UNENUMERATED DEMOCRACY: LESSONS FROM THE RIGHT TO VOTE

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I would venture to guess that, if most constitutional law types were asked to free associate the first case they think of when hearing the term *unenumerated rights*, *Roe* or *Lochner* would be blurted out the most frequently. Or maybe *Griswold*. But probably not cases like *Reynolds v. Sims*[1] or *Harper v. Virginia Board of Elections*,[2] which recognized an equal right to vote in the absence of explicit constitutional language about voting. Although *Reynolds* and *Harper* were controversial decisions in their own time and still occasionally kick up a little dust, they have not been nearly as hotly disputed or as publicly controversial as, say, the modern privacy cases on procreative autonomy.

In this Essay, I suggest that straying from more familiar terrain and examining the right to vote through the lens of the unenumerated-rights debate can generate some valuable insights about that debate. In particular, I stress two points: First, looking at the right to vote from this vantage point suggests the sharp limitations of enumeration as a guiding concept in constitutional law. Enumeration as a norm is plagued by significant uncertainties, including what is arguably the crucial question: What counts as enumeration? That is, just how specific does textual enumeration need to be to satisfy the requirement? I will suggest that "enumerationism" itself cannot answer this key question, and that it therefore does not—and cannot—do the conceptual heavy lifting on its own. In fact, the interpreter must rely on values extrinsic to enumeration itself in order to implement and give meaning to the enumeration norm. And the selection of the relevant extrinsic values will—no surprise—end up giving the interpreter the very kind of discretion that enumeration itself aspires to cut off.

The second point I will explore relates to the normative justification for an enumeration requirement. Restricting constitutional rights to those with a textual basis is conventionally defended as promoting democracy by leaving more questions to the political process.

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[1] 377 U.S. 533 (1964).

[2] 383 U.S. 663 (1966).

Democratic ideals are thus likely to be among the extrinsic values that shape the working contours of enumeration. But democracy turns out to be a problematic justification for enumerationism. It is paradoxical, I will argue, to invoke democracy to object to a right that, like the right to vote, is claimed to be precisely necessary for democracy itself. I will argue, moreover, that just as the meaning of enumeration is contestable, so is the meaning of democracy itself. All of this suggests, in turn, that there is considerable give on both sides of the familiar, if crude, equation: enumeration = democracy.

I. THE EVOLUTION OF AN EQUAL PROTECTION BASED RIGHT TO VOTE: FROM *HAPPERSETT* TO *HARPER*

A. Constitutional Text

The constitutional text on voting is sparse, but is practically bountiful in the contemporary Constitution as compared to the original document. The original Constitution provided no explicit right to vote in state elections. The Constitution said more, but still relatively little, about federal elections. Under Article I, Section 3, the Senate was originally to be chosen by state legislatures, not voters, so there was clearly no voting right implicated there.[3] Article II, Section 1, similarly affords no basis for finding a right to vote for the president because it provides for the Electoral College and for each state legislature to determine how that state's electors are selected.[4] That leaves the House of Representatives, which, under Article I, Section 2, is to be "composed of Members chosen every second Year by the People of the several States."[5] Language requiring representatives to be "chosen . . . by the People" contemplates a vote, and so might be seen as conferring an implied right to vote, but is notably silent both on who is to be included in the "People" and on how elections are otherwise to be run. On this point, the Section says only that the qualifications for "the Electors" of United States House members are to be the same as those for the "Electors of the most numerous Branch of the State Legislature."[6] The text of Article I thus crucially relies on state law to determine who is permitted to vote in House elections. Finally, Article I, Section 4 states that state legislatures shall

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[3] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."), *amended by* U.S. CONST. amend. XVII, § 1.

[4] *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

[5] *Id.* art. I, § 2, cl. 1.

[6] *Id.*

ordinarily prescribe "[t]he Times, Places and Manner" of congressional elections, subject to congressional power to make regulations in most cases.[7] This reference to elections once again suggests the contemplation of federal voting, though not any affirmative grant of a voting right. In sum, the original Constitution did not independently define or protect voting rights and left matters of the franchise largely in the hands of the state.

A number of provisions concerning voting have subsequently been added to the constitutional text, and these have contributed to a steady erosion of what was once conceived as the nearly plenary power of the states in regard to the franchise. The Seventeenth Amendment brought the Senate into line with the House by providing that each state's senators were to be "elected by the people" and by invoking the voter-qualification standard applicable to "the most numerous branch of the State legislatures."[8] The Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments each forbade denying or abridging the right to vote—the Fifteenth "on account of race, color, or previous condition of servitude"; the Nineteenth "on account of sex"; the Twenty-fourth for "failure to pay a poll tax or other tax" in a federal election; and the Twenty-sixth "on account of age."[9] The Fourteenth Amendment did not expressly include voting in Section 1, which contains the more generally worded Equal Protection, Due Process, and Privileges or Immunities Clauses. But Section 2 of that Amendment did address voting through its express provision for reduced representation. The relevant language subjects a state to losing a portion of the congressional seats to which it would otherwise be entitled by virtue of its population if it denies the vote to male citizens who are at least twenty-one years old, unless such citizens have "participat[ed] in rebellion, or other crime."[10]

B. Supreme Court Interpretation

The Supreme Court's evolving understanding of a constitutionally protected right to vote has unfolded against this sparse textual backdrop. For many years, the Court categorically denied that there was any federal constitutional right to vote. In *Minor v. Happersett*, the Supreme Court bluntly said that "the Constitution of the United States does not confer the right of suffrage upon any one."[11] The Court said this in the course of rejecting a claim that Missouri had

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[7] *Id.* art. I, § 4, cl. 1.

[8] *Id.* amend. XVII, cl. 1.

[9] *Id.* amend. XV, § 1; *id.* amend. XIX, cl. 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1.

[10] *Id.* amend. XIV, § 2, *amended by* U.S. CONST. amend. XXVI, § 1.

[11] 88 U.S. (21 Wall.) 162, 178 (1875).

violated the Fourteenth Amendment by denying the vote to women, reasoning that women were citizens, but citizenship did not necessarily include suffrage.[12] The opinion also emphasized that the "United States has no voters in the States of its own creation" because voter qualifications, even for federal elections, depend entirely on state law.[13] This language was repeated and endorsed in cases such as *United States v. Cruikshank*,[14] a case in which race-based discrimination in voting was alleged, and *Pope v. Williams*, where the Court said that "[t]he privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."[15]

But the story is, of course, not nearly so simple. In fact, the Court soon strayed from *Happersett*'s dual notions that there is no constitutionally protected voting right and that states alone create federal voters (and, implicitly, voting structures). Over time, the Court recast voting rights as having a significant federal dimension. Early decisions establishing the parameters of congressional power to regulate voting helped to set the Supreme Court on this path.[16] The march toward conceptualizing voting as protected by the Federal Constitution was not unbroken, for the language in late nineteenth-century decisions equivocated.[17] But the march continued nevertheless, culminating in the opinion in *United States v. Classic*, which decisively pronounced the right to vote to be "established and guaranteed by the Constitution."[18]

It remained for the Supreme Court's later decisions in *Reynolds v. Sims*[19] in 1964 and *Harper v. Virginia Board of Elections*[20] in 1966 to begin to give real content and contours to the right to vote. *Reynolds*

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[12] *Id.* at 165, 174–75 (finding that, while "[t]here is no doubt that women may be citizens," suffrage was not an absolute right granted to all citizens).

[13] *Id.* at 170.

[14] 92 U.S. 542, 555 (1876) ("In *Minor v. Happersett*, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States." (citation omitted)).

[15] 193 U.S. 621, 632 (1904).

[16] *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 664 (1884) (recognizing that the Constitution adopts state-level qualifications for voters, but stressing this did not indicate that the "right to vote for a member of Congress was not fundamentally based upon the Constitution," especially in light of the Fifteenth Amendment, which reflects that the right to vote was of "supreme importance to the national government"); *Ex parte* Siebold, 100 U.S. 371, 383–84 (1880) (discussing how Article I, Section 4 of the U.S. Constitution allows cooperation between Congress and the states in making regulations covering elections, but stating the "power of Congress over the subject is paramount" because it may "*make or alter* such regulations" (internal quotation marks omitted)).

[17] *See, e.g.*, McPherson v. Blacker, 146 U.S. 1, 37–38 (1892) (according states broad power with respect to the method of selecting presidential electors and characterizing the Fifteenth Amendment in more limited terms).

[18] 313 U.S. 299, 314–15 (1941).

[19] 377 U.S. 533 (1964).

[20] 383 U.S. 663 (1966).

built upon three earlier cases. The first was *Baker v. Carr*, which renounced the rule that malapportionment claims were nonjusticiable political questions.[21] The next was *Gray v. Sanders*, where the Court rejected a "county unit" system that aggregated votes on a per-county basis.[22] That system diluted the power of populous urban counties and enhanced the power of their more sparsely populated rural counterparts. Invoking the Equal Protection Clause, the Court said in *Gray* that "all who participate in the election are to have an equal vote."[23] Notably, however, Justice Douglas's opinion in *Gray* did not restrict itself to equal protection. Perhaps foreshadowing the penumbral approach that he would soon famously advance in *Griswold v. Connecticut*,[24] Douglas instead opted for something that, if properly called enumeration at all, was more like panenumeration: "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[25] Finally, in *Wesberry v. Sanders*, the Court struck down malapportioned congressional districts and sounded a similar theme about equality.[26] This time, however, the Court read into the text of Article I, Section 2, a strong—if textually questionable—equality principle.[27]

Reynolds followed closely on the heels of these three cases and imposed a one-person-one-vote requirement on state elections through the Equal Protection Clause. In doing so, the Court used robust rhetoric about the right to vote, casting it as central based on its ability to protect other rights:

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[28]

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[21] 369 U.S. 186, 231 (1962).

[22] 372 U.S. 368, 380 (1963).

[23] *Id.* at 379.

[24] 381 U.S. 479, 484 (1965) (asserting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

[25] *Gray*, 372 U.S. at 381.

[26] 376 U.S. 1, 7–8 (1964).

[27] Article I, Section 2, Clause 3 refers to apportionment "among the several States," not within individual states. *See Wesberry*, 376 U.S. at 25–45 (Harlan, J., dissenting).

[28] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

The strong language characterizing the right to vote as preservative of other rights was derived from dicta in the Court's decision in *Yick Wo v. Hopkins*,[29] another equal protection case, and has become one of *Reynolds*'s signature phrases.

Rhetoric like this, focusing as it does on the instrumental centrality of voting to politics, would suggest that *Reynolds* recognized an unqualified constitutional right to vote. But in terms of both its holding and its justification, the case was about voting equality, not voting per se. The plaintiffs' claim was one of voting dilution, not deprivation, so the focal point was voters' equality in relation to one another. Consider the Court's framing of the right:

> [E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.[30]

The emphasis on citizens having an "equally effective voice" in elections, if utopian, signals that *Reynolds* was grounded in ideas of political equality, not unfettered political liberty.

Where *Reynolds* concerned vote dilution, the Court's 1966 decision in *Harper* striking down the poll tax in state elections more directly implicated the right to vote itself. Those failing to pay the Virginia tax were turned away at the polls. The Court began its analysis with the constitutional text, noting in passing and as if it had never been controversial that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution."[31] More pertinent to the Virginia poll tax, the opinion proceeded to say that, while "the right to vote in state elections is nowhere expressly mentioned [in the Constitution]," it was nevertheless protected.[32] The Court noted, but did not engage, the argument that the First Amendment might give rise to an implicit right to vote in state elections.[33] It instead saw the case as crucially about inequality, saying that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."[34] Justice Douglas distin-

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[29] 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.").

[30] *Reynolds*, 377 U.S. at 565.

[31] Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

[32] *Id.*

[33] *Id.*

[34] *Id.*

guished the decision in *Lassiter v. Northhampton County Board of Elections*, decided seven years earlier, which had upheld the use of literacy tests in North Carolina.[35] The opinion argued that literacy had some reasonable relation to the right to vote, but wealth did not.[36] The Court in *Harper* thus characterized the case as one of "invidious discrimination."[37]

Had enumeration been its central preoccupation, the *Harper* Court might have pursued a different doctrinal path. The year before *Harper* was decided, the Supreme Court had decided *Harman v. Forssenius*, a case that struck down an attempt by Virginia to evade the Twenty-fourth Amendment's ban on poll taxes in federal elections.[38] Once it became clear that the Twenty-fourth Amendment would pass, Virginia abolished the poll tax as an absolute prerequisite for federal elections, while maintaining the tax for state elections.[39] In response to the new federal amendment, Virginia enacted a law requiring voters in federal contests either to pay the poll tax or to file proof of residence six months before the election.[40] The Court found the law to be a sophisticated means of evasion and struck it down as violative of the Twenty-fourth Amendment.[41] In the course of its analysis, however, the Court alluded to what might qualify as the mother of all smoking guns—a statement from the 1902 Virginia Constitutional Convention, at which the state first wrote a poll tax into its constitution:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[42]

Recall that when Virginia passed the law struck down in *Harman*, it retained the poll tax for state elections that was subsequently struck

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[35] 360 U.S. 45, 53–54 (1959). For subsequent statutory elimination of literacy tests, see Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b (2000)).

[36] *Lassiter*, 360 U.S. at 53–54.

[37] *Harper*, 383 U.S. at 668 (internal quotation marks omitted).

[38] 380 U.S. 528, 544 (1965). I am indebted to Pam Karlan for a conversation about this case.

[39] *Id.* at 531.

[40] *Id.* at 532.

[41] *Id.* at 544.

[42] *Id.* at 543 (quoting 2 VIRGINIA CONSTITUTIONAL CONVENTION (PROCEEDINGS AND DEBATES, 1901–1902), at 3076–77 (statement of Rep. Glass)). The opinion went on to assert that "[t]his statement was characteristic of the entire debate on the suffrage issue; the only real controversy was whether the provisions eventually adopted were sufficient to accomplish the disenfranchisement of the Negro." *Id.* at 543 n.23 (citing 2 VIRGINIA CONSTITUTIONAL CONVENTION (PROCEEDINGS AND DEBATES, 1901–1902), at 2937–3080).

down in *Harper*. The availability of this blatant evidence of racial intent suggests that the *Harper* Court could have confidently struck down the Virginia poll tax as straightforward race discrimination under either the Fourteenth or the Fifteenth Amendment. The evidence seems more than sufficient to satisfy any intent test the Court might have chosen to apply under either of these Amendments.[43] It is noteworthy that the Court in *Harper* declined to take this more "enumerated," or at least more well-established, path by striking down the poll tax as a form of race-based voting discrimination. One might reasonably read the Court's failure to do so as reflecting an interest in elaborating a more general right of political equality.

Near the end of the *Harper* opinion, Justice Douglas resisted Justice Black's charge, in dissent,[44] that the Court was illegitimately writing a political theory into the Constitution. Douglas responded with a gesture toward Justice Holmes's iconic reference to Herbert Spencer and economic theory in the famous *Lochner* dissent:

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.[45]

The language drawing a parallel to due process based fundamental rights is significant, for it frames the voting right in the terms in which it has come to be commonly understood—as part of the fundamental rights branch of equal protection. In light of language like this and in other cases,[46] it is not surprising that it is commonly said that "the Supreme Court repeatedly has declared that the right to vote is a fundamental right protected under equal protection."[47]

Yet, notwithstanding the broad language of *Reynolds* and *Harper*, the Court has also said a number of times that there is no constitutional right to vote per se. Indeed, in later cases, the Court has repeated and, to some extent, refined the understanding of the right to vote as relational, not categorical. In two important footnotes to the majority opinion in *San Antonio Independent School District v. Rodriguez*, for example, the Court said that "the right to vote, *per se*, is not a con-

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[43] The intent requirements imposed on the Fourteenth and Fifteenth Amendments in *Washington v. Davis*, 426 U.S. 229 (1976), and *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion), respectively, were imposed after *Harper*. The Voting Rights Act was subsequently amended to create a remedy for voting discrimination in the absence of proof of intent. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

[44] Harper v. Va. Bd. of Elections, 383 U.S. 663, 678 (1966) (Black, J., dissenting).

[45] *Id.* at 669 (majority opinion).

[46] *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626–27 (1969) ("Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantively affect their lives.").

[47] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 842 (2d ed. 2002).

stitutionally protected right,"[48] but that "a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction."[49] The relational framing of the right was again emphasized with the controversial application of the voting right in *Bush v. Gore*, where the Court relied on *Reynolds* and *Harper* to hold that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[50]

II. IS THE RIGHT TO VOTE UNENUMERATED?

To the extent that the *Reynolds-Harper* right has been characterized as unenumerated, the characterization has been fueled by the doctrinal grounding of the right in the fundamental interests branch of the Equal Protection Clause.[51] Some have dubbed that branch of equal protection analysis "substantive equal protection," a slogan meant to underscore "the parallel to substantive due process."[52] And, as might have been predicted by Justice Douglas's language in the *Harper* opinion,[53] some have suggested that the *Reynolds-Harper* right was framed in the language of equal protection principally to avoid the accusation of *Lochner*-ism that may have greeted the announcement of a liberty-based, categorical right to vote.[54]

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[48] 411 U.S. 1, 35 n.78 (1973).

[49] *Id.* at 34 n.74 (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

[50] Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam). There have been a number of significant cases since *Reynolds* and *Harper* that have given some contours and texture to the equal right to vote, leading among them cases like *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), which concerned voter qualifications for particular kinds of elections, and *Richardson v. Ramirez*, 418 U.S. 24 (1974), which concerned felony disenfranchisement. I do not probe applications of the *Reynolds-Harper* right because my more limited focus is on the framing, logic, and justification of the right to vote itself.

[51] *See, e.g.*, Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1509 (2002) (noting that the "unenumerated interest" in voting has been protected under the fundamental rights strand of equal protection doctrine); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 962 n.35 (2002) (noting that the right to vote, although "not independently protected" is, nonetheless, a fundamental right triggering heightened scrutiny under the Equal Protection Clause); *cf.* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 34 (1995) ("The 'unenumerated' right to vote is justified because it is a significant precondition for deliberative democracy . . . .").

[52] Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 77 n.131; *see also* Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 101–02 (comparing substantive due process to substantive equal protection); *cf.* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 477–80 (2002) (arguing that *Harper* is best seen as combining aspects of both equal protection and due process).

[53] *See supra* text accompanying notes 31–45.

[54] *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979) ("[T]he equal protection clause did for the Warren Court precisely what the due process clause did for the *Lochner*-era Court—it served as a vehicle for judicial intervention in

Equal protection rhetoric aside, casting the right as "fundamental" has proven to be a bit of an attractive nuisance for critics of unenumerated rights because such critics often object to unenumerated and fundamental rights on the same grounds. Robert Bork and Lino Graglia, for example, criticize both unenumerated and fundamental rights as antidemocratic.[55] Their argument is the familiar one that charges judges with finding textually unsupported, bogus "rights" that have the effect of removing from the ordinary political process questions that should be decided by the electorate's chosen representatives. Despite this common critique of unenumerated and fundamental rights, however, the two categories are distinct in certain ways. Fundamentality is a very old idea in constitutional interpretation,[56] and it goes to importance, while enumeration goes to textual specificity. The perceived importance of a right may, of course, be relevant to a court's willingness to find it within constitutional text, or despite the absence of clear constitutional text. But the two adjectives nevertheless describe different things.

Moreover, not all fundamental rights are unenumerated. The Sixth Amendment, to name one of many examples, is said to create a "fundamental" right to a jury trial in federal criminal cases through its explicit text.[57] And if it is in fact less objectionable to call a right "fundamental" if it is enumerated, then the two categories may mutually shape and modify one another in interesting ways. The broader a view one takes about what constitutes enumeration, the smaller the set of assertedly illegitimate fundamental rights.

That takes us to the key question: Is the *Reynolds-Harper* fundamental voting right necessarily unenumerated? It is sometimes characterized in those terms,[58] but one might well argue the contrary proposition. The voting right might, instead, be seen as enumerated because it falls within the broadly worded terms of, and the textually

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state policy choices to promote a set of values responsive to the Justices' vision of political and social ideals."); *see also* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 972 (1997) (arguing that the Warren Court "could not feasibly rely on the doctrine of substantive due process" after *Lochner*); Karlan, *supra* note 52, at 479 (characterizing the *Harper* decision's use of equal protection as "largely an artifact of the Warren Court's decision to avoid the then-discredited idea of substantive due process").

[55] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 352–53 (1990) (criticizing interpretive theories that empower courts as impairing "the full right of self-government"); Lino A. Graglia, *The Constitution and "Fundamental Rights"*, *in* THE FRAMERS AND FUNDAMENTAL RIGHTS 86, 97–101 (Robert A. Licht ed., 1991) (arguing that judicial activism is usurping the established authority of majority rule).

[56] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The principles, therefore, so established, are deemed fundamental.").

[57] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968) (deeming the Sixth Amendment jury-trial right a "fundamental right").

[58] *See supra* note 51.

unqualified equality norm created by, the Equal Protection Clause. This interpretive hypothesis would proceed from the fact that the enumerated text of the Clause fails to exclude voting laws from the class of laws subject to the equal protection requirement.

Does this hypothesis reflect a sound understanding of enumeration? Confining our attention to constitutional text for the moment, there are various interpretive counterarguments that might defeat this suggestion that the *Reynolds-Harper* right should be seen as enumerated. One objection might flow from the Representation Reduction Clause in Section 2 of the Fourteenth Amendment, which specifically provides a representational sanction for states that deny the vote to male citizens twenty-one or older, except in specified circumstances.[59] Echoing Justice Harlan's dissent in *Reynolds*, Raoul Berger inferred that Section 2 was the *only* provision in the Fourteenth Amendment that was intended to deal with voting.[60] Yet, as a textual matter alone, this argument is problematic for several reasons. First, the text of Section 2 is considerably less significant than it once might have been because subsequent amendments have made much of that Section obsolete by specifically barring race, sex, and age discrimination in voting.[61] Second, Section 2's representational sanction might reasonably be read to address *only* the denial of voting to males over twenty-one, and not other voting-related matters like reapportionment or the poll tax. Indeed, many scholars parsing the legislative history of the Fourteenth Amendment have concluded, contrary to

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[59] The Clause allows states to exclude only those male citizens over twenty-one who participated in crimes:

> But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .

U.S. CONST. amend. XIV, § 2, *amended by* U.S. CONST. amend. XXVI, § 1. On the Reduction of Representation Clause, see Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 589–93 (2001).

[60] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 70–89 (1977) (arguing that Section 1 did not provide Congress with control over voting rights); *see also* Reynolds v. Sims, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) ("The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today."); *cf.* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974) (relying on Section 2's specific language about criminals to reject a challenge to felony disenfranchisement under Section 1).

[61] *See* U.S. CONST. amend. XV, § 1 (race); *id.* amend. XIX, cl. 1 (sex); *id.* amend. XXVI, § 1 (age). For a particularly aggressive form of this argument, see Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 291–92 (2004). One need not necessarily go as far as Chin does to say, more modestly, that later amendments have diminished the relevance of Section 2 to voting-rights jurisprudence.

Harlan's and Berger's conclusions, that the legislative history is inconclusive and does not necessarily support the idea that Section 2 bars reading Section 1 as an independent source of protection for voting rights.[62] As Neil Komesar has pointed out, the fact that there may have been insufficient votes to *include* language protecting suffrage does not mean that there were necessarily sufficient votes to *exclude* such protection.[63] And, of course, no such exclusion does appear in the text, so it seems at least plausible to conclude that the drafters intended to leave to later interpreters the meaning of Section 1 in relation to voting equality.

Consider a different textual objection to viewing the Equal Protection Clause as sufficient to establish the *Reynolds-Harper* right as enumerated: its relative vagueness compared to the specificity of the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments, which ban voting restrictions based on race, sex, poll taxes in federal elections, and age, respectively.[64] The specificity of these provisions might be enlisted to support the negative inference that nothing else in the Constitution protects voting equality.[65] This is a version of the specific-trumps-the-general notion in interpretation. But this reading also has its shortcomings. The words in the voting-rights Amendments can be sensibly parsed in the opposite direction. One might, indeed, take a textual tack and read the language in the voting-rights Amendments referring to the "right to vote" not being denied or abridged on the textually specified bases as evidence that some "right to vote," in fact, predated these Amendments. And, since each of these Amendments was enacted *after* the Equal Protection Clause, the general equality command in the Fourteenth Amendment might

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[62] The most extensive argument of this kind appears in William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 SUP. CT. REV. 33. For other analyses pointing in a similar direction, see Oregon v. Mitchell, 400 U.S. 112, 276–78 (1970) (plurality) (Brennan, White, and Marshall, JJ., dissenting in part and concurring in part), WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 49–63 (1988), and Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617, 644–45 (2003).

[63] Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 204–08 (1987) (arguing that the Fourteenth Amendment may not have passed had its drafters made explicit either a right to vote or an exclusion of that right).

[64] This question is especially relevant in relation to the Twenty-fourth Amendment, banning poll taxes in federal elections, and *Harper*, which invalidated poll taxes in state elections.

[65] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 611–12 (1964) (Harlan, J., dissenting) (arguing that the Fifteenth and Nineteenth Amendments would not have been necessary had the Fourteenth protected voting rights); BERGER, *supra* note 60, at 104–05 (same); *cf.* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1875) ("If suffrage was one of [the] privileges or immunities [protected by the Fourteenth Amendment], why amend the Constitution to prevent its being denied on account of race, &c.?").

plausibly be read to be the textual source of such a preexisting voting right.

Another difficulty with reading the specific voting-rights Amendments to preclude the *Reynolds-Harper* voting right is the contestable assumption that an atomized interpretation of the four voting-rights Amendments is the only, or the best, way to read them. One might, for example, instead read these Amendments collectively, as reflecting a strong equality norm in voting, an evolving consensus of sorts.[66] That norm, in turn, might strengthen, rather than undercut, the idea that the Equal Protection Clause should be read to protect equality in voting-related areas as a general matter, as it protects equality in other realms.

In thinking about the Equal Protection Clause as a plausible enumeration of the *Reynolds-Harper* right, it is worth noticing that the Fourteenth Amendment is not the only constitutional provision that might support the results in *Reynolds* and *Harper*. Some have suggested, for example, that the First Amendment offers an appropriate source of protection against the laws challenged in *Reynolds* and *Harper*.[67] These theories cast voting as a form of political expression and voice. Others have suggested that the Guarantee Clause, freed of its judicially imposed justiciability barriers,[68] would have been the better choice, stressing the dependency of republican government on voting.[69] Indeed, no less a critic of unenumerated rights than Bork argued that the malapportionment challenged in *Baker v. Carr* should

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[66] *See, e.g.*, Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 261–78 (2005) (interpreting constitutional amendments protecting the right to vote as reflecting a deep commitment to political equality); *cf.* Dorf, *supra* note 51, at 973–87 (arguing that the voting-rights Amendments combine with the Equal Protection Clause to form a "general equality provision" of the Constitution); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002) (finding in the Nineteenth Amendment a strong principle of gender equality linked to the Fourteenth Amendment).

[67] *See* Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) ("The right to vote derives from the right of association that is at the core of the First Amendment . . . ."); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1255–60 (2003) (finding protection for voting in the First Amendment right of association); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 52–59 (1975) (arguing that the First Amendment's implicit equality principle protects voting rights as political expression).

[68] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (deeming the Guarantee Clause of Article IV nonjusticiable); *cf.* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–50 (1912) (calling the division "between judicial authority over justiciable controversies and legislative power as to purely political questions" a "settled distinction").

[69] *See* BORK, *supra* note 55, at 85–86 (maintaining that the Guarantee Clause should be applied because a republican form of government should allow the majority to govern); *cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICAL REVIEW 118–23 (1980) (arguing that reapportionment decisions are best understood as grounded in a reading of the Constitution that combines the Equal Protection and Guarantee Clauses).

have been struck down based on the Guarantee Clause because it systematically blocked majority rule.[70]

There are significant conceptual differences among these three constitutional principles—equality, expression, and republican form of government—that might lead theories of voting rights shaped by each to play out differently for various reasons. But they are little different from one another in terms of enumeration. That is, none is meaningfully "more enumerated" than the others, and they, in fact, share the same interpretive structure: each reasons from a general constitutional norm to a specific right in a way that is utterly unremarkable in conventional constitutional jurisprudence.

All of this suggests that, in the face of a claim that a general constitutional provision (like the Equal Protection Clause) supports a specific right (like the equal right to vote), the unenumerated-rights idea cannot autonomously tell us what counts as enumeration. The enumeration norm is, in this important sense, hollow at its core. Put differently, this is a version of a baseline problem: there simply is no interpretive standard of expected specificity to which we can turn. Indeed, if there *were* any such baseline, it would likely be one of expected generality. The profusion of broad and undetailed constitutional provisions makes it difficult to cast textual specificity as the default position. It is, thus, perverse for those devoted to the virtues of writtenness to deny the fair interpretive inference that flows from the character of much of the Constitution's written text.

III. FINDING A METRIC FOR ENUMERATION

This empty-enumeration problem suggests that the metric for specificity must come from outside the enumeration preference itself. Where else might that metric be found? One favorite place that enumeration enthusiasts tend to turn is to theories of originalism. While there is conceptual affinity between enumerationism and originalism, it is important to distinguish between them. Originalism is a contestable evidentiary theory of what the possibly enumerating words mean. And often, of course, original meaning is hotly disputed. One can see a good and germane example of this interpretive uncertainty by contrasting Raoul Berger's and William W. Van Alstyne's reckonings of what, if anything, the Fourteenth Amendment's drafters meant in relation to voting rights.[71]

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[70] BORK, *supra* note 55, at 85–86.

[71] *Compare* BERGER, *supra* note 60, at 70–74 (arguing that the Amendment's legislative history proves intent not to interfere with malapportionment practices), *with* Van Alstyne, *supra* note 62, at 37–38 (arguing that the legislative history is ambiguous and cannot support such an inference).

Moreover, there is a significant potential tension between enumerationism and originalism. The two are often embraced by fellow travelers, but there may well be more friction than harmony between the two ideas. This is because enumeration of broad values like equality (or free speech, liberty, or republican government) might itself be understood to militate against a search for any specific original intent. The drafters' very choice to employ broad text would seem to support the idea that such clauses were not intended to be tightly tethered to any originally contemplated set of particular problems. The character of the enumerated text, in other words, might well be seen to undercut the legitimacy of searching for the *unenumerated*, specific, original intent.

If originalism does not work, perhaps a better place to look to resolve the level of specificity necessary to constitute enumeration is to the values driving the enumeration norm—that is, to the conceptual justification for insisting upon enumerated text in the first instance. There is a range of plausible answers to that question, but the most familiar and important one flows from ideas about democracy.[72] The majoritarian would say that we should insist upon enumeration because it leaves more decisions to the political process and fewer to the courts.[73] The crude calculation is that the more textual specificity that is required before a court can find a right, the more democracy the polity gets.

For several reasons, democracy alone won't work as the relevant rule on specificity. One reason is that it is too general to be of much help in determining the quantum of specificity necessary in particular cases. Consider the voting example: With the normative pull of democracy firmly in mind, we still know that the Fourteenth Amendment contains a general equality norm that does not exclude voting, and we still don't know if that is sufficiently specific to satisfy the demands of enumeration. And, as I have suggested, there are simply too many generalized constitutional commands to support any categorical, democracy-driven requirement of exacting specificity.

More importantly, perhaps, there is a deeper paradox here: the democratic case against unenumerated rights is tautological when applied to a right that is precisely claimed to be demanded by democracy. How, in other words, can democracy be the grounds to deny the equal-voting right said to be vital to supporting democracy

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[72] Other obvious candidates include arguments relating to institutional competence and rule-of-law values like certainty, notice, and predictability.

[73] *See* BERGER, *supra* note 60, at 85–90 (arguing that the legislative history of the Equal Protection Clause favors leaving more decision to the political process); BORK, *supra* note 55, at 352–53 (arguing for "untidy" political responses to moral problems rather than courts' "abstract generalizations"); Graglia, *supra* note 55, at 97–101 (characterizing fundamental rights decisions as illegitimately wresting control from the political process).

itself? Here we begin to see a central point: the Constitution plays a necessary, if contested, role in constituting democracy.

To put it another way, democracy is itself unenumerated. There are many textual provisions that might be understood to articulate democratic norms and values, but they don't all point in the same direction or correspond to the same underlying view of democracy. The skeletal outlines of representative democracy are traced in the Constitution, but much about the meaning and requirements of democracy is left to be decided. Broadly worded structural provisions creating majoritarian political institutions coexist with broadly worded norms about such core democratic values as free expression, equality, liberty, and citizenship. Sometimes, applying these different provisions to the same set of facts produces different results. And we must consider, not only these multiple pieces of democracy-shaping constitutional text, but also the structural inferences—inferences that further complicate the concept of enumeration. All of this makes it problematic to rely on simple appeals to something thought self-evidently to be "democracy" as a way to defeat constitutional rights claimed to lack a sufficient basis in text.

Consider an example of the plural meanings of democracy that can be distilled from the Constitution. In *Romer v. Evans*, the Supreme Court struck down a state constitutional initiative passed by Colorado voters that would have eliminated existing laws banning discrimination based on sexual orientation and made gay persons categorically ineligible for the protection of such laws.[74] Different understandings of democracy, each plausibly grounded in the Federal Constitution, might point in very different directions in analyzing the constitutionality of the anti-gay rights initiative.[75] A majoritarian democrat would presumably favor allowing the electorate to decide, by voting, whether this kind of discrimination should be barred or allowed. A republican democrat, by contrast, might well object to giving the mechanisms of direct democracy such broad latitude to trump and proactively preempt policy decisions made by elected representatives. And an advocate of cultural democracy might object, on different grounds, to the sweeping exclusion of gay persons from what the *Romer* Court called the domain of "ordinary civic life."[76]

Democracy, in other words, has multiple meanings that are sometimes sharply opposed. This makes it hard to determine both what the Constitution says about democracy and what it means to use de-

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[74] 517 U.S. 620, 631–36 (1996).

[75] I explore *Romer* through the lens of democracy in Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361 (1997).

[76] 517 U.S. at 631.

mocracy as the value shaping the contours of the enumeration norm. One response to these quandaries from an enumeration enthusiast might be to suggest that there is no reason not to let the democratic process decide questions of democracy. Avoid the confusing welter of potential constitutional ideas about democracy, such a person might say, by tightly linking constitutional provisions to their explicit textual meaning, and thereby letting the political process—not the Constitution—define democracy's meaning and its requirements. But if we take *Reynolds* and *Harper* as the examples, we can quickly see the difficulty with the let-democracy-decide-what's-democratic solution. It is not hard to see why it is objectionable on democratic grounds to leave significant policy questions about democracy to the vote-diluted polity of *Reynolds* or to the skewed-against-the-poor polity of *Harper*. Moreover, as John Hart Ely lucidly saw, it is problematic to expect incumbent elected officials to change a system that benefits them, whether that system might be said to violate constitutionally grounded democratic precepts or not.[77]

In short, once we focus closely on the role of democracy, we can see the limits of the enumeration principle, because it becomes clear how little work the idea of enumeration itself actually does in the analysis. Because we need to look beyond the idea of enumeration to draw the essential lines, it begins to look like a weak principle on both the descriptive and normative levels. It is weak as a descriptive matter because it crucially fails to tell us how much specificity is required to constitute enumeration. It is weak as a normative matter because it, in fact, relies on independent normative principles like democracy to make sense of enumeration itself.

All of this leaves us needing to work out the paradox of resolving what democracy requires when the very right claimed is said to be necessary for democracy. This presents a new set of line-drawing issues. On the one hand, for the structural reasons that are so well illustrated by *Reynolds* and *Harper* themselves, we can't sustainably prefer that democratic institutions resolve all rules of democracy. But we also ought not expect courts to design every aspect of democracy through the vehicle of constitutional interpretation. That would be unworkable, given the vast array of macro- and micro-institutional choices involved in a democratic political process. And it would also be undesirable to cut the populace out of shaping any aspects of democratic institutions.

This dilemma might thus be restated as a question: Which sorts of democratic questions should be resolved at the constitutional level, and which at the political level? We might draw the line where the

[77] ELY, *supra* note 69, at 105–34.

structural difficulties in the political process are greatest.[78] We might, instead, draw the line based on the rights thought utterly essential to democracy.[79] Or we might just need better lines altogether. Wherever the line is drawn, however, the *Reynolds* and *Harper* rights should fare well in the analysis; the arguments supporting an equal right to vote are strong, whether we see it in terms of structure or individual rights.

IV. CONCLUSION: BEYOND VOTING

My analysis has stressed two points: First, that enumeration suffers as an interpretive principle because of its inability to determine in any autonomous kind of way what counts as enumeration; and second, that democracy is a more problematic justification for enumeration than is ordinarily supposed because democracy is itself unenumerated. One might well ask whether voting is sui generis in ways that limit the relevance of these points to the larger debate about unenumerated rights. Let me suggest that voting does plainly have special relevance to democratic theory, but that the points explored here are nevertheless suggestive for the larger debate.

The empty-enumeration problem I have described is as relevant to interpreting, say, the word "liberty" in the Constitution as it is to interpreting the word "equality" in the context of voting because the basic issue is the same: the enumeration norm cannot clearly tell us what counts as enumeration. Further, the point about democracy being unenumerated carries over, since the issue is the open texture of democracy itself. The Constitution does not clearly specify what democracy means, nor does it clearly establish which clauses or amendments should be seen as required by the democracy that the Constitution helps to constitute. Nor, crucially, does the Constitution clearly confine democracy to the formal apparatus of politics.

The *Romer* example introduced earlier makes these points about democracy's own unenumerated character. As I have argued at greater length elsewhere, constitutional principles of equality, liberty, and citizenship are central to standard approaches to democracy.[80]

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[78] *See* Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 44 (2004) (arguing for judicial review of democratic procedures that focuses on constraining "the structural cancer of political self-entrenchment").

[79] *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 83–100 (2003) (distinguishing core from contested principles); *see also id.* at 138–56 (criticizing the structural approach to political-process claims); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001) (criticizing "'structural' equal protection" cases for "not . . . protect[ing] the rights of an identifiable group of individuals").

[80] *See* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 746–50 (2004); Jane S. Schacter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP.

That means, in turn, that nominally "social" rights that find protection in these Fourteenth Amendment norms—such as rights relating to abortion or sexuality—might be understood as required by, or relevant to, equal democratic citizenship, or to a vision of democracy as "a society of equals."[81] This sort of constitutional reading, once opened up, suggests that the idea of equal citizenship might forge a conceptual link between procreative or sexual rights on the one hand and democracy on the other. That link, in turn, takes us right back to the paradox we saw in relation to the right to vote: it is problematic to invoke democracy against a set of unenumerated rights claimed to be inherent in, or a precondition of, democracy itself. This analysis, in other words, deprives the invocation of democracy against unenumerated rights of its self-evident, self-effectuating force, and prompts consideration of what the requirements of democracy are, once properly understood. Irrespective of how that difficult question is answered, the debate is enriched by engaging these issues.

POL. & CIV. RTS. L. REV. 733, 763–67 (2004). *See generally* DEMOCRACY: A READER (Ricardo Blaug & John Schwarzmantel eds., 2001) (canvassing links between and among equality, autonomy, citizenship and democracy).

[81] Joshua Cohen, *For a Democratic Society*, *in* THE CAMBRIDGE COMPANION TO RAWLS 86, 91–92 (Samuel Freedman ed., 2003).