunities in their favor.

There has been no discussion thus far of the problem of private property, whose protection was a principal interest of the framers.[68] But there is a close practical relationship between the desire to protect private property from governmental intrusion

64. *See* THE FEDERALIST No. 51 at 344–45 (J. Madison) (P. Ford ed. 1898).

65. *Id.* at 344; *see also* THE FEDERALIST No. 72 (A. Hamilton). For an attempt at harmonization of the Federalists Nos. 10 & 51, see G. WILLS, *supra* note 56, at 201–07.

66. THE FEDERALIST No. 51, at 346 (J. Madison) (P. Ford ed. 1898).

67. *See* Ackerman, *supra* note 27. Charles Beard and others, of course, have attributed the content of the Constitution to self-interested motivations. For a useful collection, see ESSAYS ON THE MAKING OF THE CONSTITUTION (L. Levy ed. 1969).

68. *See, e.g.*, THE FEDERALIST No. 54 (A. Hamilton) (government instituted for protection of property). *See generally* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); R. HOFSTADTER, *supra* note 58; Nedelsky, *supra* note 42. Of course, *The Federalist No. 10* proclaims that differences in property are based on the "diversity in the

and the devices set up by the framers to guard against the dangers posed by faction. In the framers' view, the problem of faction lay partly in the danger that a self-interested group would obtain governmental power in order to put property rights at risk. The various safeguards, including representation by officials who would be able to take a broader view of the relevant issues, may be understood as having the protection of property rights from majoritarian incursion as one of their principal purposes.[69] In this respect as well, the federalists can be contrasted with their antifederalist opponents, whose weaker concern for private property coexisted easily with their preference for decentralized democracy.[70] Moreover, the federalists' hospitable view—at least in some settings—toward political stalemate and government inaction[71] may be associated with a desire to protect private property; inaction would preserve the existing distribution of wealth.

There is in this sense a close practical relationship between the concern for private property and the Madisonian governmental structure. But the relationship is hardly one of logical necessity. It is, for example, possible to believe in the Madisonian conception of the role of national representatives, but at the same time to accept redistribution of resources and selection of preferences as legitimate governmental goals. Under this view, the representative must deliberate rather than respond mechanically to constituent pressures; but if deliberation produces a conclusion in favor of redistribution or different preferences, so be it. This was neither the hope nor the expectation of the Federalists. But it is entirely consistent with their underlying conception of politics and representation, and as we will see, it has significant parallels in current constitutional law.

III. A Deliberative Democracy

The picture that emerges has been aptly termed "deliberative democracy."[72] The federalists rejected the view of their adversa-

faculties of men" and that such diversity cannot be eliminated without extinguishing freedom. *See* The Federalist No. 10, at 56–57 (J. Madison) (P. Ford ed. 1898).

69. *See* Nedelsky, *supra* note 42; *see also* Epstein, *supra* note 17.

70. *But see* Kenyon, *supra* note 29 (arguing that the antifederalists were not in favor of substantial redistribution).

71. *See, e.g.*, The Federalist No. 22 (A. Hamilton); The Federalist No. 10 (J. Madison).

72. *See* Bessette, *supra* note 26, at 102. *See also* The Federalist Nos. 27, 63, 71 & 78 (A. Hamilton)(on the theme of deliberation).

ries on the ground that it undervalued the likelihood that local government would be dominated by private interests instead of profiting from civic virtue. Moreover, the federalists doubted that the private interests of the citizenry could be subordinated by instilling principles of civic virtue. Finally, they thought that commercial development was crucial to the new nation and could not be achieved without a considerable degree of centralization. But the federalists did not believe that representatives would or should respond mechanically to private pressure. Instead, the national representatives were to be above the fray of private interests. Above all, their task was deliberative. Indeed, the task of the legislator was very close to the task of the citizen in the traditional republican conception.

The republican elements of the federalists' approach are captured in Hamilton's suggestion that

> When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.[73]

The notion that politics might be conducted solely as a process of bargaining and trade-offs was thus far from the federalist understanding.[74] The federalists' suspicion of civic virtue and their relatively skeptical attitude toward the possibility that citizens could escape their self-interest led them to reject the traditional republican structure without rejecting important features of its normative understanding of politics.

For the federalists, politics was to be deliberative in a special sense. Representatives were accountable to the public; their deliberative task was not disembodied. The framers thus created political checks designed to ensure that representatives would

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73. THE FEDERALIST No. 71 at 477 (A. Hamilton) (P. Ford ed. 1898); *see also* THE FEDERALIST Nos. 55 & 59 (A. Hamilton); THE FEDERALIST No. 49 (J. Madison). *Compare* THE FEDERALIST No. 78 (A. Hamilton)(discussing judges). *See* J. ELSTER, ULYSSES AND THE SIRENS (1979) (on voluntary foreclosure of choices).

There is a close parallel between this conception of representation and recent justifications for the Supreme Court's role as a provider of a disinterested second look at legislation. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). *See also* text accompanying notes 215–216 *infra*.

74. *See* THE FEDERALIST No. 77, at 515 (A. Hamilton) (referring to "a scandalous bartering of votes and bargaining for places") (P. Ford ed. 1898).

not stray too far from the desires of their constituents. The result was a hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum.[75]

The federalists thus achieved a kind of synthesis of republicanism and the emerging principles of pluralism. Politics rightly consisted of deliberation and discussion about the public good. But that process could not be brought about in the traditional republican fashion; such an effort, in light of human nature, would deteriorate into a struggle among competing factions. A partial solution lay in principles of representation. The mechanisms of accountability would prevent representatives from acquiring interests distinct from those of their constituents. Moreover, the separation of powers would ensure that if a particular group acquired too much power over one set of representatives, there would be safeguards to prevent that group from obtaining authority over the national government in general.

Recent historical work has shown that the framers' understanding cannot be fully explained in either Lockean or pluralist terms.[76] Republican thought played a critical and too often neglected role in the framers' understanding—notwithstanding their departure from the more conventional republicanism of the antifederalists. A significant element[77] in federalist thought was the expectation that the constitutional system would serve republican goals better than the traditional republican solution of small republics, civic education, and limited reliance on representatives. The federalists believed that the new scheme of representation would preserve the underlying republican model of politics without running the risk of tyranny or relying on naive understandings about the human capacity to escape self-interest. I use the term "Madisonian republicanism" to refer to the result-

75. *See* H. PITKIN, *supra* note 19.

76. *See, e.g.*, J. POCOCK, *supra* note 7; Katz, *The Origins of American Constitutional Thought*, 3 PERSP. AM. HIST. 474 (1969); Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972). *But see* J. DIGGINS, *supra* note 27 (challenging the republican understanding and stressing the importance of Locke); Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982).

77. This is not to deny that there were Lockean and pluralist motivations as well. *See generally* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz 2d ed. 1979). As indicated in the text, these motivations manifested themselves in efforts to protect private property from majoritarian intrusion and to develop surrogate safeguards in the event that national representatives failed to act responsibly.

ing scheme, which occupies an intermediate position between interest-group pluralism and traditional republicanism.

IV. INTEREST GROUPS AND THE CONSTITUTION: CURRENT DOCTRINE

A. *Was Madison Wrong?*

It should hardly be controversial to suggest that Madison's understanding of the role of the representative has been only imperfectly realized. Few would contend that nationally selected representatives have been able to exercise the role Madison anticipated. The state of political and economic theory on this point remains surprisingly crude. But there is mounting evidence that the pluralist understanding captures a significant component of the legislative process and that, at the descriptive level, it is far superior to its competitors.

There are numerous theories about legislative decisionmaking. One theory suggests that a considerable amount of legislative behavior can be explained if one assumes that members of Congress seek single-mindedly the goal of reelection.[78] Another approach indicates that three primary considerations— achieving influence within the legislature, promoting public policy, and obtaining reelection—have more explanatory power than any single-factored approach.[79] In the economic literature, there have been efforts to explain legislative behavior solely by reference to constituent pressures.[80] Such interpretations have been attacked as too reductionist.[81]

What emerges is a continuum. At one pole are cases in which interest-group pressures are largely determinative and statutory enactments can be regarded as "deals" among contending interests. At the other pole lie cases where legislators engage in deliberation in which interest-group pressures, conventionally defined, play little or no role. At various points along the continuum a great range of legislative decisions exist where the out-

78. *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

79. *See* R. ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (1979); R. FENNO, CONGRESSMEN IN COMMITTEES (1973). *See also* J. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1981).

80. *See* Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984); Peltzman, *supra* note 14; Stigler, *supra* note 6.

81. *See* A. MAASS, CONGRESS AND THE COMMON GOOD (1983); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); Stewart, *supra* note 7.

comes are dependent on an amalgam of pressure, deliberation, and other factors. No simple test can distinguish cases falling at different points on the continuum.

This is not an appropriate place for an evaluation of existing theories of legislative behavior. It is clear that constituent pressures play a significant role in many legislative decisions and that the federalist ideal of national responsibility to a national constituency does not exist in practice. We are far from Madison's deliberative democracy. Indeed, the evidence suggests that the factional struggle that Madison sought to escape more closely captures politics as it is generally practiced.

B. *The Judicial Response*

Constitutional doctrine has not responded with equanimity to the prevalence of pluralist politics. Indeed, it is possible to trace much of judge-made public law directly to a concern that the Madisonian ideal has been too sharply compromised in practice. The core demand of the equal protection and due process clauses, for example, is that measures taken by legislatures or administrators must be "rational."[82] This demand has been puzzling to those who understand the political process as a series of unprincipled bargains among competing social groups.[83] Under this conception of the political process, review of statutes for "rationality" is incoherent. It demands of statutory enactments something inconsistent with their very nature as the product of self-interested efforts by competing groups seeking scarce social resources.

The rationality requirement may, however, be understood precisely as a requirement that regulatory measures be something other than a response to political pressure.[84] In the rationality cases, the Court requires some independent "public

82. Thus, for example, when a state enacts a statute banning the sale of milk in paperboard milk cartons, the government must show that the prohibition serves some public interest and is not merely the product of a successful imposition of pressure by the plastics industry. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). Or when a state prevents opticians, but not ophthalmologists, from selling certain services, it must justify its action by showing that the measure is a means of protecting consumers and not simply a reflection of pressures imposed by ophthalmologists. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

83. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

84. *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

interest"[85] to justify regulation. A reference to political power is, by itself, insufficient. In no modern case has the Court recognized the legitimacy of pluralist compromise as the exclusive basis for legislation.[86] In many cases, modern and not-so-modern, the Court has indicated that such compromise is impermissible if it is the sole reason for the legislative enactment at issue.[87]

The equal protection and due process clauses are not the only constitutional provisions that can be understood as a repudiation of the pluralist conception of politics. Modern contracts clause doctrine, for example, allows the state to abrogate a contractual obligation only if it can show that the abrogation is a means of promoting a legitimate public value.[88] The eminent domain clause embodies a similar principle at two different stages of the "takings" inquiry. The first is the requirement that a "public use" be shown to justify a taking of private property;[89] the second involves the understanding that if a statute can be fit within the police power, it will be upheld even if no compensation has been paid.[90]

As this brief survey shows, much of modern constitutional doctrine reflects a single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the

85. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 535 (1973).

86. The closest case is Ferguson v. Skrupa, 372 U.S. 726, 732 (1963), where the Court stated, "[S]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Even this statement is ambiguous, for the label "invidious" is frequently applied to classifications based only on raw power.

To be sure, the Court has upheld statutes where the connection is at best attenuated; whether this suggests that the Court's commitment is merely rhetorical is discussed below.

87. The indication can be found in cases demanding a "public value" justification for statutory classifications. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Tigner v. Texas, 310 U.S. 141 (1940); Rosenthal v. New York, 226 U.S. 260 (1912); Engel v. O'Malley, 219 U.S. 128 (1911); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Heath & Milligan Mfg. Co. v. Worst, 207 U.S. 338 (1907).

88. According to the Supreme Court, the requirement is an effort to ensure that "the State is exercising its police power, rather than providing a benefit to special interests." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983) (footnote omitted). For example, a state may abrogate a contractual obligation not as a response to factional pressures, but to prevent an act inconsistent with a legitimate public policy—like the commission of a crime or the passing on to consumers of increased costs. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).

89. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 464 U.S. 932 (1984).

90. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928)

raw power to obtain governmental assistance.[91] To say this is hardly to deny that there have been significant changes over time, or that there are any differences among various clauses. In the *Lochner*[92] era, for example, the Court prohibited not only raw exercises of power, but also what it (wrongly) saw as the same thing: efforts to alter the existing distribution of wealth and entitlements. Such efforts did not fall within the conventional understanding of the police power under the due process, eminent domain, and contracts clauses.[93]

The *Lochner* approach, rooted in solicitude for private property,[94] supplemented the prohibition of decisions based on raw power with a conclusion that redistributive measures should be understood in precisely the same terms, as a naked preference for one group or individual at the expense of another. The solicitude for private property continued the original fusion of Madisonian conceptions of representation with a desire to protect private property from redistribution at the behest of factions.

The current understanding of the police power is far broader, encompassing a wide range of efforts to redistribute wealth or opportunities.[95] The modern doctrinal framework retains the preexisting conception of the role of national representatives but substantially abandons the idea that private property is entitled to special protection from majoritarian processes. Representatives must deliberate rather than respond mechanically to constituent pressures; but decisions to redistribute resources or opportunities, or to adapt the preexisting structure of entitlements and preferences, may well be based on an effort to promote the public good. If representatives choose to restructure

91. The privileges and immunities and dormant commerce clauses can be viewed similarly, though both provisions are directed to the narrower problem of discrimination between citizens and non-citizens. *See* Sunstein, *Naked Preferences and the Constitution*, *supra* note 84, at 1704–10, for a general discussion of the relationship among these clauses.

92. Lochner v. New York, 198 U.S. 45 (1905).

93. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (due process clause); Mugler v. Kansas, 123 U.S. 623 (1887) (due process clause); Lochner v. New York, 198 U.S. 45 (1905) (due process clause in the context of contractual interference); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) (eminent domain clause).

94. *See* Epstein, *supra* note 17; J. Nedelsky, *supra* note 42; text accompanying notes 68–74 *supra*.

95. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 464 U.S. 932 (1984); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *But see* Epstein, *Towards a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (attempting to reinstitute the original fusion of concerns about factions with concerns about redistribution).

the existing distribution of wealth, entitlements, or preferences, their choice is usually not, for that reason, unconstitutional.[96]

There have also been differences in the intensity with which the Court has sought to enforce the prohibition of decisions based solely on raw power. Occasionally, the Court has scrutinized the connection between legitimate ends and statutory means to ensure that raw exercises of power are in fact "flushed out."[97] At other times, the Court's approach to these issues is highly deferential.[98] In such cases, the Court has held it sufficient if a legitimate purpose can be hypothesized and if there is a minimally plausible connection between that purpose and the statute at issue. But the fact that there are differences in the intensity of review is not inconsistent with the claim that the Court's basic perception of the prohibited end has remained the same.[99]

The Court's perception is closely related to the Madisonian understanding of both politics and representation. Under that conception, as we have seen, the task of the legislator is not to respond to private pressures but to deliberate on and to select values. This is the basis on which Madison responded to the anti-federalists and justified the scheme of representation in a large republic. In constitutional doctrine, the judicial perception of the prohibited end—decisions based solely on private pressure—is identical to the danger that united the federalists and the anti-federalists in their fears about the risks posed by faction. In constitutional doctrine as well, the government must show that something other than private pressure accounted for its decision. In both the federalist and the judicial accounts, representatives are supposed to stand to some degree above the struggle of private interests, deliberating on and attempting to bring about a common good.

The individual rights provisions are not the only area in which this basic theme can be found. Several of the most important separation of powers cases reflect a similar point. For example,

96. Some redistributions are, however, unconstitutional even if they are the product of a deliberative process. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979)(physical invasion under the takings clause).

97. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

98. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). *See also* cases cited in note 87 *supra*.

99. *See* text accompanying notes 107–112 *infra*.

INS v. Chadha[100] involved the constitutionality of the legislative veto device, a mechanism by which one house of Congress could invalidate executive action by passing a veto not subject to presidential control. In invalidating the legislative veto, the Supreme Court emphasized the factional dangers produced by evasion of the bicameralism and presentation requirements of Article I.[101] According to the Court, those requirements were designed as safeguards against the possibility that private groups might usurp the governmental process in order to distribute wealth or opportunities in their favor. Another prominent separation of powers decision, *Schechter Poultry*[102]—the most celebrated case employing the nondelegation doctrine to invalidate a federal statute—involved the explicit delegation of governmental authority to private groups. The statute at issue authorized representatives of labor and management effectively to write legislation, subject to minimal executive or congressional supervision.[103] This feature of the statute contributed heavily to its unconstitutionality.

The descriptive power of this conception of politics—that legislators have a deliberative responsibility—is quite broad. It captures a theme that pervades American constitutional law. Indeed, that conception is the most plausible candidate we have for a unitary understanding of the sorts of conduct forbidden by the Constitution.

A critique of this approach would point out that even if the Court's rhetoric suggests a rejection of interest-group politics as a legitimate basis for legislation, statutes are rarely invalidated on that basis.[104] The Court is willing to hypothesize legitimate ends even in cases in which it is highly unlikely that those ends in fact account for legislation.[105] Moreover, it requires only the loosest connection between statutory means and the public value at issue.[106] The existing doctrinal framework ensures that most stat-

100. 462 U.S. 919 (1983).

101. *Id.* at 940–43.

102. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

103. *See id.* at 521–22 n.4.

104. Some of the most prominent exceptions include City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985); Zobel v. Williams, 457 U.S. 55 (1982); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). *See also* Williams v. Vermont, 105 S.Ct. 2465 (1985); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985). The latter cases implicate the special danger of protectionism raised by discrimination against out-of-staters. *See* Sunstein, *supra* note 84, at 1705–10.

105. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

106. *See, e.g.*, Schweicker v. Wilson, 450 U.S. 221 (1981).

utory classifications—outside the limited areas of race, gender, alienage, and illegitimacy—survive review. The state need not demonstrate that the value was in fact responsible for the legislative decision, even if the statute is an obvious response to factional power, and the representatives apparently did not deliberate at all.

Under this view, the prohibition against exercises of raw power is merely rhetorical—in reality, no prohibition at all. This phenomenon implies that the current doctrinal framework reveals judicial acceptance of the pluralist understanding and no constitutional objection to interest-group politics as such. Skepticism about the existence of the prohibition might be buttressed with the view, associated with the legal realists,[107] that what matters is what the courts do, not what they say; and what they do is to uphold the outcome of pluralist struggle at almost every turn.

There is much that is persuasive in this critique. It would be foolish to suggest that, at any time since the decline of the Lochner period, the Court has been engaged in a serious or sustained effort to police the operation of interest-group politics. On the other hand, it would be equally foolish to attempt to explain current law as a system in which interest-group politics is accepted as an ordinary and permissible element of the political process. The existing doctrinal framework differs dramatically from what one would expect to see if the pluralist understanding were fully accepted.

As an illustration of this point, consider the fact that after abandoning the Lochner approach, the Court was confronted with three principal options for doctrinal development. It could conclude with Justice Holmes,[108] and perhaps Justice Black,[109] that decisions based on raw exercises of power are a legitimate and appropriate part of politics. Such a conclusion would lead to the elimination of rationality review altogether. The Court would announce that political pressures are a legitimate basis for statutory classifications and that so long as impermissible factors (such as race) do not enter into the decision, there is no constitutional issue.

The Court's second option was to adhere to the conclusion that decisions based on raw power are prohibited, to accept the

107. J. FRANK, LAW AND THE MODERN MIND 22–31 (1930).
108. *See* Quong Wing v. Kirkendall, 223 U.S. 59 (1912).
109. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).

fact that redistribution need not be characterized as such a decision, but to continue to scrutinize the political process carefully to ensure that legislators were responding to something other than factional pressure. Under such an approach, Lochner-like decisions involving redistributive statutes would be overruled if the legislators had responded to a plausible conception of the public good.

The third option was to continue to assert that decisions based on raw power are prohibited, to accept redistribution as a permissible social goal, and to adopt a highly deferential approach in examining whether a statute is in fact solely a response to interest-group pressures. Such an approach would reflect the same normative model of government as the second. The difference is that it would rely on considerations of the separation of powers to create a strong presumption in favor of the legislature against the charge that a statutory enactment is solely a reflection of the power of private groups.

The third option is, of course, the one the Court has selected. This option is different from the first: it results in a different rhetoric, occasionally produces different results,[110] creates a distinct analytic framework, and, most important, reflects a normative understanding, with strong Madisonian overtones, that is altogether different from that which underlies the pluralist understanding. There are not, to be sure, frequent differences in result between the first and third options, but that should not disguise the fact that the two reflect sharply divergent conceptions of politics.

In this regard, the prohibition of decisions based on raw power may be regarded as a member of the class of "underenforced" constitutional norms.[111] Such norms are binding on government, but their judicial enforcement is limited because of the familiar institutional concerns of judicial competence and authority.[112] Whether the norm in question here should be enforced more vigorously is a matter taken up below.

110. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); *cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

111. *See generally* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

112. *See id.* at 1220–28.

C. *The Problem of "Ideology"*

Large elements of constitutional law are not susceptible to explanation in the terms used thus far. The Constitution creates a shield of "rights" on which government may not intrude even if the legislative process is genuinely deliberative. Those rights—including most prominently the right to free speech—are protected regardless of the motivation of the legislature.[113] Deliberation is, in this respect, a necessary though not a sufficient condition for validity. Independent constitutional constraints operate to bar government action that is properly motivated under the framework described thus far.

Another set of constraints finds its source in "heightened scrutiny" under the equal protection clause. In cases involving discrimination against blacks, women, aliens, and illegitimates, the Court has invalidated statutes even when they were not raw exercises of power in the ordinary sense.[114] For example, the Court has struck down provisions stating that wives are automatically entitled to social security benefits, but that husbands must show dependency.[115] Such statutes are not raw exercises of power; they are responsive to certain (perhaps mistaken or invidious) conceptions about the nature of female participation in the workplace. How might these developments be explained?

An intriguing possibility is suggested by the Court's own explanation of why it approaches such classifications with special skepticism. In the area of gender, the Court has said that its skeptical approach guarantees that the relevant classifications are supported by "reasoned analysis" and are not the byproduct of "traditional, often inaccurate, assumptions about the proper roles of men and women."[116] At first glance, the notion that legislation must be the product of "reasoned analysis" seems odd.

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113. The legislative motivation does, however, play a role in determining the level of judicial scrutiny. *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). Moreover, the right to free speech may be regarded as an effort to protect the deliberative process. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

Other rights-based constraints include protection against takings of private property, protection against interference with religious liberties, and protection against the unfair administration of criminal justice.

114. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Graham v. Richardson, 403 U.S. 365 (1971); Lee v. Washington, 390 U.S. 333 (1968).

115. *See* Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

116. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982).

That notion may be properly applied to the courts and perhaps to administrative agencies.[117] But reasoned analysis is normally not a prerequisite of legislation.

Underlying the Court's approach is a perception that classifications in this context are likely to reflect private power, even if it is possible to identify a public value that the relevant classification can be said to serve. When a statute discriminates against women, there is a special likelihood that it is not an effort to promote the public good, but is instead an unthinking reflection of existing relations of power. Discrimination against women may result from the disproportionate authority of men over lawmaking processes or, more precisely, from an understanding about the proper roles of men and women that itself operates to promote the power of men and to undermine the power of women.[118]

The basic approach is largely a version of the prohibition of decisions based on raw power, but with an important twist. Here it is insufficient to invoke a plausible, even widely held conception of the public interest as a basis for the classification. The public value justification must survive critical scrutiny designed to ensure that it is not itself a product of existing relations of power.

The "reasoned analysis" requirement is classically republican. The role of the representative is to deliberate on the public good, not to respond mechanically to existing social conceptions. Under the Court's framework, such conceptions must themselves be subjected to critical review.[119] They cannot be automatically translated into law. The result is to apply the deliberative task to social practices that had previously been accepted as natural and

117. *See* notes 128–158 *infra* and accompanying text.

118. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 ETHICS 561 (1983); Pateman, *Women and Consent*, 8 POL. THEORY 149 (1980).

119. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3259 (1985); ("[M]ere negative attitudes, or fear . . . are not permissible bases for treating a home for the mentally retarded differently . . . [T]he City may not avoid the strictures of [the Equal Protection] clause by deferring to the wishes or objections of some fraction of the body politic"); *cf.* J. HABERMAS, THE THEORY OF COMMUNICATIVE COMPETENCE (1984) (discussing communicative action, in which preferences are subject to critical scrutiny, as basis for social determinations); Unger, *supra* note 35, at 602 (discussing "superliberalism").

inviolate.[120]

One of the distinctive features of this approach is that the outcome of the legislative process becomes secondary. What is important is whether it is deliberation—undistorted by private power—that gave rise to that outcome.[121] Some classifications that would be unconstitutional if they were the product of an unreflective process will be upheld if they are the result of "reasoned analysis."[122] The Court's willingness to scrutinize public value justifications to determine whether they are in fact a disguise for, or rooted in, private power is a crude use of the concept of "ideology" as a basis for review of legislation.[123]

There are considerable difficulties in using a conception of ideology as the basis for analysis of equal protection problems. Courts are ill-equipped for the task of deciding whether particular values in fact reflect relations of power. In the abstract, there may be no reason to believe that the courts are more insulated from the effects of ideology than other governmental institutions. Moreover, there are formidable difficulties in the view that something called "reasoned analysis" might be used by human actors to expose certain values as the product of private power.[124] I re-

120. See R. UNGER, PASSION 7–15 (1984) (discussing "modernist thesis" that existing practices should be subject to critical scrutiny).

121. Some classifications, of course, will not be upheld even if they come about after lengthy periods of deliberation by legislators. There is a judicial perception that certain measures are inevitably "distorted"—the product of private power—notwithstanding the fact of lengthy discussion. One might distinguish between classifications that might be, but are not, the product of deliberation, *see* note 122 *infra*, and classifications that are inevitably the product of power even if there has been actual discussion of their costs and benefits. This latter possibility of course makes the distinction between "procedural" and "substantive" review quite thin. (I am indebted to Donald Regan for helping to clarify my thoughts on this point.)

122. The gender cases illustrate this point most clearly. In Califano v. Goldfarb, 430 U.S. 199 (1977), the Court indicated that if the statutory discrimination against women workers had been the product of a detailed inquiry into the facts, it might have been upheld. In Heckler v. Mathews, 104 S. Ct. 1387, 1398 (1984), the Court upheld a statute designed to protect reliance interests under the statute invalidated in *Goldfarb*. The Court concluded that the latter statute, unlike the former, was impermissibly motivated. In Califano v. Webster, 430 U.S. 313, 317 (1977), the Court upheld discrimination in the calculation of social security benefits on the ground that the legislative history showed that the classification was an effort to compensate for past discrimination against women.

123. *See* J. ELSTER, *supra* note 11; M. FOUCAULT, POWER/KNOWLEDGE (C. Gordon ed. 1980); R. GEUSS, THE IDEA OF A CRITICAL THEORY (1981); J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1971).

124. *See, e.g.*, M. FOUCAULT, DISCIPLINE AND PUNISH 27–28 (1979); M. FOUCAULT, HISTORY OF SEXUALITY 85–91 (1980); J. KEANE, PUBLIC LIFE AND LATE CAPITALISM 168–72 (1984); Lukes, *Of Gods and Demons: Habermas and Practical Reason*, in HABERMAS: CRITICAL DEBATES 134

turn to these issues below.[125] For the moment, it is sufficient to suggest that modern constitutional doctrine recognizes that some values are in fact the product of power.

It would be a mistake, however, to conclude that a commitment to counteracting the effects of "ideology" is a consistent or dominant theme in the cases. The requirement of "reasoned analysis" is applied in a relatively small category of cases involving discrimination on the basis of race, gender, alienage, and illegitimacy.[126] Elsewhere, the Court is much more deferential. In the most prominent example, the Court has refused to invalidate legislation involving stereotypical (and unreflective) conceptions about the poor.[127]

What emerges is a jurisprudence that inspects legislation to determine whether representatives have attempted to act deliberatively, but there are sharp divergences in the nature and extent of the judicial inquiry. In general, the Court is extraordinarily deferential, adopting a strong presumption in favor of the legislation. Scrutiny is heightened only in narrow circumstances in which public value justifications are subject to critical inspection. But in both contexts, the underlying conception of representation is Madisonian, and the normative understanding of politics is republican.

V. Factions and Administrative Law

Thus far, the focus has been on constitutional law—doctrines rooted in the equal protection, due process, eminent domain, and contract clauses—insofar as they reflect a particular understanding of the prohibited end. In the area of administrative law, where the basic doctrines are nonconstitutional in status, there are similar themes.

At one level, this should be expected. Since the early growth

(J. Thompson & B. Held eds. 1982). The notion of practical reason as a device for attacking ideology is, however, enjoying a resurgence in some circles. *See* R. Bernstein, *supra* note 7, at 182–223; J. Habermas, *supra* note 123; A. MacIntyre, *supra* note 7. Recent feminist writing provides a particularly useful model for understanding the relationship between knowledge and power. *See* A. Jagger, Feminist Politics and Human Nature (1983); Held, *Feminism and Epistemology: Recent Work on The Connection Between Gender and Knowledge*, 14 Phil. & Pub. Aff. 296 (1985); Pateman, *Defending Prostitution*, *supra* note 118.

125. *See* text accompanying notes 207–238 *infra*.

126. *See* notes 114–123 *supra*.

127. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

of administrative agencies, the problem of faction has been a central concern.[128] The original separation of powers scheme was intended to combat that problem with the safeguards of electoral accountability and separated powers. The creation of administrative agencies breached both of those safeguards. Agency functions do not fall easily into the conventional categories of legislation, administration, and execution; often they combine all three. More fundamentally, administrative agencies exercise broad discretionary power with only intermittent control from the electorally accountable branches of the federal government.[129] The danger is that private groups will co-opt the administrative process and exploit it to their advantage.

The initial response of the courts was predictable: they invalidated the delegation of lawmaking authority to administrative agencies.[130] As noted above, *Schechter Poultry* involved a delegation of legislative power to private groups,[131] who were effectively authorized to make law with only minimal supervision from Congress or the President. For various reasons,[132] the strategy of invalidation on constitutional grounds was ultimately abandoned.[133] After the abandonment, administrative law consisted largely of an effort to require clear authorization for government intrusions into the realm of private property.[134] This approach paralleled developments in constitutional law that used the touchstone of private property as the basis for judicial intervention.[135] But here—as in the constitutional area, and for the same reasons[136]—the touchstone of property is no longer a plausible basis for judicial review. Much of modern administrative law is a means of serving the original purposes of the nondelegation doctrine, and of promoting Madisonian goals, without invalidating

128. *See generally* note 3 *supra*.

129. *See* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION (1983).

130. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

131. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See generally* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

132. *See generally* Stewart, *supra* note 3.

133. *See, e.g.*, Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three-judge district court). There have, however, been some rumblings in the Court in the other direction. *See, e.g.*, Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

134. *See* J. VINING, LEGAL IDENTITY 20–27 (1978); Stewart, *supra* note 3.

135. *See* text accompanying notes 91–94 *supra*.

136. *See* notes 87–90 *supra* and accompanying text.

regulatory statutes or relying on traditional conceptions of private property.[137]

The most important doctrinal innovation in administrative law, for example, is the "hard-look doctrine."[138] In its current incarnation, the doctrine contains four principal features. Agencies must give detailed explanations for their decisions;[139] justify departures from past practices;[140] allow participation in the regulatory process by a wide range of affected groups;[141] and consider reasonable alternatives, explaining why they were rejected.[142] Courts will also scrutinize the decision on the merits.[143] These devices may be understood as a form of means-ends scrutiny akin to what we have seen in constitutional law. The courts examine the connection between statutorily relevant ends and the means chosen by the agency to promote those ends. If the connection is sufficiently attenuated, impermissible bases for regulatory action can be "flushed out." These bases may be impermissible because they are not relevant under the governing statute or because they are solely the product of political pressures.[144]

The hard-look doctrine has significantly transformed administrative decisionmaking, particularly in notice-and-comment

137. *See* J. VINING, *supra* note 134 at 29–33, 179–81; Stewart & Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193, 1232–39, 1278–79, 1317–18 (1982).

138. Originally created by the District of Columbia Court of Appeals, the "hard-look doctrine" is now the generally accepted framework for reviewing the work of administrative agencies. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509 (1974).

139. *See, e.g.,* Brae Corp. v. United States, 740 F.2d 1023, 1047 (D.C. Cir. 1984); Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1425 (D.C. Cir. 1983); NAACP v. FCC, 682 F.2d 993, 997 (D.C. Cir. 1982).

140. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 103 S. Ct. 2856, 2865–66 (1983); Community Nutrition Inst. v. Block, 749 F.2d 50, 54 (D.C. Cir. 1984); Public Citizen v. Sneed, 733 F.2d 93, 100 (D.C. Cir. 1984); National Tour Brokers Assn. v. ICC, 671 F.2d 528, 532 (D.C. Cir. 1982).

141. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 523–525 (1978) (holding that such participation requirements must be grounded in the Administrative Procedure Act); NAACP v. FCC, 682 F.2d 993, 1001 (D.C. Cir. 1982); National Welfare Rights Org. v. Finch, 429 F.2d 725, 739 (D.C. Cir. 1970). Notwithstanding *Vermont Yankee,* the APA's provisions for judicial review have generated record requirements that may in turn produce participation. *See* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure,* 91 HARV. L. REV. 1805, 1809 (1978).

142. *See* State Farm, 103 S. Ct. at 2869–2870; Walter O. Boswell Memorial Hosp. v. Heckler, 749 F.2d 788, 797 (D.C. Cir. 1984); Brae Corp. v. United States, 740 F.2d 1023, 1039 (D.C. Cir. 1984).

143. *See, e.g., State Farm,* 103 S. Ct. at 2871–74.

144. *See* Garland, *Deregulation and Judicial Review,* 98 HARV. L. REV. 507 (1985).

rulemaking. The drafters of the Administrative Procedure Act[145] intended informal rulemaking to resemble legislation. The process would be an open-ended one in which officials would be free to consult all affected interests. No detailed explanation of agency outcomes would be required; a "concise statement of basis and purpose"[146] would suffice. Administrative rulemaking, in short, was to be "political" in character, in the sense that officials would base decisions not on conventional processes of reasoning, but on responses to constituent desires and on informally obtained information about issues of fact and policy. In this respect, administrative rulemaking lay at the opposite pole from agency adjudication, which was surrounded by the ordinary trappings of the judicial process.[147]

In these circumstances, the various judicial innovations reflected in the "hard-look doctrine" seem quite odd. By applying many of the safeguards of adjudication to the rulemaking process, those innovations transform notice-and-comment rulemaking into something very different from ordinary legislation.

A revealing development in this regard involves "*ex parte* contacts" in rulemaking. Such contacts are defined as off-the-record communications between government officials and private parties potentially affected by their decisions. In the most celebrated case involving such contacts, commissioners of the Federal Communications Commission were alleged to have spoken off-the-record with network officials about regulatory proposals.[148] The legal question was whether the Administrative Procedure Act bars such communications, or at least requires that they be put in the administrative file or be disclosed to the public.

Under the original understanding of rulemaking, there was no prohibition of *ex parte* contacts, and public disclosure was not required. This result was a natural outgrowth of the legislative model of administration. Legislators are not discouraged from

145. 5 U.S.C. §§ 551–559 (1982).

146. *See* 5 U.S.C. § 553(c)(1982); *see also* South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 886 (4th Cir. 1983); Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974).

147. *See* 5 U.S.C. §§ 554, 556 (1982).

148. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). *See also* Iowa State Commerce Comm'n v. Office of Fed. Inspector, 730 F.2d 1566, 1576–77 (D.C. Cir. 1984); Sierra Club v. Costle, 657 F.2d 298, 400–10 (D.C. Cir. 1981); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 541–43 (D.C. Cir. 1978); Action for Children's Television v. FCC, 564 F.2d 458, 468–74 (D.C. Cir. 1977).

communicating informally with affected citizens about proposed measures. On the contrary, informal communications are affirmatively encouraged because they facilitate the process of obtaining information about the nature and extent of constituent desires. Similarly, administrators deciding on proposed rules were not to be precluded from consulting informally with all interested parties.[149] Such consultation would hardly impair the legitimacy of the administrative process; indeed it would promote it.

Recent judicial efforts to require disclosure of *ex parte* contacts stem from an altogether different conception of administration. That conception departs from the original legislative understanding based on constituent pressure in favor of a more deliberative role for administrators.[150] The new conception reflects a belief that the pluralist understanding of administration threatens to subvert statutory goals by reflecting private whim.[151]

What do the courts—and to some degree Congress[152] and administrative agencies[153]—hope to accomplish with these procedural safeguards? The answer should be familiar. Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy.[154] A principal concern is that without the procedural and substantive requirements of the hard-look doctrine, the governing values may be subverted in the enforcement process through the domination of powerful private groups.

Those values may be found in the statute, which must of course be taken as authoritative. If, as is often the case, the statute is ambiguous, the values must be ascertained by the agency through a more open-ended process. In this process, the agency must ensure public scrutiny and review and thereby guard against outcomes imposed by dominant factions. The hard-look doctrine, in its examination of the relationship between regula-

149. *See* Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,* 1979 SUP. CT. REV. 345.

150. *See State Farm,* 103 S. Ct. 2856 (1983).

151. *See id.*

152. *See, e.g.,* 42 U.S.C. §§ 7401–7642 (1982) (Clean Air Act).

153. Many agencies have voluntarily adopted procedural safeguards of this sort.

154. *See* Sunstein, *Deregulation and the Hard-Look Doctrine,* 1983 SUP. CT. REV. 177.

tory means and legitimate public ends, is a method of facilitating this process.

Accompanying this idea is a judicial attempt to discipline the administrative process with contemporary principles of "comprehensive rationality."[155] This approach requires explicit identification of goals[156] and careful exploration of the ways in which those goals might be achieved. It aims to ensure that agency decisions will be based on statutorily permissible factors, and are neither blindly responsive to political pressures nor based on irrelevant considerations. "Comprehensive rationality" is typically associated with a belief in a more or less objective public interest and with skepticism toward the idea that the purpose of politics is simply to mediate a struggle among contending social groups.[157] Not surprisingly, critics of this judicial role have based their critique on a perception that agency decisions ought to be understood as products of pluralist politics.[158] This perception is a recent incarnation of the notion that democratic outcomes are those reached by officials who respond to constituent pressures.

VI. ADMINISTRATIVE AND CONSTITUTIONAL STANDARDS: A REPRISE

Most of these developments in contemporary administrative law have occurred without constitutional compulsion. They must be understood either as a species of statutory interpretation—of the Administrative Procedure Act and of governing substantive

155. *See* Diver, *Policymaking Paradigms in Administrative Law,* 95 HARV. L. REV. 393, 394–95 (1981).

156. Contemporary "policy science" often considers ends exogenous. *See* Tribe, *Policy Science: Analysis or Ideology?,* 2 PHIL. & PUB. AFF. 66 (1973). That is not true in contemporary administrative law; ends as well as means have to be justified, either because of their connection with the statutory scheme or, in the absence of statutory guidance, because of their connection with public preferences. *Cf.* J. HABERMAS, *supra* note 119 (discussing the justification of values).

157. This is a prominent theme in American administrative law. In a different incarnation, similar conclusions were based on the hope that official experts might be able to discern the public interest in a nonpartisan fashion. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS (1938); *see also* Frug, *The Ideology of Bureaucracy in American Law,* 97 HARV. L. REV. 1276, 1286–92 (1984).

158. *See* Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc., 104 S. Ct. 2778, 2793 (1984); Scalia, *Separation of Functions: Obscurity Preserved,* 34 AD. L. REV. v (1982) (Chairman's message); Shapiro, *On Predicting the Future of Administrative Law,* 6 REG. 18, 20–21 (1982); Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking,* 1 REG. 38 (1977).

statutes—or as federal common law.[159] But the developments are strikingly similar in both form and ultimate aim to developments under equal protection review. In that context, courts have imposed requirements on the legislative process that encourage a kind of reasoned decisionmaking that is inconsistent with pluralist premises. Recall that "reasoned analysis" is the Court's own description of its basic requirement in the *Mississippi University* case.[160] In numerous other cases, the Court has employed the same basic devices found in the administrative context—means-ends scrutiny, examination of alternatives, facilitation of participation—to help ensure that legislation is not merely a response to pressure.

In both administrative and constitutional law, judge-made doctrines, applicable to legislators and bureaucrats, are designed to ensure against the dangers of faction. In both areas, the means of achieving this goal have been two-fold. The first involves scrutiny of the system of representation. If particular groups have been excluded from the decisionmaking process, judicial deference is reduced; either participation must be afforded[161] or the decision on the merits must be reviewed with care.[162] The second method requires detailed explanations, in either the legislative history or the administrative justification, to persuade the court that the relevant officials engaged in a genuine attempt to discern the public interest.

There is, however, a significant difference between the administrative and constitutional doctrines. In administrative law, the various requirements are imposed with considerably more rigor. This phenomenon is probably best explained as a product of conventional understandings of the separation of powers. The underlying idea is that in reviewing legislative action, especially when the relevant questions concern the motivations for such action, courts ought to give legislators the benefit of every doubt. Before invalidating a statute, they should require overwhelming

159. *But see* Vermont Yankee Nuclear Power Corp. v. National Resource Defense Council, Inc., 435 U.S. 519, 547–48 (1978) (suggesting that administrative law must be traceable to authoritative statutes). *See generally* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

160. 458 U.S. 718 (1982).

161. *See, e.g.*, Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 734 F.2d 1437, 1446 (D.C. Cir. 1984); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971).

162. In the constititutional area, see United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

evidence that the measure in question is in fact a pure response to political power. The rationale for deference applies with much less force to actions of administrative agencies, whose constitutional pedigree is far less clear.[163] The constitutional status of administrative agencies has been uncertain precisely because they evade the ordinary constitutional safeguards against domination by powerful private groups. Congress is, of course, subject to structural safeguards, even if, as we have seen, they are at best an imperfect guaranty.[164]

The Court's deferential approach in constitutional law might also reflect judicial ambivalence about the notion that pluralist compromise is impermissible in the legislative realm. The difficulties in filtering out naked wealth transfers—even in cases in which legislation is plausibly understood as a purely private deal[165]—are formidable. Such an inquiry requires the courts to look behind the statute and its history and effectively to supervise the functioning of the legislative process. The courts' almost universal[166] unwillingness to undertake that inquiry reflects not only separation of powers concerns, but also skepticism toward the view that the Constitution forbids legislation that is based on the power of self-interested private groups.

These considerations lead to a more general point. Concerns about institutional legitimacy often receive their doctrinal form in judicial requirements of participation and reasoned explanations. When the institution's pedigree is clear, no such require-

163. For a time, agency decisions were treated with the same respect as legislative enactments. Now, it is clear that less deference is applied, both because of constitutional principles and because of the Administrative Procedure Act. *See* Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984). The uneasy constitutional position of administrative agencies is reflected in the statutes mandating judicial review of agency action. *See, e.g.*, 5 U.S.C. §§ 551–559, 701–706 (1982). For a discussion of the APA drafters' attitude toward judicial review, see Sunstein, *supra* note 154, at 198–200.

164. Rationality review is applied to administrators as well as to legislators; but the existence of more searching judicial scrutiny under the Administrative Procedure Act has made rationality review superfluous. *See* text accompanying notes 182–184 *infra* (discussing the possibility that legislation may amount to the delegation of public power to private groups).

Compare in this regard the cases implementing the state action exemption to the Sherman Act. Delegation of price-fixing authority to private actors is unlawful, *see* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1950), but a decision to set up a regulatory scheme that operates as an alternative to the marketplace is permissible if there is continuing government supervision of the private conduct. *See, e.g.*, Southern Motor Carriers Rate Conference, Inc. v. United States 105 S. Ct. 1721 (1985).

165. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

166. Most of the exceptions involve "heightened scrutiny." *See* text accompanying note 114 *supra*.

ments are imposed. This has significant implications for the universally drawn distinction[167] between due process requirements of participation in "legislative" decisions and those in "adjudicative" decisions. In the legislative context, no participation need be afforded as a matter of constitutional right. The processes of representation are a sufficient guaranty of legitimacy,[168] in the sense that representation will ensure adequate responsiveness to the public at large. By contrast, in adjudicative proceedings—when a single person or small group is singled out for special treatment—participation is required. When a personal or narrowly held interest is at stake, the processes of representation are unlikely to be of sufficient help. Hence the rule, fundamental to administrative law, that the due process clause requires a right to participate only in adjudicative proceedings.[169]

In recent years, there have been inroads on this traditional dichotomy. In American public law, these inroads have occurred on three fronts. Some courts have interpreted regulatory statutes to create rights to participate and receive an explanation in legislative-type proceedings.[170] In other cases, courts have suggested that the Constitution independently requires that participation and explanation be available in administrative rulemaking proceedings.[171] Finally, a few courts have suggested that in certain situations, the Constitution requires that legislatures also respect these rights.[172]

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167. *Compare* Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) *with* Londoner v. City of Denver, 210 U.S. 373 (1908).

168. To some degree, the distinction turns on the nature of the issues. Where the disputed questions turn on issues of policy, forensic factfinding devices may be less useful. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958).

169. *See id.*

170. *See* notes 141, 161 *supra.*

171. *See* Burr v. New Rochelle Municipal Hous. Auth., 479 F.2d 1165 (2d Cir. 1973).

172. A revealing development in this connection involves general requirements of deliberation or electoral accountability in cases concerning intrusions on constitutionally sensitive interests. In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court invalidated a civil service regulation that barred noncitizens from working in the civil service. According to the Court, concerns involving foreign affairs were not the legitimate province of the civil service commission; such concerns could not, therefore, be invoked in support of the regulation. Concerns involving the efficiency of the service are within the domain of the commission, but there was no evidence of deliberation on the part of the commission to the effect that efficiency concerns justified an across-the-board ban on employment of aliens. The regulation was therefore invalidated. The basic notion is that deliberative processes are a necessary surrogate for broad representation; when the latter is absent, the former is required.

The same notion is at work in opinions concluding that only proper decisionmakers, susceptible to special electoral control or reflecting broad deliberation, may undertake "affirma-

In all of these areas, procedural rights are created because of a perception that the existing processes of representation are an inadequate guaranty that the outcome will be something other than the result of private whim. Especially in the administrative context, but elsewhere as well, these developments reflect a perception that traditional "political" decisions, based on constituent pressures, are likely to mask undue influence over government processes by powerful private groups. In all of these areas, the governing conception of politics is Madisonian: the representative must seek a public good that is distinct from the struggle of private interests. Judicially-created rights to participate and to receive an explanation are designed to help bring about that result.

VII. Reviving Madisonian Republicanism

The judicial initiatives explored thus far are best understood as evidence of a mounting distrust of pluralism and a growing preference for a scheme that borrows from the Madisonian understanding of representation. Acceptance of the Madisonian conception of politics, however, does not necessarily imply that the courts ought to play a role in moving the political process in Madisonian directions. It is highly unlikely that the courts, acting by themselves, could accomplish a great deal in bringing the political process closer to the Madisonian conception.[173] Changes in the nature of politics will depend far more on the practices of legislative and administrative actors. Moreover, the familiar considerations of judicial authority and competence might counsel against an aggressive judicial role.[174]

But if courts took the Madisonian conception seriously, legal doctrine would be significantly modified, even though the foundations for these modifications exist in current law. This section outlines the direction in which legal doctrine might shift if the principles of Madisonian republicanism were used aggressively as a basis for reviewing legislative and administrative action.

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tive action." *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 597 (1979) (White, J., dissenting) (emphasizing the absence of deliberation and electoral safeguards in prohibiting the hiring of methadone users).

173. *Cf.* D. Horowitz, The Courts and Social Policy (1977) (discussing institutional weaknesses of courts in bringing about social changes); J. Keane, *supra* note 124 (discussing changes necessary to bring about reinvigorated public life).

174. *See* text accompanying notes 204–207 *infra*.

A. *Proposals*

1. *Strengthened rationality review.*

The first change that a Madisonian approach to judicial review would cause is that courts would enforce more stringently the rationality requirement of the equal protection, due process, contract, and eminent domain clauses. The strengthened review would not, however, prohibit the category of impermissible ends identified during the *Lochner* period.[175] Instead it would involve review to ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefited—or, to state the matter positively, to ensure that representatives have exercised some form of judgment instead of responding mechanically to interest-group pressures.[176]

Under this strengthened system of review, two aspects of current law would be altered. First, courts would not be as willing to hypothesize legitimate legislative purposes. They would require some reason to believe that the legitimate purpose actually played a part in the legislative judgment. Second, courts would require a closer fit between statutory means and legitimate ends. The existence of a merely plausible connection would be insufficient.[177]

As an example, consider *United States Railroad Retirement Board v. Fritz*.[178] At issue there was a statute designed to improve the financial condition of the railroad retirement system—an analogue of social security—by eliminating certain benefits. Most of those whose rights had "vested" were unaffected by the statute.

175. *See* text accompanying notes 91–93 *supra*; Sunstein, *Naked Preferences, supra* note 84.

176. As noted above, there is a continuum between these two poles, both representing caricatures of a complex reality. *See* text accompanying notes 81–82 *supra*. The strengthened rationality review would be designed to ensure against outcomes approaching the latter end of the pole.

177. Under heightened scrutiny both of these changes from rationality review have been made. Individual justices occasionally suggest that rationality review should be modified along these lines. *See* Schweiker v. Wilson, 450 U.S. 221, 242–45 (1981) (Powell, J., dissenting); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183–98 (1980) (Brennan, J., dissenting); Harris v. McRae, 448 U.S. 297, 341–44 (1980) (Marshall, J., dissenting). "Heightened" means-ends scrutiny was advocated more than a decade ago in Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–48 (1972), but without a conception of the underlying prohibited end. *See also* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (purporting to apply rationality review, the Court invalidated a classification disadvantaging the mentally retarded; the standard of review was in fact "heightened").

178. 449 U.S. 166 (1980).

The principal disadvantaged group consisted of those permanently insured as of 1974—the date of the changeover from the old to the new system—but deprived of benefits because they had left the railroad industry before 1974, had no current connection with it at the end of 1974, and had fewer than 25 years of railroad service. The benefits of other groups—including those with a current connection in 1974 but with less than five years of total service—were unaffected. The statutory distinction was attacked on equal protection grounds.

The Court upheld the classification on the ground that "equitable considerations" justified the discrimination. Those considerations included rewarding people who were likely to pursue full careers in the railroad industry and protecting people who were still in railroad employment when they became eligible for benefits. Therefore the statute was "rational." The Court concluded that it was constitutionally irrelevant whether this reasoning in fact underlay the congressional decision.[179]

As it turned out, this last suggestion was critical, for the legislative history suggested a very different story from the equitable considerations invoked by the Court. All of the available evidence indicated that members of Congress believed that no group of beneficiaries would be harmed by the statute; indeed, Congress intended to protect the reliance interests of all employees. There are frequent statements to this effect in the history that were unrebutted by the government. The statute in fact had been drafted by private groups—representatives of labor and management—none of whom had an interest in protecting the plaintiffs, former railroad employees, from loss of their benefits. Hence the conclusion of the district court: "Essentially, the railroad labor negotiators traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees, even though doing so violated the basic Congressional purposes of the negotiations."[180]

Thus understood, the case has a surprising analogue in *Schechter Poultry*.[181] In both cases, the problem lay in the delegation of public power to private groups who were authorized to draft legislation subject to little or no congressional review.

179. *Id.* at 179.

180. *Id.* at 191 (Brennan, J., dissenting) (quoting the unpublished opinion of the district court).

181. 295 U.S. 495 (1935).

Why, then, did only two justices vote to invalidate the legislation at issue in *Fritz*? The answer probably lies in a perception that legislation of that sort is common in modern regulation and that a decision to subject it to serious constitutional review would unduly increase judicial scrutiny of the legislative process. Inadvertent legislative classifications may be frequent, at least if inadvertence is measured by reference to the understanding of most legislators.[182] Moreover, private groups often have an important role in drafting statutes.[183] If this role renders statutes suspect, the consequence might be an extremely intrusive judicial role, notwithstanding the conventional understanding that delegations of government power to private groups are constitutionally troublesome.[184]

If the Madisonian understanding implicit in the rationality cases is to be taken seriously, however, the Court was wrong in its apparent belief that invalidation of the statute in *Fritz* would have led to intolerable consequences. At issue was a statute that had been drafted by private parties, who sought to protect their own interests, or those of their allies, and of no one else. As a result, a group not represented in the private negotiations was significantly harmed. Most important, Congress was unaware of that harm and indeed had sought to prevent it. *Fritz* is a striking example of a kind of Madisonian nightmare: national legislators abdicating their obligations because of pressure applied by powerful private groups.[185] In vindicating the Madisonian understanding, cases like *Fritz* provide an opportunity for a modest first step.[186]

This conclusion might be generalized. If courts were to adopt

182. *See, e.g.*, H. Fox & S. Hammond, Congressional Staffs: The Invisible Force in American Lawmaking 143 (1977) (emphasizing that drafting and other functions are performed by staff).

183. *See, e.g.*, K. Kofmehl, Professional Staffs of Congress 117–18 (1977) (at "various stages in the process of drafting and revising a bill, committee aides often negotiated at the staff level with respresentatives of the affected agencies and or interest groups to remove their objections to it"); H. Walker, The Legislative Process 113 (1948) (discussing "lobby-drafted bills").

184. *See* Jaffe, *supra* note 131.

185. *See* R. Stewart, The Logic of Federalism (unpublished manuscript 1984).

186. In this regard, *Fritz* might be compared with Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), where the Court invalidated an exclusion of "non-related individuals" from the food stamp program on the theory that the exclusion reflects "a bare . . . desire to harm a politically unpopular group." 413 U.S. at 534. For other cases involving statutes that might be invalidated on rationality grounds, see, e.g., Schweiker v. Wilson, 450 U.S. 221 (1981); New Orleans v. Dukes, 427 U.S. 297 (1976).

a Madisonian approach to judicial review, and if the rationality requirement is not to become merely rhetorical, some scrutiny of legislative processes is necessary. Such scrutiny would inquire into whether legislators based disparate treatment on a decision that some conception of the public interest would be promoted, or whether such treatment was instead a response to factional pressure. To be sure, these alternatives represent polar ends of a continuum; the question for the courts is whether the measure at issue approaches the latter end. This approach would amount to a kind of hard-look doctrine for unconstitutional legislative action. Its basic elements are already furnished by modern rationality review; the approach suggested here would call for marginally more searching scrutiny.[187]

2. *Equal protection, ideology, and reasoned analysis.*

The second element in a reformulated public law doctrine would be the application of the approach of *Mississippi University*[188] and similar gender cases to other areas of the law. As noted above, in *Mississippi University* the Court showed a willingness to examine public value justifications to see whether such justifications were in fact rooted in, or were merely a disguise for, existing relations of power. Exploration of the legal and institutional treatment of women[189] is a carefully developed model here; it may be possible to generalize these insights.

A useful illustration is the much-discussed case of *Dandridge v. Williams*.[190] At issue in *Dandridge* was a Maryland statute that imposed a ceiling on benefits poor families could receive under the Aid to Families with Dependent Children (AFDC) program, no matter how large that family might be. The statute was defended largely on the ground that it provided an incentive for employment and achieved parity between those on welfare and those working at or near the minimum wage. The problem with the first of these justifications is that very few of the eligible families contained anyone who was employable—116 families of the

187. Resistance to such a proposal is based on a particular conception of the separation of powers—it is illegitimate for courts to examine legislative processes with even minimal care, on the grounds that such an examination strains judicial capacities and, further, is inconsistent with the interest-group character of most modern legislation. Such arguments are taken up below. *See* text accompanying notes 202–237 *infra*.

188. 458 U.S. 718 (1982).

189. *See* note 124 *supra*.

190. 397 U.S. 471 (1970).

32,000 receiving AFDC. [191] Moreover, there was no showing that the Maryland statute promoted in any way the goal of achieving wage parity.

Quite possibly, the statute reflected stereotypical conceptions about the poor in general and poor women in particular: that their poverty is a product of sloth, and they breed children to increase their welfare payments. It is unlikely that these justifications could have survived the "reasoned analysis" demanded in *Mississippi University*. If that demand had been taken seriously, the Maryland statute might well have been invalidated.

This conclusion might be converted into a general approach to cases involving the poor and other contexts—involving, for example, the mentally retarded[192] and homosexuals—in which it seems likely that legislative outcomes will reflect existing relations of power. Under such an approach, judicial scrutiny would not reflect a Lochner-like presumption in favor of private ordering or a general effort to protect private property from government intrusion. The diminishing judicial solicitude for private property is largely attributable to a mounting understanding that private property rights are not "natural" but are themselves dependent on governmental as well as individual choices.[193] Scrutiny of the relationship between statutory outcomes and private power would generalize this insight, subjecting such outcomes to public scrutiny and review. Taken to its logical extreme, this approach would require review of failure to act as well as action; a refusal to reassess the existing distribution of wealth and opportunities can, of course, be understood as a product of factional power.

As the Lochner era suggests, there are substantial difficulties with such a judicial role. Those difficulties are taken up below. But if *Mississippi University* were taken seriously, statutes like those in *Dandridge* would receive more probing scrutiny.

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191. *See id.* at 526 (Marshall, J., dissenting). The notion of "employability" is of course not scientifically ascertainable; it depends on a series of value judgments about under what circumstances should people be required to work. The figure cited in the text represents the standards set for the AFDC program.

192. *See* City of Cleburne, 105 S. Ct. at 3249 (purporting not to apply "heightened scrutiny" but invalidating a statute disadvantaging the mentally retarded, applying more than the usual level of review.)

193. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Miller v. Schoene, 276 U.S. 272 (1928). For discussion, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

3. *The continuing development of public administrative law.*

Administrative law has undergone considerable evolution since its original preoccupation with the protection of private autonomy from government intrusion.[194] A more complete implementation of the Madisonian understanding would require courts to build on the present trends. Courts have begun to develop a set of principles that amount to a public law that is independent of private law doctrines.[195] The next step is for courts to continue the development of substantive and procedural devices designed to ensure against factional tyranny in the implementation process. Such devices would include general application and extension of the four basic requirements of the current hard-look doctrine—to require, for example, disclosure of at least some *ex parte* contacts in informal rulemaking. The basic goal would be to ensure that agency outcomes reflect some form of deliberation on the part of agency officials. The deliberative process should in turn involve statutorily relevant factors.

Equally important, courts should recognize that the availability and extent of judicial scrutiny should not depend on whether the agency is regulating, deregulating, or not acting at all. Courts should not treat deregulation substantially differently from regulation.[196] There is also a trend in the direction of judicial review of agency inaction.[197]

This trend of reviewing inaction owes its origin to two perceptions. The first is that administrative inaction is often produced by the capture of governmental power by well-organized groups—often the very industry the relevant agency is entrusted

194. *See* J. VINING, *supra* note 134; Stewart, *supra* note 3.

195. *See* Sunstein, *supra* note 154.

196. *See State Farm*, 463 U.S. at 291. The only difference is that deregulation involves a reduction of private costs, a factor that is properly taken into account by the relevant agency. *See* Sunstein, *supra* note 154.

197. In Heckler v. Chaney, 105 S. Ct. 1649 (1985), the Court endorsed a "presumption" against review of inaction, but the presumption is easily rebutted. *See* Dunlop v. Bachowski, 421 U.S. 560 (1975) (cited with approval in *Chaney*, 105 S. Ct. at 1657). The *Chaney* decision should not be taken as a general rejection of judicial review of failure to act. *See* Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985). For lower court decisions, see Air Line Pilots Ass'n. v. CAB, 750 F.2d 81 (D.C. Cir. 1984); Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983); WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981); National Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979). *See also* Public Citizen Health Research Group v. Comm'r, FDA, 740 F.2d 21, 35 (D.C. Cir. 1984). *Cf.* Montana v. Clark, 749 F.2d 740, 744 (D.C. Cir. 1984) (reviewing decision not to amend long-standing rules after notice and comment period).

to regulate.[198] Political checks are insufficient safeguards against that prospect, even when lax enforcement is not intended by Congress.[199] Judicial review at the behest of beneficiaries, no less than review at the behest of members of the regulated class, may increase the likelihood of agency fidelity to statutory standards. The second perception is that the interests of regulatory beneficiaries deserve no less legal protection than those of the regulated.[200] The role of the courts is no longer to protect private autonomy alone.

One way to take the Madisonian understanding more seriously would be for courts to reform the doctrines of standing, reviewability, and scope of review so as to treat the beneficiaries of regulation generally in the same way as regulated entities.[201] By thus applying the hard-look doctrine, this reformulation would generate a public law independent of private law rules. It would amount to the administrative law analogue of the general shift in constitutional law from *Lochner* era understandings to the current emphasis on the deliberative process found in some of the modern cases.

B. *Critiques*

We have seen that if the Madisonian conception were used as a basis for judicial review of legislative and administrative action, there would be considerable doctrinal movement. Moreover, the movement would be in directions that have strong historical support. But the proposals might be criticized on two fronts, both of which raise large and difficult issues.

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198. *See* Stewart, *supra* note 3. *Cf.* Stigler, *supra* note 6 (suggesting that such capture is sometimes intended by Congress).

199. *See* R. LITAN & W. NORDHAUS, *supra* note 129. An important factor, often overlooked in debates concerning the value of judicial review of agency action, *see, e.g.*, J. MASHAW, BUREAUCRATIC JUSTICE (1983), is the deterrent effect of the prospect of judicial review on regulators during the initial decisionmaking process. The prospect of review often serves as a central guarantor of fidelity to procedural and substantive norms—a fact that will be missed if one focuses only on the reported cases, where, to be sure, the courts make their share of mistakes. *See* R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

200. Such perceptions are reflected in changes in the law of standing, see Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); of procedural due process, see Goldberg v. Kelly, 397 U.S. 254 (1970); and of reviewability, see Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

201. *See* note 197 *supra*; *see also* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

1. *The viability of Madisonian representation.*

The first criticism, substantive in nature, would suggest that it is utopian to believe that representatives can be forced into the deliberative Madisonian mold. In this view, history shows that representatives, even at the national level, are unable to carry out the relevant tasks. Madisonian republicanism may be as romantic and outmoded as the face-to-face governance promoted by the antifederalists. The proposed judicial role would therefore be futile. At most, it would produce "boilerplate"—rationalizations designed to placate the courts—rather than a genuine critical inquiry into issues of value and fact.[202]

Moreover, the failure of representatives to act deliberatively may be a positive good, for it guarantees their accountability to the electorate. One person's factional tyranny may, in the view of another, be the system of accountability in action. Requiring deliberation on the part of governmental officials might remove the salutary check of constituent pressures. The virtue of majority rule, in this view, consists precisely in mechanical official responses to the desires, or power, of the citizenry. Defects in the processes of pluralism should be remedied with an effort to increase access to government authority for those who are otherwise unable to participate, rather than by requiring politics to assume a deliberative form.[203]

A final critique would stress that in view of the limitations of deliberation, at least under conditions of widespread social, economic, and political inequality, it is necessary to supplement or replace deliberative politics with exercises of power on the part or in the interest of the disadvantaged.[204] Requiring deliberation does little to accelerate social change and may, in fact, strengthen the status quo by legitimizing purely "political" decisions of the legislature. In this view, Madisonian republicanism fails to address the most important problems in contemporary democracy.

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202. *See* J. ELY, *supra* note 22. *Cf.* J. ELSTER, *supra* note 12 (discussing this attack).

203. This is of course the solution of *Carolene Products*, 304 U.S. at 152 n.4. *See generally* Ely, *supra* note 22. *But see* M. HORKHEIMER, ECLIPSE OF REASON 26–30 (1947).

An alternative critique of Madisonian republicanism stresses that, unlike classic republicans, Madison discounted the possibility that citizens generally might engage in the deliberative processes of government. In Madison's view, that task could be accomplished only by representatives. *See* B. BARBER, STRONG DEMOCRACY (1984). The discussion here does not deal with this particular debate—between classical and Madisonian republicans—but instead focuses on the differences between Madisonian republicanism and pluralism.

204. *See* J. KEANE, *supra* note 124.

2. *Institutional problems.*

A different critique would focus on institutional concerns about judicial competence and authority. The first claim in this connection is that existing sources of law fail to vest courts with the power to undertake the proposed tasks. The equal protection clause and the Administrative Procedure Act—the principal sources of authority for the proposed judicial innovations—are far from open-ended grants of authority to move legislative and administrative processes in Madisonian directions.[205] Nor, in this view, are courts well-suited for the task. The job of ascertaining the extent of factional control over legislative processes involves unmanageable inquiries into legislative motivation and the drafting process. Even individual legislators almost always act on the basis of mixed motivations. Conceptions of the public good and the desire to be reelected are inseparably intertwined. The problem becomes truly intractable when the issue is the "motivation" of a multimember decisionmaking body. In such circumstances, the notion of motivation becomes incoherent; another basis for analysis is necessary.[206] Finally, there is little reason to believe that courts are themselves immune from "ideology." The history of Anglo-American law suggests the opposite. Nor is it clear that there is such a thing as "reasoned analysis," constituting a neutral standpoint from which to assess social issues.[207]

These are formidable objections. They suggest, above all, that it is unrealistic to believe that courts might on their own make significant progress in moving legislation and administration in Madisonian directions. But the objections are not insurmountable. It will be possible to sketch only the outlines of a response here.

The first point is that the existing work in economics and political science suggests that interest groups play an important

205. *Cf.* Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984) (emphasizing the need to trace judicial decisions to independent sources of authority).

206. There are many such attacks on motivation-centered inquiries in American law. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224 (1971); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). For a recent discussion, see Ackerman, *supra* note 24. *See also* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

207. *Cf.* M. FOUCAULT, *supra* note 123 (discussing relationship between power and production of knowledge).

but not decisive role in most modern regulation.[208] There are gradations of interest-group pressure; other factors contribute to legislative outcomes. In these circumstances, courts might well be able to push politics in particular directions. Invalidation of the statute in *Fritz*,[209] for example, would have served a valuable function both in the particular case and in warning legislators against the delegation of government power to private groups. The claim of utopianism is therefore overstated.

Requiring justifications does not, to be sure, guarantee "reasoned analysis" on the part of the legislature. Boilerplate, representing not the actual process of decision but instead a necessary bow to the courts, is hardly an unambiguous good and would undoubtedly be increased by the proposed requirements. But requiring justifications does serve an important prophylactic function.[210] The history of administrative and constitutional law is filled with examples.[211] To some degree, there will be boilerplate. But identification of the legitimate public purposes purportedly served by statutory classifications should improve representative politics by ensuring that the deliberative process is focused on those purposes and the extent to which the classifications serve them—a point to which I return below.[212] In any event, procedural requirements occasionally have substantive consequences. Identification of the actual purposes served by a statute may, for example, diminish the likelihood of its enactment. *Fritz*[213] may itself be an illustration: It is uncertain whether the statute would have been passed had Congress been aware of its effects on the vested rights of certain employees.

Moreover, the equal protection clause has always been understood as a requirement of justification for classifications, and that requirement is directed above all at decisions based solely on political power. The suggestion here is to take that understanding—explicit in current law and with roots in Madisonian principles of representation—more seriously. The same reasoning applies to the provisions of the Administrative Procedure Act

208. *See* A. MAASS, *supra* note 81 (attacking interest-group theories of congressional behavior); notes 78–81 *supra* and accompanying text.

209. 449 U.S. 166 (1980).

210. *See* Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199.

211. *See* Stewart & Sunstein, *supra* note 137, at 1283 & n.379.

212. *See* text accompanying notes 225–238 *infra*.

213. 449 U.S. 166 (1980).

that create a general requirement that agencies support their decisions in terms of statutorily relevant factors.[214]

There is an apparent anomaly in relying on principles of Madisonian republicanism as a basis for a vigorous judicial role.[215] Those principles are rooted in a conception of politics which does not easily accommodate judicial intrusions. But those intrusions become defensible when they are based on constitutional and statutory provisions whose purpose and effect are to improve a political process that amounts in the circumstances to lawmaking by powerful private groups. The judicial role outlined here is hardly desirable in the abstract, and it need not be exclusive; it is justified in part by the need for some institution of government to incline politics in Madisonian directions.

Perhaps more fundamentally, the original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures. Such insulation, it was thought, would facilitate the performance of the deliberative functions of government. That system of insulation has broken down with the decline of the electoral college, direct election of senators, and, most important, technological developments that have enabled private groups to exert continuing influence over representatives. In these circumstances, it is neither surprising nor inappropriate that the judicial role has expanded and that some of the deliberative tasks no longer performed by national representatives have been transferred to the courts.

It is true that the evidentiary difficulties are considerable in ascertaining legislative and administrative motivation. But they are not substantially more troublesome than those involved in determining whether voting requirements or tests are motivated by racial discrimination—a conventional judicial inquiry.[216] The concept of legislative motivation is as much a judicial construct as it is an inquiry into some actual state of mind.[217] No unitary legislative motivation underlies statutory enactments; in identifying the relevant motivation, courts are, to some degree, creating a

214. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

215. *Cf.* Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (criticizing theories of judicial role justifying efforts to improve political processes).

216. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

217. *See* Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 246–70 (1981).

fiction. But so long as the difficulties are recognized, a standard that relies on legislative motivation is likely to be a better means of implementing the constitutional safeguards discussed here[218] than any of the possible alternatives.

One alternative route, for example, would be to make constitutional outcomes turn not on motivation but on the existence of legitimate reasons for government action.[219] Under this view, it would not matter, for example, whether the legislature "in fact" adopted a statute barring the use of plastic milk cartons to protect the paper industry or instead to guard against environmental degradation.[220] What matters is that the latter justification is available as a response to those who have been harmed; the availability of that response is sufficient for validation. Similarly, it would not matter whether a written test for employment as police officers has been adopted to prevent blacks from qualifying or to ensure quality among those employed.[221]

The inferiority of this approach stems from the fact that the actual, as opposed to hypothetical, reasons for government action make an important difference. "[E]ven a dog," as Justice Holmes said, "distinguishes between being stumbled over and being kicked."[222] The analogy to private law is imperfect, but in the context of legislative motivation, the difference is relevant in two respects. First, it may be important to those disadvantaged by the classification. If the disadvantage is the incidental consequence of a measure designed to promote legitimate goals, the injury is of a different nature from that produced by a deliberate

218. Some constitutional protections apply regardless of legislative motivation. "Fundamental rights," for example, are protected regardless of the end government is trying to pursue.

219. This is proposed in Ackerman, *supra* 24, at 740–46. It is also reflected in occasional suggestions by the Supreme Court that it is irrelevant whether the legitimate reason actually produced the result in question. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 612 (1960).

Another alternative focuses on effects rather than motives or reasons at all. That approach suffers from familiar difficulties, *see* Washington v. Davis, 426 U.S. 229, 238–48 (1976), though in the racial context those difficulties are not insuperable. In that context, reluctance in adopting an effects test stems in part from a *Lochner*-like reluctance to understand the extent to which present outcomes are a product of past governmental choices. *See* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

220. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); *see also Fritz*, 449 U.S. at 179 (suggesting that "actual" motivation is irrelevant).

221. Washington v. Davis, 426 U.S. 229 (1976).

222. *See* O. HOLMES, THE COMMON LAW 3 (1881).

effort to exclude or harm a group.[223]

Second, and more fundamentally, the difference is relevant to the exercise of legislative responsibility, which, as we have seen, is a principal focus of the equal protection clause. That clause is largely an effort to ensure that certain reasons do not play a role in government decisions; it is rooted in a desire to ensure that if one person or group is to be treated differently from another, it must be as a result of a particular form of legislative deliberation. That understanding stems in turn from a perception, dealt with in more detail below,[224] that a legislature that deliberates is more likely to develop desirable laws than one that responds to existing constituent pressures. If legislative responsibility, understood in these terms, is the major concern, the actual motives for legislative action assume central importance. And it is often possible, notwithstanding the problems of mixed motivations and the evidentiary difficulties, to discern the dominant motivation by using conventional techniques.[225] In this context, all solutions are imperfect, but it is better to struggle with the evidentiary problem than to uphold all government action when a non-invidious justification can be hypothesized, or strike down all such action when an invidious purpose is plausibly at work.

The final question deals with the viability of Madisonian republicanism. Was Madison correct in his rejection of pluralist approaches to politics in favor of an understanding that relies on the existence of a common good distinct from the aggregation of private interests? Would it be more desirable to perfect the processes of pluralism than to adopt a deliberative model of politics? To answer these questions would require an elaborate statement,[226] but some of the relevant considerations may be outlined here.

A pluralist approach to politics views private preferences as exogenous variables and will not subject them to critical scrutiny

223. Sometimes, of course, those disadvantaged by statutory classifications are unaware of the legislative motivation.

224. *See* notes 226–239 *infra* and accompanying text. Identifying motives also promotes political accountability by focusing the deliberative process, and public scrutiny, on those motivations.

225. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Moore, *supra* note 217, at 246–70.

226. *See generally* R. BERNSTEIN, *supra* note 7, at 207–31 (1983); T. SPRAGENS, THE IRONY OF LIBERAL REASON (1981); Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327 (1981).

and review. Under a pure version of the pluralist understanding, the representative responds mechanically to constituent pressures. Those pressures are in turn a product of the existing distribution of wealth, the existing set of entitlements, and the existing structure of preferences. But all three may be objectionable to some degree or another; the task of political actors, either representatives or citizens, is to reflect critically on them, not necessarily to accept them.

Two premises are implicit in this claim. The first is that some preferences are either objectionable or, more generally, the product of distorting circumstances. The second is that through the process of deliberation and debate, objectionable or distorted preferences might be revealed as such. Preferences are of course shaped by the available opportunities and the existing allocation of power. The phenomenon of "sour grapes"[227] reflects the fact that in some circumstances people reject opportunities because they perceive them to be unavailable. Preferences adapt to the available options; they are not autonomous.[228] In these circumstances, politics properly has, as one of its central functions, the selection, evaluation, and shaping of preferences, not simply their implementation.[229] For this reason, the Madisonian ideal is likely to result in better laws than an approach that takes for granted the existing distribution of wealth, power, and entitlements as well as the existing set of preferences. There is, in short, something like a "common good" or "public interest" that may be distinct from the aggregation of private preferences or utilities.[230]

Legislators operating in Madisonian fashion are not prohib-

227. *See generally* J. ELSTER, *supra* note 12; *see also* R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979).

228. The phenomenon of endogenous changes in preferences is one with which public choice theorists have only begun to come to terms. *See, e.g.*, Von Weizsacker, *Notes on Endogenous Change in Tastes*, 3 J. ECON. THEORY 345 (1971); Yaari, *Endogenous Changes in Tastes: A Philosophical Discussion*, in DECISION THEORY AND SOCIAL ETHICS 59 (H. Gottinger & W. Leinfellner eds. 1976).

229. *See* J. ELSTER, MAKING SENSE OF MARX (1985) (comparing the goal of self-realization with satisfaction of consumption choices).

230. *See* J. ELSTER, *supra* note 12; M. HORKHEIMER, *supra* note 203, at 26–30; Sax, *The Claims for Retention of the Public Lands*, in RETHINKING THE FEDERAL LANDS 125 (S. Brubaker ed. 1984).

Conventional lawyers' approaches to majority rule, as a system of aggregating preferences, fail to come to terms with well-established conundrums in developing a social welfare function. *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 22–33 (2d ed. 1963) (impossibility of aggregating preferences); A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE

ited from deciding that in some settings their role is to maximize aggregate utility, defined by reference to public desires. A considered utilitarian judgment on the part of the legislature is hardly impermissible in all contexts. But it would require a singularly optimistic view of politics to suggest that there is an identity between the result that would be reached by the considered utilitarian legislator and that which would result from responses to constituent pressures as they are generally imposed.[231] There is a significant difference between the legislator responding mechanically to constituent pressures and the legislator who, deliberating in Madisonian fashion, acts as a considered utilitarian. And even if aggregation of preferences could be obtained through pluralist politics,[232] the appeal of pluralism is undermined by the fact that the legislator should reflect on constituent preferences—a principle embodied in familiar efforts to transform preferences through representative government, as in the case of antidiscrimination laws.

In the pluralist understanding, the notion of a distinctive common good becomes tyrannical or mystical: tyrannical, because pluralists see the change of preferences, or the subordination of private interests to the public good, as inevitably coercive and rarely the product of reasoned argument; mystical, because pluralists take private preferences as exogenous variables.[233] But those who regard the transformative or deliberative function of politics as a central feature will have sympathy for Madisonian conceptions of governance.

The second point is that a deliberative politics will make it less likely that official action will be produced solely for private-regarding reasons. Such reasons are by hypothesis an insufficient basis for legislation; citizens and officials must appeal to a broader public good.[234] This requirement will in turn increase

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THEORY 202–10 (1980) (discussing demonstration by Gibbard and Satterthwaite that no plausible procedure of social choice is strategy-proof).

231. *But cf.* Becker, *supra* note 18 (arguing that interest-group tradeoffs are more likely to promote economic welfare than alternatives).

232. *See* note 230 *supra*.

233. *See* S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM (1984); A. MACINTYRE, *supra* note 7; J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1950) (attacking notion of a "public interest"); T. SPRAGENS, *supra* note 226.

234. See Tocqueville's somewhat overstated claim that:

> When the public is supreme, there is no man who does not feel the value of public good-will, or who does not endeavour to court it by drawing to himself the esteem and affection of those amongst whom he is to live. Many of the passions which con-

the likelihood that the public good will in fact emerge from politics. The requirement that measures be justified rather than simply fought for has a disciplining effect on the sorts of measures that can be proposed and enacted. At the same time, this requirement will make it more likely that citizens and legislators will act for public-regarding reasons.

Both of these consequences are far from certainties. To a substantial degree, citizens and representatives will generate public-regarding justifications that are largely a mask for self-interest.[235] Moreover, social, political, and economic inequalities will have significant consequences for the potential of rational deliberation.[236] Under current or perhaps even ideal conditions, a deliberative politics is an imperfect guarantee of public-regarding outcomes. But by disciplining the kinds of reasons that may be offered in support of legislation, it increases the likelihood that they will come about.[237]

All this is hardly to argue for the existence of a unitary public good, especially in a society consisting of disparate groups with competing interests. The requirement of deliberation does not exclude compromises among those with different conceptions of appropriate government ends.[238] But it does demand that representatives engage in some form of discussion about those ends,

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> geal and keep asunder human hearts, are then obliged to retire, and hide below the surface. Pride must be dissembled; disdain does not break out; selfishness is afraid of itself. Under a free government, as most public offices are elective, the men whose elevated minds or aspiring hopes are too closely circumscribed in private life, constantly feel that they cannot do without the population which surrounds them. Men learn at such times to think of their fellow-men from ambitious motives, and they frequently find it, in a manner, their interest to be forgetful of self.

A. de Tocqueville, *Democracy in America,* in J. MILL, POLITICS AND SOCIETY, 186, 222–23 (G. Williams ed. 1976); *see also* W. NELSON, ON JUSTIFYING DEMOCRACY (1980). This conception of public life parallels the conception emerging from recent feminist writing. *See* N. HARTSOCK, MONEY, SEX AND POWER (1983) (criticizing pluralism); H. PITKIN, FORTUNE IS A WOMAN 285–327 (1984) (discussing "Machiavelli at his best").

235. *See* THE FEDERALIST NOS. 1 (A. Hamilton) & 10 (J. Madison); J. DIGGINS, *supra* note 27.

236. *See* J. HABERMAS, *Reply to My Critics,* in CRITICAL DEBATES, *supra* note 124, at 221; J. ELSTER, *supra* note 11, at 44 (if "free and rational discussion will only be possible in a society where political and economic domination have been abolished, it is by no means obvious that abolition can be brought about by rational argumentation").

237. *See* J. ELSTER, *supra* note 12, at 35–42 (discussing and criticizing this claim).

238. *See* H. PITKIN, *supra* note 234, at 299–304; Rawls, *Justice as Fairness: Political Not Metaphysical,* 14 PHIL. & PUB. AFF. 223 (1985); *see also* B. ACKERMAN, *supra* note 16, at 249–50; *cf.* B. BARBER, *supra* note 203 (distinguishing between "unitary" and "strong" democracy); P. Brest, The Constitution of Democracy (1984) (unpublished manuscript) (distinguishing between ideal of the polis and "discursive participation").

rather than responding mechanically to political power or to existing private preferences.

These considerations suggest that an active judicial posture in pursuit of republican goals may be both desirable and legitimate. That posture has firm roots in history and existing law; and it might move politics in appropriate directions. It may be utopian to suppose that courts can bring about a political process like that anticipated by Madison and his federalist allies. But they are capable of generating movement in that direction.

VIII. Conclusion

The federalist understanding of politics, though not pluralist, represented a sharp break from the thrust of previous republican thought—especially in its hostility to the small republic, its hopes for public-spirited representation, and, perhaps above all, its skepticism about the likelihood that civic virtue would be a significant remedy for the problem of faction. At the same time, the federalists accepted the republican belief that private and public interests are distinct and that the structure of government should lead political actors to pursue a general public good. The federalist solution to the problem of faction relied on control of the governmental process by a group of public-spirited representatives who would be subject to electoral supervision and to various other safeguards.

Much of modern legal doctrine focuses on the same theme. In particular, large areas of constitutional and administrative law are concerned with the problems raised by the influence of powerful private groups over legislative and administrative processes. Modern rationality review attempts to ensure that representatives have acted to promote the public good and not solely in response to political pressure. Stricter constitutional review can be understood, at least in part, as an effort to subject public value justifications to critical scrutiny. In administrative law, judge-made doctrines may be seen as an attempt to diminish the authority of powerful private groups over the regulatory process, ensuring that regulatory decisions are reached through a process of deliberation about statutorily relevant factors. These requirements amount to an effort to promote the Madisonian conception of politics and representation without according special protection to private property or private ordering.

We have also seen that, if taken seriously, these themes might

serve as the basis for important doctrinal innovations. Judicial scrutiny of the legislative process might take the form of a more serious inquiry into both process and outcome, designed to ensure that what emerges is genuinely public rather than a reflection of existing relations of private power. Developments in administrative law might provide the basis for a set of doctrines designed to undermine the power of particular groups over the administrative process. The judicial role would take the form, not of protecting traditional private rights, but of creating a process of decision designed to ensure against the likelihood that private groups will be able to usurp government power to distribute wealth or opportunities in their favor.

It would be a mistake to suggest that courts should play an exclusive role in performing these tasks, and it would be fanciful to believe that, on their own, courts could successfully respond to the problem of factional power over lawmaking processes. Nonjudicial institutions must be encouraged to respond to that problem as well. But the special role for courts might be justified on the ground that judicial insulation provides an opportunity for critical scrutiny of citizen preferences—in Madison's terms, refinement and enlargement of the public view—rather than their mechanical implementation. In this respect, a relatively active judicial role is designed to fulfill the purposes of the original constitutional scheme, which attempted to insulate national representatives in order to facilitate the performance of their deliberative tasks.

All of these suggestions are subject to formidable objections. The considerable trust they repose in the federal judiciary may be misplaced.[239] At the same time, acceptance of the Madisonian conception would perpetuate the understanding, fundamental to the constitutional scheme, that the antifederalist view of politics and human nature is romantic and anachronistic. That view was based on belief in the possibility that citizens as well as representatives would be able to engage in the essential tasks of politics. Much was lost—even if much was also gained—with the adoption of the federalist skepticism about the deliberative capacity of the citizenry at large. Views resembling those of the antifederalists have enjoyed something of a revival in recent years,[240] and such

239. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); J. MASHAW, *supra* note 199.

240. *See* J. KEANE, *supra* note 124; Brest, *The Fundamental Rights Controversy: The Essential*

views would imply a conception of politics and of the judicial role that is as distinct from the Madisonian understanding as the Madisonian understanding is distinct from modern pluralism. To those sympathetic to the antifederalist conception, the Madisonian approach will seem at most a second-best substitute.

From another direction, it might be suggested that the Madisonian conception of politics, and especially its republican roots, have themselves become anachronistic. The notion that representatives might engage in the deliberative task of which the federalists spoke seems increasingly romantic with the declining belief in civic virtue and with the mounting authority of powerful private groups over the processes of government. But as the bicentennial of the Constitution approaches, it is especially important to appreciate the grounds on which Madison and his peers stopped short of pluralist approaches, and sought a system in which private preferences are subjected to critical evaluation.

Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1105–09 (1981); Frug, *supra* note 157; Sandel, *Introduction*, in LIBERALISM AND ITS CRITICS, *supra* note 7; Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285 (1966).