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DARYL J. LEVINSON

## Rights and Votes

**ABSTRACT.** This Article explores the functional similarities, residual differences, and interrelationships between rights and votes, both conceived as tools for protecting minorities (or other vulnerable groups) from the tyranny of majorities (or other dominant social and political actors). The Article starts from the simple idea that the interests of vulnerable groups in collective decisionmaking processes can be protected either by disallowing certain outcomes that would threaten those interests (using rights) or by enhancing the power of these groups within the decisionmaking process to enable them to protect their own interests (using votes). Recognizing that rights and votes can be functional substitutes for one another in this way, the Article proceeds to ask why, or under what circumstances, political and constitutional actors might prefer one to the other – or some combination of both. While the primary focus is on constitutional law and design, the Article shows that similar choices between rights and votes arise in many different areas of law, politics, and economic organization, including international law and governance, corporations, criminal justice, and labor and employment law.

**AUTHOR.** David Boies Professor of Law, New York University School of Law. Thanks to Gabriella Blum, Ryan Bubb, John Ferejohn, Barry Friedman, Heather Gerken, Ryan Goodman, Bernard Grofman, Don Herzog, Roderick Hills, Daniel Hulsebosch, Michael Klarman, Robert Keohane, Janos Kis, Douglas Laycock, Michael Levine, Dotan Oliar, Benjamin Sachs, Adam Samaha, Peter Schuck, Matthew Stephenson, and Adrian Vermeule, and to participants in workshops at Harvard Law School, New York University School of Law, and University of Virginia School of Law, for useful comments on drafts.



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## INTRODUCTION

Rights and votes are commonly cast in stark opposition to one another. Theorists of political liberalism and justice tend to view rights as extrapolitical limitations on democratic decisionmaking. Constitutional lawyers, too, have long been obsessed with what they see as an inherent conflict between constitutional rights and democracy—and, at the institutional level, between judicial and legislative supremacy. Even where rights and votes are not pitted against each other, they are treated as categorically different phenomena. Disciplinary boundaries divide political and constitutional theorists—who tend to “think in terms of rights and equality”—from political scientists and election law scholars who are interested in “the organization of power.”<sup>1</sup> The division between rights and votes also cuts through the middle of constitutional law. A central organizing principle of doctrine, scholarship, and curriculum is the distinction between the “structural” provisions of the Constitution, which create the institutional framework of democratic government, and the “rights” provisions, which place limits on what that government is permitted to do.

Yet rights and votes need not be seen as working at cross-purposes or taxonomized as deeply different kinds. At least in some settings, rights and votes might be viewed instead as compatible tools for performing the same basic job. In particular, both can be used in domains of collective decisionmaking to protect minorities (or other vulnerable groups) from the tyranny of majorities (or other dominant social and political actors).<sup>2</sup> One way of protecting a minority is to create and enforce rights against majoritarian exploitation. Another is to structure the political process so that minorities are empowered to protect themselves.

In fact, rights and votes have been viewed as functionally similar in this way in a wide array of constitutional and political contexts. For example, the Framers of the U.S. Constitution attempted to protect the rights of property owners, religious dissenters, and other minorities by creating a structure of government that would politically empower these groups to block any attempt

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1. Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 40 (2004).
  2. Of course, rights and votes have other functions besides protecting the interests of minorities, and they may share some of these other functions as well. For example, both might be used to improve the epistemic quality of collective decisionmaking. Voting mechanisms may harness the “wisdom of crowds,” through Condorcet or related mechanisms, while rights may assign decisionmaking authority to those individuals or groups with the most information or the best incentives to make good decisions. For present purposes, however, the focus will remain on the utility of rights and votes for protecting the interests of minorities and other vulnerable groups.

by overbearing majorities to trample their interests. James Madison and the other Federalist Framers dismissed the enumeration of rights—as in the Bill of Rights—as a less effective means to the same ends. More recent constitutional designers concerned with protecting ethnic and religious minorities have confronted the same choice between relying on mechanisms of political empowerment and rights backed by judicial review. The NAACP in the Jim Crow South had to decide whether to allocate resources to securing access to the ballot or to strengthening substantive rights protection—whether to push first for the Voting Rights Act or for the Civil Rights Act.<sup>3</sup> Courts and constitutional theorists, too, have recognized that rights can compensate for the absence of political empowerment: this is the pivotal insight of “process” theorists like John Hart Ely and arguably the basis for much of the Supreme Court’s post-New Deal rights jurisprudence on the *Carolene Products* Footnote Four model.<sup>4</sup> Courts have leveraged the functional similarities of rights and votes in other ways, as well. During times of war and crisis, for instance, the Supreme Court has attempted to protect civil rights and liberties indirectly by bolstering political checks on executive power.<sup>5</sup>

Consolidating and abstracting from these and other examples, this Article explores the functional similarities, residual differences, and interactions between rights and votes as tools for minority protection. The Article starts from the simple idea that the interests of vulnerable groups in collective decisionmaking processes can be protected either by disallowing certain outcomes that would threaten those interests (using rights) or by enhancing the power of these groups within the decisionmaking process to enable them to protect their own interests (using votes). Recognizing that rights and votes can be functional substitutes for one another, the Article proceeds to ask why, or under what circumstances, political and constitutional actors might prefer one to the other—or some combination of both.

More specifically, the Article is organized as follows. Part I surveys a range of contexts in which rights and votes have been recognized as alternative mechanisms for protecting the important interests of minorities and other vulnerable groups. While the primary focus is on constitutional law and design, the survey in Part I shows that similar choices between rights and votes arise in many different areas of law, politics, and economic organization, including international law and governance, corporations, criminal justice, and

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3. See *infra* Section I.E.

4. See *infra* Section I.D.

5. See *infra* Section I.C.

labor and employment law. In all of these contexts, rights and votes can serve as functional substitutes for one another.

That said, rights and votes are not always *perfect* substitutes. Drawing on the examples surveyed in Part I, Part II identifies and critically examines the most commonly cited *differences* between rights and votes that have been thought to bear on the choice of whether to use one or the other. One such difference operates along the dimension of breadth versus depth. Votes offer minorities and other groups the ability to exert influence over a broad range of issues, but with no guarantee of prevailing. Rights potentially offer such a guarantee, but only for a restricted range of issues. Along a different dimension, voting arrangements are generally believed to be more durable—more resilient against majoritarian opposition—than rights. A number of additional considerations, on the other hand, seem to weigh in favor of rights. For example, votes may be of little value for individuals and small minorities; attempts to bolster the political power of minorities may vest these groups with undesirable holdout power and generate high decision costs; and limitations on the permissible or practical scope of the political community may render some groups ineligible for political enfranchisement in the first place. Part II discusses these and other considerations that may influence the choice between rights and votes in any given setting.

Part III extends the central analysis of the Article in two directions. First, rights and votes are not just substitutes but also, in some circumstances, *complements*. Section III.A discusses a number of respects in which political representation may enhance the value of rights, and the other way around. Groups may need political power to preserve and enforce their rights, and rights may generate or be preconditions for the meaningful exercise of democratic political power. Second, rights and votes are not the only means of protecting minorities and other vulnerable groups from the outcomes of collective decisionmaking. Section III.B moves beyond rights and votes to consider a third common method of protecting minorities: federalism (or a range of institutional analogues). Rather than empowering minorities to exercise greater voice in political decisionmaking processes or using rights to protect them against particularly unfavorable outcomes from those processes, minority groups can be permitted to exit the larger political community and exercise autonomous decisionmaking authority in a community of their own. The discussion in this Section describes how decentralized governance arrangements offer a third alternative to rights and votes in some contexts and then proceeds to explore some of the relative advantages and disadvantages of that approach.

To avoid confusion, it should be noted at the outset that the Article's use of the terms "rights" and "votes" may depart somewhat from ordinary meanings.

Here, “votes” are understood to include not just ballots but also any form of representation or direct participation in processes of collective decisionmaking, or any institutional or structural arrangement of those processes that better enables groups to influence outcomes. Giving a minority group “votes,” in this expansive sense of the term, can mean enfranchising them at the polls. But it can also mean bolstering their voice through redistricting or proportional representation; increasing their decisionmaking power within the legislature by requiring supermajority votes or creating vetogates; facilitating pluralist bargaining or nonelectoral channels of influence through which minorities can exercise meaningful political voice even if they are outvoted; or creating structures and institutions like the separation of powers or the United States Senate that similarly empower numerical minorities to block or influence policy.

The analytic framework of the Article draws a further distinction between “votes” and “exit” in the form of decentralized, autonomous decisionmaking by particular groups or outright secession. Regrettably, this distinction cuts across the conventional category of constitutional “structure,” which is commonly understood to include both the electoral and institutional framework of national democracy (i.e., “votes”) and federalism (i.e., “exit”).<sup>6</sup> Lumping federalism together with separation of powers has some advantages from the parochial perspective of U.S. constitutional law, but it elides the more broadly useful distinction, emphasized here, between empowering a group within a collective decisionmaking process (i.e., “votes”) and empowering the group to make its own decisions through a separate decisionmaking process (i.e., “exit”).<sup>7</sup>

As for “rights,” the term is applied broadly throughout the Article to characterize a wide range of substantive limitations on the permissible outcomes of collective decisionmaking processes. Also included under the rubric of rights in some contexts are affirmative *entitlements* to certain substantive outcomes—“positive,” “welfare,” and “second” or “third” generation kinds of rights, in addition to the traditional “liberal” or “negative” varieties. On the other hand, what are conventionally called voting “rights” are categorized for present purposes not as rights but as votes.<sup>8</sup> In the modern

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6. See *infra* Section II.A.

7. See *infra* Section III.B.

8. This reflects the view that enfranchisement and other forms of democratic representation and participation are primarily of instrumental value in pursuing first-order interests. More broadly, the essential operative distinction between votes and rights in the analytic framework of this Article is between rules and arrangements that are valued instrumentally, for their utility in achieving or avoiding substantive outcomes through processes of

world of constitutional law and theory, rights are strongly associated with judicial interpretation, specification, and enforcement, and the Article correspondingly pays special attention to judicially enforced rights. But given that judicial enforcement is not a prerequisite for meaningful rights protection,<sup>9</sup> rights should not be understood as limited or reducible to the judicially enforced variety. Moreover, as the Article emphasizes throughout, voting rules are also subject to judicial enforcement.<sup>10</sup> This is a further reason for treating the role of the judiciary as a separate variable, apart from the choice of rights and votes.

Abstracting from all of this definitional complexity, the distinction between rights and votes might be understood simply as a special case of the more general distinction between “process” and “substance” (or between “means” and “ends”). Indeed, at a very high level of generality, the Article’s contribution might be viewed merely as reiterating the familiar critical refrain that such distinctions do not run very deep. Like all procedural arrangements, votes predictably affect substantive outcomes. Consequently, outcome-based concerns can be addressed in either of two ways. The direct way is simply to specify up front that certain outcomes must (not) be produced. The indirect way is to allocate decisionmaking power or structure decisionmaking processes in such a way as to stack the deck in favor of desirable outcomes or against undesirable ones. If this observation is in some general sense familiar, it also remains surprisingly generative. Or so the discussion that follows will attempt to show.

## I. RIGHTS OR REPRESENTATION

Rights and votes appear as functional alternatives in a broad range of settings in which collective decisionmaking processes threaten the interests of

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collective decisionmaking, and the substantive outcomes of those processes that are the object of ultimate concern. At a purely formal level, any number of “rights” (conventionally so-called) might be reclassified as votes to the extent they are valued for their instrumental utility in affecting the outcomes of collective decisionmaking process. See *infra* notes 301-317 and accompanying text (discussing complementarity with respect to political speech, etc.). Conversely, to the extent voting and other forms of democratic participation are valued intrinsically and not just instrumentally, voting “rights” might indeed count as rights. On the intrinsic versus the instrumental value of voting, see generally Morris P. Fiorina, *The Voting Decision: Instrumental and Expressive Aspects*, 38 J. POL. 390 (1976); and Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993).

9. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366 (2006) (arguing against the common equation of rights and judicial review).
10. See, e.g., *infra* notes 81-85 and accompanying text.

minorities and other vulnerable groups. The collection of examples that follows serves to illustrate the ubiquity of the choice between the two types of devices and the array of institutional forms each can take.

### A. Constitutional Structure and Rights

A conventional divide in constitutional law separates structure from rights. The structural parts of the U.S. Constitution – consisting primarily of the first three Articles, which constitute the three branches of the federal government – are supposed to create a framework for democratic governance. Rights provisions, such as those enumerated in the Bill of Rights, are supposed to protect individuals and minorities against majoritarian abuses perpetrated through that framework.<sup>11</sup>

But the rights/structure distinction is in many ways misleading. For one thing, it obscures the fact that the Bill of Rights, as originally conceived, was as much about protecting the political decisionmaking power of local majorities as about protecting the rights of individuals and minorities. Many of the rights it enumerated were meant not to protect against majoritarian tyranny, but, quite the opposite, to bolster majoritarian governance by placing limits on the self-serving behavior of federal officials and by safeguarding institutions of state and local self-government to insulate citizens from these officials' despotic reach.<sup>12</sup> More relevant for present purposes, separating structure from rights misses the point that the original design of the Constitution relied primarily on structural arrangements to protect rights.<sup>13</sup> Convinced that direct protection of constitutionally enumerated rights would be futile, the Federalist Framers, led by James Madison, attempted to secure rights *indirectly*, by creating a structure of government that would empower vulnerable groups to protect their interests through the political process.

To elaborate, the Framers were concerned about two different types of potentially vulnerable groups. The first was the citizenry at large – majorities –

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11. The powers of the branches (for example, the Article I, Section 8 powers of Congress) are conventionally lumped together with the rest of constitutional structure. Federalist constitutional theory, in contrast, portrayed rights and powers as two sides of the same coin; rights were said to begin where powers left off. See THE FEDERALIST NO. 84, at 511-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
  12. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xii-xiii, 3-133 (1998). Understood in this way, the Bill of Rights demonstrates that, just as votes can be used to create and preserve rights, rights can be used to create and preserve votes.
  13. See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357 (2007) [hereinafter Graber, *Enumeration*].



who might be tyrannized or plundered by despotic federal officials. This is a worst-case version of the inevitable agency problems of representative government. The Framers were also concerned that the principal-agent relationship between constituents and their representatives could become *too* tight, allowing dominant factions of the electorate to capture government for their own selfish ends – including, especially, the oppression of minorities.<sup>14</sup> As Madison drew the distinction in *Federalist No. 51*, “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”<sup>15</sup>

It was this latter problem, of faction, that Madison (among others) had come to believe was the most worrisome.<sup>16</sup> “In our Governments,” Madison wrote,

the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.<sup>17</sup>

At the same time, however, Madison doubted that constitutional rights could do much to prevent political majorities or other powerful factions from having their way. The problem was that countermajoritarian rights could not be backed by the “dread of an appeal to any other force within the community” more powerful than the very majorities who posed the threat.<sup>18</sup> On the assumption that “the political and physical power” in society were both lodged “in a majority of the people,”<sup>19</sup> countermajoritarian rights would simply be disregarded or overridden when push came to shove.<sup>20</sup>

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14. The classic statement of this general concern is Madison’s THE FEDERALIST NO. 10, *supra* note 11 (James Madison).

15. THE FEDERALIST NO. 51, *supra* note 11, at 323 (James Madison).

16. Madison’s view was based in large part on the experience of state governments in the decade leading up to the Constitution. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290, 313-14 (1996).

17. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 160, 161-62 (1998) [hereinafter Madison, Letter to Jefferson].

18. *Id.* at 162.

19. *Id.*

20. Recent experience also pointed to the futility of attempting to constitutionalize countermajoritarian rights. In a letter to Jefferson justifying his opposition to a Bill of Rights, Madison argued that “experience proves the inefficacy of a bill of rights on those

Madison and the other Framers decided to take a different tack. Rather than attempting to enumerate and protect rights directly, they contrived a structure of government that they hoped would protect individual liberty and minority interests indirectly. This structure had several important components. Perhaps most important of all, shifting power to the national government of the extended republic would bring more factions into competition with one another and therefore make it more difficult for a stable, unified majority to capture the government and tyrannize minorities.<sup>21</sup> Madison made the case that “the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects.”<sup>22</sup> At the same time, Madison believed that large federal election districts and the indirect election of Senators and the President would select for representatives who would “possess most wisdom to discern, and most virtue to pursue, the common good of the society” and insulate them from the heat of majoritarian political pressure.<sup>23</sup> In this way, the constitutional structure of government 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

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occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.” *Id.* at 161. Other Federalists shared Madison’s view. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 376-82 (1969). As Roger Sherman put the basic point, “No bill of rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights.” Roger Sherman, *A Countryman, II.*, *NEW HAVEN GAZETTE*, Nov. 22, 1787, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788*, at 218, 219 (photo. reprint 2003) (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892) (emphases omitted).

21. In his *Federalist No. 10*, Madison explains:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

THE FEDERALIST NO. 10, *supra* note 11, at 83 (James Madison); see also THE FEDERALIST NO. 51, *supra* note 11, at 270 (James Madison) (“[T]he society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”).

22. THE FEDERALIST NO. 51, *supra* note 11, at 324 (James Madison).

23. THE FEDERALIST NO. 57, *supra* note 11, at 350 (James Madison).

patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>24</sup>

One obvious drawback of the Framers’ structural solution to the problem of majority tyranny was that it threatened to exacerbate the problem of agency. A plan to empower democratically insulated federal officials was bound to stoke Anti-Federalists’ fears of a distant national government tyrannizing the local citizenry. Responding to this worry, Madison offered a further structural solution, this one focused on the branches of the federal government and on the relationship between the federal government and the states. Just as a multiplicity of factions would compete with and check one another in society and the electorate, Madison reasoned, competition among the branches and levels of government might create a self-enforcing check on potentially despotic national officials. Thus, *Federalist No. 51* describes how the constitutional separation of powers between the legislative and executive branches invites “[a]mbition . . . to counteract ambition.”<sup>25</sup> Along similar lines, Madison suggested that state governments would be motivated and empowered through various channels of political influence to enforce the federal power-sharing arrangement built into the constitutional design and to protect their citizens against national tyranny.<sup>26</sup> Here again, the idea was that the structural design of government would create politically self-sustaining protections for the rights and liberties of citizens.

In sum, Madison’s hope was that votes—here conceived very broadly as the constitutional structure of the national political process—would do the work of rights.<sup>27</sup> Viewed in this way, as Alexander Hamilton put it, “[T]he [structural] Constitution is itself, in every rational sense, and to every useful purpose, A

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24. THE FEDERALIST NO. 10, *supra* note 11, at 82 (James Madison); *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41-42 (1985).

25. *See* THE FEDERALIST NO. 51, *supra* note 11, at 322 (James Madison). Courts and constitutional theorists continue to believe that the competition between the legislative and executive branches results in a self-enforcing balance of power. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950-51 (2005) [hereinafter Levinson, *Empire-Building*].

26. *See* THE FEDERALIST NO. 45, *supra* note 11, at 290-91 (James Madison). Here too, courts and constitutional theorists continue to believe that competition for power between the states and the federal government will create a self-enforcing set of “political safeguards” for federalism. *See* Levinson, *Empire-Building*, *supra* note 25, at 948-50.

27. As Hamilton aptly summarized this strategy of constitutional design, “[A]ll observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government.” THE FEDERALIST NO. 31, *supra* note 11, at 196 (Alexander Hamilton).

BILL OF RIGHTS.”<sup>28</sup> Some decades after ratification, Madison continued to believe that “[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself, as may afford, in a certain degree, directly or indirectly, a defensive authority in behalf of a minority having right on its side.”<sup>29</sup>

### *B. Constitutional Protection for Slavery*

The constitutional law and politics of slavery, from the Founding through the Civil War, offers a vivid illustration of how constitutional structure was supposed to protect rights—in this case, the rights of slave owners. While it was generally accepted at the Founding that some sort of constitutional protection for slavery was a necessary condition for Southern states to join the Union, there was little inclination at the Philadelphia Convention to write explicit, substantive protections for slaveholders into the constitutional text.<sup>30</sup> In part, this was because some of the Framers were squeamish about that peculiar institution. Madison, for one, thought it would be “wrong to admit in the Constitution the idea that there could be property in men.”<sup>31</sup> But it was also because Southern Federalists had internalized Madison’s more general approach to constitutional design. They were convinced that “parchment guarantees for human bondage would not restrain a Northern majority committed to abolishing slavery.”<sup>32</sup> Thus, the Constitution contains no explicit, rights-like prohibition on national interference with slavery in the Southern states.<sup>33</sup>

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28. THE FEDERALIST NO. 84, *supra* note 11, at 515 (Alexander Hamilton).

29. James Madison, Speech to the Virginia Constitutional Convention (1829), in *SELECTED WRITINGS OF JAMES MADISON* 355 (Ralph Ketcham ed., 2006).

30. On the debates over slavery at the Convention, see Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

31. Speech of James Madison at the Constitutional Convention (Aug. 25, 1787), in 10 *THE PAPERS OF JAMES MADISON* 157, 157 (Robert A. Rutland et al. eds., 1977).

32. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 114 (2006) [hereinafter GRABER, *CONSTITUTIONAL EVIL*].

33. The Constitution does accommodate the institution of slavery in a number of other respects. See U.S. CONST. art. I, § 2, cl. 3 (declaring that slaves will count as three-fifths of a person for purposes of legislative apportionment); *id.* art I, § 8, cl. 15 (granting Congress the power to call up the militia to suppress insurrections, which would have included slave uprisings); *id.* art. I, § 9, cl. 1 (prohibiting Congress from banning the importation of slaves until 1808); *id.* art. I, § 9, cl. 5 (prohibiting Congress from imposing export taxes of the sort that could

The slaveholding South preferred to stake its fortunes on the structural design of the federal government. Proportional representation in the lower house of Congress and the Electoral College, bolstered by the Three-Fifths Clause, held out the hope of eventual Southern control of the House of Representatives and the presidency. Even without majority control, Southern representatives would have sufficient power to block any national movement to do away with slavery.

Or so slaveholders were assured at the Founding.<sup>34</sup> As it turned out, however, the Founding bargain over slavery reflected a major miscalculation about the demographic future of the Republic. Northerners and Southerners alike had expected faster population growth in the South than the North, but in fact the opposite turned out to be true: the relative population and political power of the North increased dramatically through the early decades of the nineteenth century. By the late 1850s, the Northern white population was more than double the Southern white population, and Northern representatives had come to dominate the House.<sup>35</sup> Although a Southerner occupied the presidency for all but twenty-three of the seventy years of the antebellum Republic, the longer-term prospects of Northern dominance loomed there too.<sup>36</sup>

The best remaining hope of protecting slavery through the national political process was the Senate, and particularly the sectional balance rule that came to govern its regional composition. Instituted as an unwritten understanding accompanying the Missouri Compromise, the balance rule dictated that the North and South would have equal representation in the Senate and therefore would hold a mutual veto over any attempt to turn the nation against or in favor of slavery. This norm became a quasi-constitutional substitute for the original constitutional bargain over slavery.<sup>37</sup> For the several decades that it was in effect, a relatively stable equilibrium was maintained, as new states entered the Union in pairs and the security of sectional balance was preserved. Only in the 1850s, when economically and politically viable opportunities for the expansion of slavery ran out and it became impossible to

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be applied to goods produced by slave labor); *id.* art. IV, § 2, cl. 3 (requiring that fugitive slaves be returned to their owners).

34. See GRABER, CONSTITUTIONAL EVIL, *supra* note 32, at 101-06.

35. *Id.* at 126-27.

36. See JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT 89-92 (1990).

37. See GRABER, CONSTITUTIONAL EVIL, *supra* note 32, at 140-44; Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in ANALYTIC NARRATIVES 148, 153-55 (Robert H. Bates et al. eds., 1998) [hereinafter Weingast, *Political Stability*].

rebalance the Senate after the admission of California as a free state, did this political settlement unravel.<sup>38</sup>

Left politically vulnerable to Northern dominance over the national government, white Southerners sought additional constitutional protections for slavery. One possibility was some form of a constitutional right to own slaves. In common with the Federalist Framers, however, antebellum white Southerners doubted that a national majority united against slavery would be long detained by constitutional rights.<sup>39</sup> Echoing Madison, James Randolph declared, “I have no faith in parchment.”<sup>40</sup> In place of ineffective rights, political thought in the antebellum period focused on presumptively more effective structural defenses against abolitionist majorities. Chief among these were the “concurrent voice” or “concurrent majority” arrangements advocated by John C. Calhoun:

[T]he adoption of some restriction or limitation which shall so effectually prevent any one interest or combination of interests from obtaining the exclusive control of the government . . . can be accomplished only in one way, . . . by dividing and distributing the powers of government [to] give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing laws or a veto on their execution.<sup>41</sup>

Calhoun and his fellow Southern politicians advocated a number of institutional instantiations of these principles, on the model of sectional balance in the Senate. These included Calhoun’s own proposal for a constitutional amendment creating a dual executive (comprising a Northern and a Southern President, each with veto power over national legislation),<sup>42</sup> as

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38. See Weingast, *Political Stability*, *supra* note 37, at 156-59.

39. See GRABER, *CONSTITUTIONAL EVIL*, *supra* note 32, at 135-40.

40. 42 ANNALS OF CONG. 2361 (1824). Elaborating on this common wisdom during the debates of the Virginia Constitutional Convention, Abel Upshur confidently proclaimed that no “paper guarantee was ever yet worth any thing, unless the whole, or at least a majority of the community, were interested in maintaining it.” See CARPENTER, *supra* note 36, at 141.

41. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE* 20 (C. Gordon Post ed., 1953) (1851). On Calhoun’s concurrent majority, see generally CARPENTER, *supra* note 36, at 77-126; DAVID M. POTTER, *THE SOUTH AND THE CONCURRENT MAJORITY* (1972); and JAMES H. READ, *MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN* (2009).

42. See CARPENTER, *supra* note 36, at 94-95.

well as similar suggestions for balancing the Supreme Court between Justices from slaveholding and non-slaveholding states.<sup>43</sup>

The Madisonian premise of these proposals, and of Southern political thought more generally during the antebellum period, was that institutional arrangements allocating political decisionmaking power would be more reliable guarantors of rights than explicit prohibitions on particular political outcomes. Politicians and constitutional theorists like Calhoun clearly understood that bolstering the representation and political power of white Southerners was a means of securing the rights of slave owners.

### *C. Emergencies and Executive Power*

The Madisonian idea of using structural protections for constitutional rights continues to play an especially important role in times of crisis. During wars and other major emergencies, executive power inevitably expands, and rights and liberties are often curtailed. Examples include the Adams Administration's suppression of Republican critics under the Sedition Act during the undeclared war with France, Lincoln's imposition of martial law and suspension of habeas corpus during the Civil War, Roosevelt's internment of Japanese Americans during World War II, and President Bush's antiterrorism measures in response to 9/11.<sup>44</sup> A common moral drawn from these cases is that war and other emergencies pose a grave threat to the constitutional order: the country succumbs to irrational panic, democratic processes break down, and the executive seizes (or is delegated) dangerous amounts of power, which he then uses to violate rights and liberties in ways that the country inevitably comes to regret after the emergency has passed.<sup>45</sup> Those who take this view are inclined to see the Constitution as a precommitment against this pathological dynamic. Thus, civil libertarians argue that courts must be especially vigilant during times of crisis in protecting

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43. See *id.* at 98-99.

44. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3 (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*].

45. *Id.* Posner and Vermeule themselves take a very different view of this pattern. Because "the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security," they argue, "it is natural, inevitable, and desirable for power to flow to this branch of government." At the same time, "[c]ivil liberties are compromised because civil liberties interfere with effective response to the threat." *Id.* at 4.

the rights of individuals and minorities against popular panic and executive despotism.<sup>46</sup>

Whatever the merits of this view in theory, it does not describe how courts in fact have behaved. Time after time in U.S. constitutional history, when courts have been confronted with arguably unconstitutional executive actions in the midst of emergencies, they have bent over backwards to find a way to defer.<sup>47</sup> The explanations for judicial deference are not hard to grasp. Judges understand the executive's institutional advantages of speed, secrecy, expertise, and information, all of which become crucially important during times of war and crisis.<sup>48</sup> Judges also recognize their own institutional inability to assess national security threats and the potentially grave consequences of constitutionally prohibiting executive actions that might have been truly necessary to prevent such a threat—grave consequences for the country, most importantly, but also for the future authority of the judiciary. More immediately, judges must worry that a President, acting urgently in a crisis situation with the backing of an alarmed public, might decide to ignore or circumvent an obstructionist Court—as President Lincoln famously did in disregarding Chief Justice Taney's habeas order in the *Merryman* case after Lincoln had suspended the writ.<sup>49</sup> For all of these reasons, the civil libertarian hope that courts will aggressively enforce individual rights against Presidents during emergencies—and (somehow) make their decisions stick—seems quite unrealistic.

More realistically, courts might be willing to intervene not to enforce rights or other substantive limitations on executive power but to enforce constitutional structure. In a number of wartime cases, the Supreme Court has enforced the separation of powers framework developed by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>50</sup> which ties the constitutionality of presidential action to the requirement of congressional authorization.<sup>51</sup> On several occasions, including in the post-9/11 *Hamdan*<sup>52</sup> case and in *Youngstown*

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46. See, e.g., DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

47. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 205 (1998).

48. POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 44, at 16.

49. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157-59 (2003).

50. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

51. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1 (2004) [hereinafter Issacharoff & Pildes, *Rights During Wartime*].

52. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).



itself, the Court has found this authorization to be lacking and has invalidated executive action. More commonly, the Court has stretched broadly worded or dubiously relevant statutes to find that Congress has, in fact, authorized whatever the President wanted to do.<sup>53</sup> Either way, this approach effectively shifts responsibility for checking executive decisionmaking from courts to Congress. Unlike a rights-based decision, the *Youngstown* framework—whether applied permissively or prohibitively—leaves Congress with the option of enacting a subsequent statute revoking, revising, or expanding the scope of executive authority.<sup>54</sup>

Empowering Congress in this way can be understood as an indirect means of protecting the civil rights and liberties that courts are unwilling or ill-equipped to enforce directly. Of course, the efficacy of this strategy depends on the willingness of Congress to stand up for rights that the executive branch is willing to sacrifice. While Congress typically defers to the President during wartime,<sup>55</sup> under some political circumstances legislators will have incentives to push back. If the President is using the cover of a national security crisis to aggrandize his own power or to pursue an agenda that a majority of citizens would not support, then Congress can be expected to provide a majoritarian check on executive overreaching.<sup>56</sup> Even in situations where the President has the support of democratic majorities, oppressed minorities may have channels of influence in Congress that they lack in the executive branch.<sup>57</sup> And, particularly during periods of divided government, policy disagreements and opportunities for political gain will often motivate congressional majorities to muster resistance to presidential power<sup>58</sup>—sometimes to the benefit of vulnerable minorities.

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53. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

54. See Issacharoff & Pildes, *Rights During Wartime*, *supra* note 51, at 39-40.

55. As Posner and Vermeule plausibly characterize the historical record, “Legislative action during emergencies consists predominantly of ratifications of what the executive has done, authorizations of whatever it says needs to be done, and appropriations so that it may continue to do what it thinks is right.” POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 44, at 47; see also ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 41-52 (2010).

56. See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 44, at 53-57 (discussing this possibility, while expressing some skepticism about its likelihood). Historically, Congress has, in fact, proven itself willing and able to intervene when costly wars have dragged on and become unpopular. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* 10-17 (2007).

57. See HOWELL & PEVEHOUSE, *supra* note 56, at 46-47.

58. See *id.* at 10-17; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2342-47, 2352 (2006).

Whatever the empirical likelihood of congressional opposition, the important thing to see is that empowering Congress has been conceived as a substitute for the direct enforcement rights. The *Youngstown* approach to executive power during times of emergency is premised upon the recognition that civil rights and liberties can be enforced indirectly through the selective political empowerment of rights-holders and those who might share their interests.

#### *D. Rights as Representation Reinforcement*

The Madisonian idea of using structure and representation in place of rights finds its mirror image in the contemporary constitutional theory of “representation reinforcement,” or political process theory. First articulated in the Supreme Court’s famous *Carolene Products* Footnote Four<sup>59</sup> and developed more fully by John Hart Ely’s *Democracy and Distrust*,<sup>60</sup> political process theory (or, simply, “process theory”) is premised on the idea that judicially enforced rights can compensate for deficits in political representation.<sup>61</sup> The operative principle is “no taxation without representation”—or, alternatively, if not representation, then rights.<sup>62</sup>

Political process theory is typically framed as a response to the “countermajoritarian difficulty,” the charge that rights-protecting judicial review is inherently antidemocratic because it stands in the way of majoritarian political preferences. Rather than conceiving of judicially enforced rights as contradicting democracy, process theorists argue, we should see at least some kinds of rights as supporting or enhancing democratic politics. To the extent that rights are used to break down barriers to political participation and to protect those groups who have been denied access to sufficient political power to protect themselves, they should be viewed as entirely consistent with democratic values. If courts intervene only to improve the democratic political process or to compensate for its flaws, the argument goes, then judicial review might contribute both to “the protection of popular government . . . and the protection of minorities.”<sup>63</sup>

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59. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

60. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

61. In historical context, process theory was an attempt to recreate a legitimate role for the Court after its *Lochner*-era jurisprudence had been discredited during the New Deal, and then to legitimate the aggressive agenda of the Warren Court. See *id.* at 74; Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713-14 (1985).

62. See ELY, *supra* note 60, at 82-83.

63. *Id.* at 86.

On this view, courts would be justified in protecting disenfranchised groups like resident aliens<sup>64</sup> and blacks in the Jim Crow South<sup>65</sup> against discriminatory legislation that might not have been enacted had members of those groups been permitted to participate in the political decisionmaking process.<sup>66</sup> Some process theorists, including Ely, would also permit courts to intervene on behalf of minority groups that are formally enfranchised but whose interests are discounted or ignored by the majority on account of psychological or sociological distance<sup>67</sup>—or, in the Supreme Court’s formulation, by “prejudice against discrete and insular minorities.”<sup>68</sup> This is the process theory justification for judicial enforcement of antidiscrimination rights to protect racial and religious minorities, gays and lesbians, and other groups that might suffer from prejudice or powerlessness in the political process.

As a normative justification for countermajoritarian judicial review, process theory has its problems.<sup>69</sup> What is important for present purposes, however, is simply the positive insight at the conceptual core of the theory: that judicially enforced rights can serve as a functional replacement for the political representation of minorities. Whatever else it might accomplish, process theory

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64. See *id.* at 161.

65. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750-51 (1991) [hereinafter Klarman, *Puzzling Resistance*].

66. Along similar lines, the judicially created Dormant Commerce Clause, limiting the ability of state governments to enact protectionist measures at the expense of out-of-state economic interests, might be justified as compensating for the lack of representation of geographic outsiders. See ELY, *supra* note 60, at 83-84; see also S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1937) (“Underlying the stated rule has been the thought . . . that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted . . .”).

67. See ELY, *supra* note 60, at 135-79.

68. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry.”).

69. The essential problem is that, in the absence of any value-neutral way for courts to identify which groups have received less than their “fair share” of political power, courts seem to be empowered to substitute their own values for those of democratic majorities. For criticisms of Ely’s work in this regard, see, for example, Ackerman, *supra* note 61, at 739-40; Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073-79 (1980); and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

provides a clear and familiar illustration of the substitutability of rights and votes as tools for protecting minorities.

### *E. Voting Rights and Civil Rights*

Martin Luther King memorably proclaimed, “Give us the ballot, and we will no longer have to worry the federal government about our basic rights.”<sup>70</sup> This prediction had a firm foundation in the post-Civil War history of race and politics in America. Political empowerment has indeed served as an important shield for African Americans against discrimination—and thus as an effective substitute for, as well as a means of securing, judicially enforced rights.

King’s position on the sufficiency of the ballot can be traced back as far as congressional debates surrounding the Reconstruction Amendments and early civil rights laws. Some argued that a federal guarantee of political rights for blacks would allow them to secure civil rights through the ordinary workings of state and local political processes, without any further federal involvement.<sup>71</sup> While that prediction proved overly optimistic, the enfranchisement of Southern blacks, effected by the Reconstruction Act of 1867 and the Fifteenth Amendment, did lead to significant improvements in their civil and social status. The three Southern states with black voting majorities at the time each enacted bans on racial segregation in public schools and places of public accommodation.<sup>72</sup> Other Southern states equalized funding for black and white schools and eliminated bans on interracial marriage.<sup>73</sup> As blacks also began to serve on juries and as police officers, black citizens came to enjoy greater protection against violence and discrimination than they would experience in the South for another hundred years.<sup>74</sup> All of these benefits disappeared with Redemption and the subsequent disenfranchisement of most Southern blacks in the 1880s and ‘90s. To give just one example, expenditures on black schools fell in striking proportion to the number of black voters. By contrast, the small black populations of a number of Northern states during the same period

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70. Martin Luther King, Jr., Give Us the Ballot, Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), in 4 THE PAPERS OF MARTIN LUTHER KING, JR. 208, 210 (Clayborne Carson et al. eds., 2000).

71. See Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 888-89 (1987) [hereinafter Tushnet, *Politics of Equality*].

72. Klarman, *Puzzling Resistance*, *supra* note 65, at 790.

73. *Id.* at 791.

74. *Id.*

leveraged their political power to secure the passage and enforcement of new civil rights laws, among other legislative benefits.<sup>75</sup>

The Great Migration of blacks to the North, combined with competition for black votes between Democrats and Republicans, led to a surge in black political power at the national level in the 1930s and '40s.<sup>76</sup> This power resulted in the first important national civil rights victories since Reconstruction, including President Truman's creation of a presidential Civil Rights Commission and a Civil Rights Division within the Department of Justice, and the 1948 executive orders forbidding segregation and discrimination in the Army and the federal civil service.<sup>77</sup> Had Southern blacks been voting during this period, the results could have been even more dramatic. As Michael Klarman has argued, it is quite possible that the enfranchisement of blacks in the South after World War II would have brought about school desegregation without *Brown v. Board of Education*.<sup>78</sup>

In reality, it was only after the enactment of the 1965 Voting Rights Act that blacks in the Deep South began voting in large numbers. The predictable consequences included improvements in municipal services and employment for blacks, a decline in discriminatory law enforcement, and the enactment of antidiscrimination legislation.<sup>79</sup> Indeed, the causal relationship between black political power and protection against discrimination has become a central theme in the judicial implementation and scholarly assessment of the Voting Rights Act. Starting with, and partly motivating, its earliest forays into the "political thicket[],"<sup>80</sup> the Court has viewed voting rights as special because they are "preservative of other basic civil and political rights."<sup>81</sup> This instrumental understanding of the value of voting led the Court to focus in early vote dilution cases on the (non)responsiveness of elected bodies to the interests of minority communities,<sup>82</sup> and to justify its aggressive expansion of

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75. See *id.* at 793-94.

76. *Id.* at 797-802.

77. See *id.* at 799-801.

78. *Id.* at 805-12.

79. For an overview of empirical studies examining the effects of the Voting Rights Act, see *id.* at 802-03; and Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1377 (1995) [hereinafter Pildes, *Politics of Race*] (book review). Less predictable has been the tradeoff between descriptive and substantive representation that has arguably diminished the legislative benefits of black representation. See Pildes, *Politics of Race, supra*, at 1377-89.

80. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

81. *Id.* at 562.

82. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1867-68 (1992).

voting rights on the theory that enfranchising minority voters is a means of securing “nondiscriminatory treatment” with respect to “governmental services, such as public schools, public housing and law enforcement.”<sup>83</sup> Even as the Court has retreated to a narrower and more intrinsic focus on electing black representatives, as opposed to protecting and advancing the interests of black citizens, scholars have continued to emphasize the “protective” power of voting rights for minorities,<sup>84</sup> and correspondingly to invoke Martin Luther King’s vision of political representation as the key to fair treatment.<sup>85</sup>

#### *F. Comparative Constitutional Design*

The choice between protecting minorities through political empowerment or through rights arises in constitutional systems beyond the United States. In societies divided by enduring sociopolitical conflicts between ethnic or religious groups, unfettered control over government by one or more groups can create unacceptable risks of domination and discrimination for those left in the minority. One solution, foremost in the minds of comparative constitutional lawyers, is to adopt bills of rights and judicial review as checks on political power. Another solution, foremost in the minds of comparative politics scholars, is to give vulnerable groups enough political power to protect themselves through the ordinary processes of democratic decisionmaking.<sup>86</sup>

The latter approach is exemplified by the theory and practice of “consociational democracy.”<sup>87</sup> The consociational model features institutionalized power-sharing among the major groups through arrangements like grand coalition cabinets, proportional representation in the legislatures, and mutual veto power over important decisions.<sup>88</sup> In its emphasis on avoiding “majority

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83. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

84. See 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 (1997).

85. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1082 n.14 (1991).

86. See Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3 (Sujit Choudhry ed., 2008) [hereinafter Choudhry, *Bridging*] (juxtaposing the rights-focused approach of comparative constitutional lawyers with the structure-focused approaches of comparative political scientists).

87. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977) [hereinafter LIJPHART, *PLURAL SOCIETIES*]; Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207 (1969).

88. See Choudhry, *Bridging*, *supra* note 86, at 18-20.

dictatorship”<sup>89</sup> by empowering minorities to block government actions that threaten their fundamental interests, the consociational approach is (self-consciously) similar to John C. Calhoun’s concurrent voice proposal.<sup>90</sup> Other structurally oriented approaches to constitutional engineering in divided societies counsel different strategies, but all share the basic approach of protecting vulnerable groups by giving them greater voice in political decisionmaking.<sup>91</sup>

For a glimpse at how consociational and similar strategies might compare to, and trade off with, protecting minorities through rights, consider the choices facing South Africa in designing its post-apartheid constitution. Under domestic and international pressure in the late 1980s and early 1990s, South Africa’s politically, militarily, and economically dominant white elite began the process of sharing power with the previously excluded black African majority. But South African whites had no intention of creating a system of unfettered black majority rule. Prime Minister F.W. de Klerk and the ruling National Party (NP) pursued two strategies in an attempt to protect white privilege against impending democracy.

The first strategy was to advocate for a power-sharing political structure.<sup>92</sup> De Klerk proposed a number of institutional features based on the consociational model, ranging from a presidency that would rotate between white and nonwhite leaders to consensus requirements among the major political parties for all important decisions—in effect, a white minority veto.<sup>93</sup> The 1993 Interim Constitution did, in fact, incorporate some measure of consociationalism, providing for power-sharing between the NP and Nelson Mandela’s African National Congress (ANC) in the executive by way of a “government of national unity.”<sup>94</sup> Ultimately, however, an essentially

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89. Arend Lijphart, *Review Article: The Northern Ireland Problem; Cases, Theories, and Solutions*, 5 BRIT. J. POL. SCI. 83, 104 (1975).

90. See LIJPHART, *PLURAL SOCIETIES*, *supra* note 87, at 37; see also READ, *supra* note 41, at 196-204 (elaborating the parallels between Calhoun and Lijphart). In fact, the constitutional order of the antebellum United States nicely fits the description of a consociational democratic arrangement. See GRABER, *CONSTITUTIONAL EVIL*, *supra* note 32, at 187-91; Ken I. Kersch, “He’ll Take His Stand,” 24 CONST. COMMENT. 773, 776-78 (2007) (book review).

91. See Choudhry, *Bridging*, *supra* note 86, at 15-26.

92. Not surprisingly, this approach was backed by Lijphart, among other outside observers, who argued that a permanent black majority could not be a stable solution. See AREND LIJPHART, *POWER-SHARING IN SOUTH AFRICA* (1985); see also READ, *supra* note 41, at 217.

93. See READ, *supra* note 41, at 216.

94. See Christina Murray & Richard Simeon, *Recognition Without Empowerment: Minorities in a Democratic South Africa*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES*, *supra* note 86, at 409, 425.

majoritarian democratic system won out, giving the ANC effective political control over the country.<sup>95</sup>

Confronted with the inevitability of black majority rule, the NP turned to a second strategy to protect their interests: rights and judicial review.<sup>96</sup> Throughout the long history of apartheid, white elites had been hostile to the idea of judicially enforced rights, dismissing them as inconsistent with the communitarian nature of the South African state.<sup>97</sup> But the prospect of permanent minority status prompted the NP to reconsider. The NP began to take the position that constitutional rights and an independent judiciary to enforce them were necessary checks on the “dictatorship of a democratic majority.”<sup>98</sup> Of particular importance to a white elite comprising 15% of the population while owning nearly 90% of land and more than 95% of productive capital in the country was strong protection for property rights.<sup>99</sup> The ANC, for its own part, initially opposed a judicially enforceable bill of rights, viewing it as a likely means of entrenching the “property, privileges, power and positions of the white minority”<sup>100</sup> – a veritable “Bill of Whites.”<sup>101</sup> Ultimately, however, the ANC’s opposition softened and rights became a central feature of the South African Constitution.<sup>102</sup> The 1996 Constitution establishes a

95. *Id.* at 426.

96. See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA’S NEGOTIATED SETTLEMENT* 91 (2000) (“[R]ealising that they would not succeed in entrenching power-sharing as a constitutional principle, [the government’s negotiators] looked to other ways to secure the NP’s position in the new constitutional order, [including] a comprehensive Bill of Rights.”).

97. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 90 (2004) [hereinafter HIRSCHL, *TOWARDS JURISTOCRACY*]. Hirschl quotes former Boer President Paul Kruger’s characterization of judicial review as “a principle invented by the Devil.” *Id.*

98. *Id.* at 92-93 (quoting S. AFRICAN LAW COMM’N, NO. 25, PROJECT 58. WORKING PAPER ON GROUP AND HUMAN RIGHTS LAW 296 (1989)); see also Richard J. Goldstone, *The South African Bill of Rights*, 32 *TEX. INT’L L.J.* 451, 452 (1997) (“Without some guarantee of protection for the rights of minorities, the previous ruling white minority government would not have relinquished power to an inevitably black-controlled majority government.”).

99. See HIRSCHL, *TOWARDS JURISTOCRACY*, *supra* note 97, at 94-95.

100. Albie Sachs, *South Africa’s Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 *ST. LOUIS U. L.J.* 1249, 1250 (1997).

101. *Id.*

102. By 1990, the ANC had shifted toward embracing a bill of rights, proposing one of its own that contained predictably weaker protections for property rights. See Catherine M. Coles, *Land Reform for Post-Apartheid South Africa*, 20 *B.C. ENVTL. AFF. L. REV.* 699, 739-41 (1993).



Constitutional Court with the power of judicial review and contains an extensive bill of rights—one that begins by declaring itself a “cornerstone of democracy in South Africa.”<sup>103</sup>

Other divided societies have wrestled with similar choices in designing their constitutions, considering both structural mechanisms of political empowerment and rights as alternative means of protecting minorities (and securing their consent to a new constitutional order). The 1950 Constitution of India, for instance, protects religious minorities through a robust array of rights.<sup>104</sup> As in South Africa, the Indian Constituent Assembly considered but ultimately rejected a set of political safeguards for these minority groups, including reserved seats in legislatures and representation in the Cabinet.<sup>105</sup> The Indian constitutional framers clearly understood political representation and rights to be substitutes. As one representative in the Assembly explained: “[W]hen we have passed the different fundamental rights which guarantee religious, cultural, and educational safeguards which are justiciable, . . . I feel that the presence of people belonging to certain groups [in the legislature] is not necessary.”<sup>106</sup> Other constitutional settlements, in contrast, have combined political empowerment and rights as complementary means of protecting minorities. Among other examples, the Dayton Peace Accords, which serve as the constitution for Bosnia and Herzegovina, incorporate the European Convention on Human Rights into domestic law while also creating consociational power-sharing arrangements among the major ethnic groups, including a three-person presidency consisting of a Serb, a Croat, and a Bosniak representative.<sup>107</sup>

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On the reasons for the ANC’s shift, see HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* 76-77 (2000).

103. S. AFR. CONST., 1996, ch. 2, § 7.

104. For a guided tour of the Constitution of India’s treatment of religion, see Laura Dudley Jenkins, *Diversity and the Constitution in India: What Is Religious Freedom?*, 57 *DRAKE L. REV.* 913, 914-20 (2009).

105. Rochana Bajpai, *Minority Rights in the Indian Constituent Assembly Debates, 1946-1949* (Queen Elizabeth House, Working Paper No. 30, 2002), available at <http://www3.qeh.ox.ac.uk/pdf/qehwp/qehwps30.pdf>.

106. See Shefali Jha, *Rights Versus Representation: Defending Minority Interests in the Constituent Assembly*, 38 *ECON. & POL. WKLY.* 1579, 1579-80 (2003).

107. See Choudhry, *Bridging*, *supra* note 86, at 12. Northern Ireland’s Good Friday Agreement of 1998 similarly combines incorporation of the European Convention on Human Rights and the creation of additional rights protections with a consociational political structure that requires dual Protestant and Catholic majorities for all “key decisions” and creates a diarchical Protestant and Catholic executive. See READ, *supra* note 41, at 204-06; see also Kieran McEvoy & John Morison, *Beyond the “Constitutional Moment”: Law, Transition, and*

In these and other constitutional designs, rights and representation have been understood as alternative means of accomplishing the same functional goals. Different constitutional designers have emphasized one or the other, and some have employed large measures of both. But the important point for present purposes is that rights and votes have been considered in tandem as comparable tools for protecting minorities.

### *G. Democratization, Rights, and Redistribution*

Beyond the constitutional design context, scholars of comparative politics have noticed the functional similarities between political representation and rights in other settings. Consider two otherwise disconnected lines of work relating to democratization and redistribution.

The first of these is an influential account of the origins of modern democracies offered by Daron Acemoglu and James Robinson.<sup>108</sup> Acemoglu and Robinson portray the process of democratization in a number of countries, ranging from nineteenth-century Britain to modern South Africa, as the ceding of political control by a small socioeconomic elite to a poor and oppressed majority. They argue that insuppressible social unrest, up to and including the threat of revolution, compelled elites in these countries to accede to majoritarian demands for the redistribution of wealth and opportunity. But elite promises to enact and sustain pro-majority policies in the future—to guarantee substantive political outcomes in the forms of rights or entitlements—were not credible. After all, the masses could not sustain their revolutionary threat indefinitely, and once they quieted down, nothing would be left to prevent the elites from renegeing. Securely back in control of political power, elites would have the means and motive to undo any rights or redistributive programs that had been put in place. This is where democracy comes in. Rather than settling for bread and circuses, the masses in these countries demanded the ballot. Broad-based enfranchisement meant that the median voter, possessing decisive political power, would share the interests of the masses rather than the elites. This created a credible, long-term commitment to pro-majority policymaking.<sup>109</sup>

On Acemoglu and Robinson's account, then, democratic political power is conceived as a more durable replacement for rights and entitlements. To

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*Peacemaking in Northern Ireland*, 26 FORDHAM INT'L L.J. 961 (2003) (tracing the origins of constitutional principles in Northern Ireland).

108. DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* (2006).

109. *See id.* at 15-30.

illustrate, Acemoglu and Robinson describe the history of South Africa under apartheid as a model situation of vast inequality and repression leading to social unrest. When black Africans began to mobilize against the apartheid regime after World War II, the NP responded with violent suppression of demonstrations and the imprisonment of ANC leaders. Despite these measures, demonstrations, riots, and strikes became more widespread through the 1970s and '80s, resulting in large numbers of deaths, industrial shutdowns, and capital flight. The NP attempted to buy peace through economic concessions like legalizing African trade unions and removing job reservations that had placed some occupations off limits to black Africans. When this failed, under the threat of escalating domestic unrest (as well as international pressure), the NP was finally forced to negotiate a transition to democracy.<sup>110</sup>

In apparent tension with this story is Ran Hirschl's account of the emergence of constitutional judicial review in South Africa and a number of other countries in recent decades.<sup>111</sup> Like Acemoglu and Robinson, Hirschl sees a pattern of elites turning over political power to the masses as countries make the transformation to majoritarian democracy. But in contrast to Acemoglu and Robinson's view of democratization as effective commitment to redistribution, Hirschl emphasizes a "hegemonic preservation" strategy that elites have used to maintain their wealth and privileges even after ceding political power.<sup>112</sup> That strategy is to constitutionalize rights—particularly property and other free-market-friendly forms of rights—and to turn over enforcement to a politically independent judiciary disposed to share and protect elite interests. Thus, Hirschl describes the South African constitutional settlement not as a forced transfer of wealth and opportunity from white elites to black Africans, but as a strategic retreat. White elites may have handed control of the government over to the black majority, but they managed to secure in return constitutional and judicial protection of their continued economic dominance.<sup>113</sup>

For present purposes, there is no need to reconcile these two descriptive theories of democratization.<sup>114</sup> It is enough to see that both theories portray political power and rights (or, more broadly, entitlements to certain outcomes) as substitutes for one another. In Acemoglu and Robinson's account, political

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110. *See id.* at 10-14.

111. HIRSCHL, *TOWARDS JURISTOCRACY*, *supra* note 97.

112. *Id.* at 11 (emphasis omitted).

113. *See id.* at 89-97.

114. The apparent tension between the two accounts might be dissipated by incorporating Hirschl's vision of elite-protective judicial review into Acemoglu and Robinson's model as a redistribution-limiting, democracy-stabilizing mechanism. *See* ACEMOGLU & ROBINSON, *supra* note 108, at 34-35, 207-11.

power serves as a more durable substitute for the redistribution and equal treatment demanded by majorities. In Hirschl's account, judicially enforced rights substitute for the political power that elites have turned over to majorities by blocking these same kinds of redistributive and egalitarian policies.

### *H. Global Governance*

The proliferation and growth in power of global governance institutions like the United Nations, the European Union, the World Trade Organization, and the World Bank have raised increasing concerns in recent decades about "democracy deficits" and "accountability gaps."<sup>115</sup> These and many other international bodies exercise powerful regulatory authority but are subject only to attenuated control by the individuals and groups whose lives their decisions affect. Small and developing countries, indigenous peoples, workers, environmentalists, the poor, and other vulnerable groups have protested that their interests are being disregarded by distant, unaccountable international decisionmakers.<sup>116</sup>

Predictably enough, concerns about the democracy deficit in global governance have catalyzed calls for greater rights protection. And courts have responded. The European Court of Justice's much-remarked decision in the *Kadi* case, for instance, can be understood in this light.<sup>117</sup> The *Kadi* case involved a challenge to U.N. Security Council resolutions requiring states to freeze the assets of named individuals and entities suspected of supporting terrorism. The counterterrorism resolutions at issue were products of the expanding role of the Security Council as a quasi-legislative international governance body, exercising powers well beyond what was contemplated in the drafting of the U.N. Charter. *Kadi*, who claimed never to have been involved with or contributed anything to a terrorist organization, argued that his rights to property and due process under the European Convention on Human Rights were being violated. Notwithstanding the U.N. Charter's self-

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<sup>115.</sup> See, e.g., ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 54 (2004); Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221, 221-36 (2008) [hereinafter Búrca, *Developing Democracy*]; Richard B. Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* 1-5 (Feb. 7, 2008) [hereinafter Stewart, *Global Regulatory Governance*] (unpublished manuscript) (on file with author).

<sup>116.</sup> See Stewart, *Global Regulatory Governance*, *supra* note 115, at 5-6.

<sup>117.</sup> Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. I-6351.

proclaimed and widely recognized priority over the ECHR in international law, the ECJ held that Kadi's rights under the Convention blocked implementation of the Security Council resolutions. As commentators have emphasized, the assertion of rights-based protection in *Kadi* must have been at least partly motivated by the troubling lack of accountability of U.N. decisionmakers to the individuals and groups whose rights and interests were being threatened.<sup>118</sup>

That these victims of unaccountable transnational regulators would turn to the EU for protection of their rights is more than a little ironic, for the EU has long been charged with a serious democracy deficit of its own.<sup>119</sup> Many have cataloged the democratic deficiencies of the EU governance structure, emphasizing the absence of direct voting by European citizens for Council representatives or the Commission President, the limited role of the Parliament, the nonexistence of European-level political parties, and the underdevelopment of a pan-European public sphere.<sup>120</sup> In fact, the dubious democratic credentials of the EU government have motivated the national courts of Member States to assert the viability of national constitutional rights as a shield for their inadequately represented citizens. The German Constitutional Court led the way, starting in the 1970s. In a case now known as *Solange I*, the Constitutional Court declared that although European Community law was generally supreme, the Court would continue to enforce fundamental rights guaranteed under the German Basic Law until the Community either did an adequate job of protecting fundamental rights on its own or improved its democratic accountability.<sup>121</sup> Twelve years later, after the creation of the directly elected European Parliament and the adoption of the European Convention on Human Rights by all of the Member States, the Constitutional Court revisited its earlier decision and decided that it was no longer necessary to review Community legislation for compliance with German

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118. See Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 9-11 (2010).

119. See Stephen C. Sieberson, *The Proposed European Union Constitution: Will It Eliminate the EU's Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 188-203 (2004); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466-74 (1991). But see Andrew Moravcsik, *In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUDS. 603 (2002) (emphasizing the "democratic" advantages of governance by institutions not directly accountable to their constituents).

120. See, e.g., Mattias Kumm & Victor Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3 INT'L J. CONST. L. 473, 486-91 (2005).

121. See Bundesverfassungsgericht [BVerG] [Federal Constitutional Court] May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 1974 (*Solange I*).

fundamental rights.<sup>122</sup> Constitutional courts in a number of other European states have followed the same approach, expressing their intention to hold national constitutional rights in reserve as a guard against the inability of EU governance institutions to maintain sufficient democratic accountability or rights protection.<sup>123</sup>

As the *Kadi* and *Solange* cases illustrate, stepping up rights protection is one response to transnational democracy deficits. Another response, also suggested in the *Solange* cases, is to look for ways of eliminating these deficits by increasing the democratic responsiveness of international regulatory bodies. The obvious challenge in this regard is that direct electoral accountability is generally infeasible in the international arena. (The EU may be an exception, although there, too, the obstacles to meaningful electoral control are formidable.<sup>124</sup>) There is some reason for optimism, however, that alternative mechanisms can reduce the agency slack between transnational regulators and the publics who are subject to their commands. Requirements or norms of transparency and broader public participation in regulatory decisionmaking,<sup>125</sup> as well as enhanced oversight by national officials,<sup>126</sup> may go some distance toward replacing electoral accountability.<sup>127</sup> In any case, efforts to close accountability and democracy gaps should be viewed alongside efforts to compensate for such gaps by enforcing rights.<sup>128</sup> In the international context, as well, representation and rights are alternative means of protecting vulnerable groups against adverse outcomes from political decisionmaking bodies.

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122. See Bundesverfassungsgericht [BVerG] [Federal Constitutional Court] Oct. 22, 1986, 73 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339, 1987 (*Solange II*).

123. See Wojciech Sadurski, 'Solange, Chapter 3': Constitutional Courts in Central Europe—Democracy—European Union, 14 EUR. L.J. 1 (2008).

124. See, e.g., Peter Mair, *Popular Democracy and the European Union Polity*, in MEANING AND PRACTICE OF ACCOUNTABILITY IN THE EU MULTI-LEVEL CONTEXT 19 (Dierdre Curtin & Anchrit Wille eds., 2008), available at <http://www.connex-network.org/eurogov/pdf/egp-connex-c-05-03.pdf>.

125. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 48-51 (2005); Stewart, *Global Regulatory Governance*, *supra* note 115, at 31-35.

126. See AMAN, *supra* note 115, at 81-82, 86.

127. For some skepticism about how far these measures can go, see Búrca, *Developing Democracy*, *supra* note 115, at 240-48.

128. See, e.g., Kingsbury et al., *supra* note 125, at 45-51 (juxtaposing the implementation of democracy and the protection of rights as two of the normative foundations of global administrative law regimes).

*I. Corporate Law*

Collective decisionmaking bodies are hardly limited to the political and constitutional context. Similar uses of and tradeoffs between rights and votes – or their functional equivalents – are evident in private organizations, such as firms. Corporations offer a particularly propitious example, as the goals and architecture of corporate law bear a striking resemblance to those of constitutional law. Like constitutional law, corporate law is concerned with problems of both agency and majoritarian tyranny. In corporations, the agency problem stems from the separation of ownership and control that characterizes the corporate form. Just as citizens delegate political authority to democratic representatives, shareholders delegate corporate decisionmaking authority to managers. And just as political representatives may not always act in the best interest of citizens, managers may not always act in the best interest of shareholders. Constitutional and corporate law share the goal of reducing the agency costs of representative government. The two legal regimes also share the goal of preventing majorities from exploiting minorities. In corporate law, this means protecting minority or noncontrolling shareholders against opportunistic behavior by majority or controlling groups.

Like constitutional law, corporate law in the United States and other countries relies on two basic strategies for protecting vulnerable groups. In the corporate context, such groups include both shareholders as a class, who must be protected against their managerial representatives, and minority shareholders, who must be protected against their majority brethren. (Compare the dual problems of agency and faction in constitutional law.<sup>129</sup>)

One approach taken by corporate law, analogous to “structural” constitutionalism and to voting and representation-based strategies more generally, is to give shareholders direct or representative voice in corporate decisionmaking.<sup>130</sup> Just as the constitutional institution of electoral democracy is the primary mechanism through which citizens control their representatives in government, electoral selection of directors is the primary mechanism through which corporate shareholders as a class exercise control over managerial decisionmaking. Voting requirements for high-stakes corporate

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129. See *supra* notes 16-29 and accompanying text.

130. In fact, corporate law scholars sometimes refer to this as a “governance” or “structural” approach. See REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 26-27 (1st ed. 2004) [hereinafter KRAAKMAN ET AL., *ANATOMY*] (“governance”); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1933-34 (1996) (“structural”).

decisions (like mergers and charter amendments) give shareholders additional voting power.

These voting and representational mechanisms generally operate to enhance the power of shareholder majorities over their managerial agents, but they are also modified in ways that reduce the power of majorities in order to protect minorities.<sup>131</sup> Mandatory cumulative voting, which facilitates board representation for minority shareholders, was once a common feature of U.S. corporate law and still survives in several states.<sup>132</sup> Every major U.S. jurisdiction requires an effective supermajority vote for “fundamental corporate decisions”—effectively empowering large minorities to block action.<sup>133</sup> Conflicted transactions between controlling shareholders and the corporation typically require the informed approval of minority shareholders.<sup>134</sup> All of these voting and approval mechanisms directly increase the voice of minority shareholders in the corporate decisionmaking process. The role of independent directors in corporate decisionmaking can be understood as indirectly serving the same purpose, on the theory that relatively insulated directors are more likely to be evenhanded and attentive to minority interests than are the controlling shareholders who appointed them.<sup>135</sup> (Compare Madison’s hope that federal representatives would “refine and enlarge” the views of the majorities who elected them to the benefit of minorities and individual rights-holders.<sup>136</sup>)

The other main strategy in corporate law for protecting vulnerable shareholders is to prohibit particular corporate decisions or transactions that are adverse to their interests—in other words, to grant them rights.<sup>137</sup> Beyond the weak duty of care that applies to all decisions by corporate officers and

131. See KRAAKMAN ET AL., *ANATOMY*, *supra* note 130, at 54–61.

132. See *id.* at 55. Vote capping rules, which reduce the power of large shareholders relative to their economic stakes, serve a similar purpose and were also once common in U.S. corporate law (and remain common in other countries). *Id.* at 55–56.

133. See *id.* at 57. The authors note that “even Delaware implicitly mandates supermajority approval for mergers, asset sales, dissolutions, and charter amendments by requiring the approval of a majority of outstanding shares for these decisions.” *Id.* at 58 n.107. Thus, if not all shareholders cast ballots, the threshold for approval will be higher than 50% of shares that have been voted.

134. See *id.* at 121–22.

135. See *id.* at 58.

136. See *supra* notes 23–24 and accompanying text.

137. Corporate law scholars sometimes refer to this as a “regulatory” or “prohibitive” approach. See KRAAKMAN ET AL., *ANATOMY*, *supra* note 130, at 23–25 (“regulatory”); Black & Kraakman, *supra* note 130, at 1930–31 (“prohibitive”).



directors, the heightened duty of loyalty protects shareholders as a class against self-dealing and other forms of self-interested behavior by managers and directors.<sup>138</sup> Judicial review of antitakeover tactics likewise serves to guard shareholders against self-serving behavior by their managerial agents.<sup>139</sup> Rights-like rules are also used to protect minority shareholders against majoritarian exploitation. Pro rata requirements forbid the discriminatory treatment of minority shareholders in the distribution of dividends or the repurchase of shares,<sup>140</sup> and appraisal rights provide comparable protection in the context of cash-out mergers.<sup>141</sup> Courts defend minority shareholders against various other forms of discrimination at the hands of controlling shareholders by scrutinizing potentially threatening transactions for “intrinsic fairness”<sup>142</sup> or for breach of fiduciary duties.<sup>143</sup>

Scholars of corporate law routinely treat these voting and rights-based strategies as substitutable regulatory tools for achieving the same basic goals. Judges, too, clearly recognize shareholder representation and prohibitions on bad treatment as substitutes. In *Paramount Communications v. QVC Network*,<sup>144</sup> for example, the Delaware Supreme Court disapproved of the Paramount board’s attempt to merge with Viacom on the grounds that Paramount shareholders would become a minority, subject to the decisions of the controlling Viacom shareholder block. Expressing concern that the fiduciary duties of the majority shareholder would not be sufficient to protect the Viacom shareholders against a cash-out merger or some other form of self-dealing, the court demanded that they be compensated with a control premium for being placed in such a vulnerable position. Alternatively, the court opined, the terms of the merger could be revised to put in place “protective devices,” such as supermajority voting requirements, that would empower minority shareholders to look out for their own interests.<sup>145</sup> Similarly, the Delaware Chancery Court’s protection of shareholder voting power against board

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138. See WILLIAM A. KLEIN, JOHN C. COFFEE, JR. & FRANK PARTNOY, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 156-70 (11th ed. 2010).

139. See *id.* at 202-07.

140. See KRAAKMAN ET AL., *ANATOMY*, *supra* note 130, at 59.

141. See KLEIN ET AL., *supra* note 138, at 215-18.

142. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 719-20 (Del. 1971).

143. See KLEIN ET AL., *supra* note 138, at 168-69.

144. 637 A.2d 34 (Del. 1994).

145. *Id.* at 42-43; see also Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 137-38, 150-53 (2003) (reading the *Paramount* decision as exemplary of corporate law’s concern with protecting minority shareholders, and going on to compare constitutional law’s concern with protecting racial minorities).

interference in hostile takeover cases (under *Blasius Industries v. Atlas Corp.*<sup>146</sup>) has been understood as simply a special case of the more general rights-based protections afforded to shareholders against other types of defensive tactics (under *Unocal Corp. v. Mesa Petroleum Co.*<sup>147</sup>).<sup>148</sup>

Of course, legal entitlements to representation and rights-like prohibitions or requirements are not the only means of protecting shareholders. An important distinction between corporate and constitutional law is the existence of market constraints on managerial and majoritarian misconduct.<sup>149</sup> Nonetheless, rights and votes remain important, and functionally interchangeable, means of protecting shareholders against managers and against one another.

### *J. Labor and Employment Law*

The law of the workplace also lends itself to constitutional and democratic analogies. Labor law empowers workers to engage in collective bargaining with employers over the terms and conditions of their employment through a proto-political process of workplace self-government. The other main regulatory regime for the workplace, employment law, protects workers by granting them rights—to minimum standards and conditions, and also to nondiscrimination. The evolution of the law of the workplace in the United States since the New Deal—from the primacy of labor law to the decline of unions and the concomitant rise of employment law—can be understood as a broad shift from protecting workers through a regime of voting and representation to protecting them through a substitute regime of rights.

In very brief summary, the New Deal initiated a regime of labor law that, in Cynthia Estlund’s words, “effectively established a ‘constitution’ of the private-sector workplace—a framework for self-governance.”<sup>150</sup> Under that constitutional framework, unionized workers and management would “engage in ‘politics’ in the form of bargaining and lawful self-help, to enact ‘legislation’ in the form of

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146. 564 A.2d 651 (Del. Ch. 1988).

147. 493 A.2d 946 (Del. 1985).

148. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 890 (2001).

149. Most obviously, shareholder vulnerability is reduced by the easy exit option, available in many circumstances, of selling their shares. See *infra* note 322 and accompanying text. In addition, managerial misconduct is constrained by contractual incentives and by the market for corporate control.

150. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 28 (2010).

a collective bargaining agreement.”<sup>151</sup> As Estlund describes, labor law viewed workers as “citizens” and the workplace as a site of self-determination and “democracy.”<sup>152</sup>

Empowering workers to bargain with employers in this “self-governance” regime was supposed to obviate the need for extensive regulation of the workplace by the real government.<sup>153</sup> And, indeed, it was only when union membership began to decline in the 1960s that the federal government saw the need to create a new regime of workplace regulation. This new regime focused on protecting the individual rights of workers. As union density continued to decline through the 1970s and ‘80s, the New Deal system of collective bargaining and workplace self-governance was largely replaced by rights-creating regulations. These included minimum standards for the terms and conditions of employment, exemplified by wage and hour laws and by Occupational Safety and Health Administration regulations; civil rights laws prohibiting discrimination on the basis of race, gender, age, and other characteristics; and broader protections against wrongful discharge.<sup>154</sup>

This new regime of employment law has invested workers with “analogs to the constitutional rights of citizens as against the government.”<sup>155</sup> We can understand these rights as partially compensating for the “democratic deficit” suffered by employees, who have for the most part lost the opportunity, once provided by labor law, to participate effectively in workplace governance.<sup>156</sup> Just as constitutional process theorists view rights as replacements for political power, we might see employment law rights as second-best replacements for representation in the collective decisionmaking process of the workplace.

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151. *Id.*

152. *Id.* at 28-29; see also Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 501-23 (1993) (critically examining the analogy between labor representation and democratic politics); cf. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1422-27 (1993) (describing how the Wagner Act was conceived on the analogy and interconnections between industrial and political democracy).

153. See ESTLUND, *supra* note 150, at 9.

154. See *id.* at 10; PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 22-29 (1990); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1568-72 (1996).

155. ESTLUND, *supra* note 150, at 11.

156. See *id.*

*K. Juries, Race, and Representation in Criminal Justice*

Returning to the U.S. Constitution, a final example of the fluidity of rights and representation is the role of the jury in protecting citizens against the application of unjust laws. The Framers saw juries as representative political bodies, analogous to legislatures, but more specifically empowered to serve as “[s]entinel and guardians”<sup>157</sup> of the rights and liberties of individual citizens against all manner of government tyranny.<sup>158</sup> In the Founding vision, juries would stand ready, for instance, to prevent self-serving executives from entrenching themselves in office by prosecuting their political critics.<sup>159</sup> The paradigm case in this regard was Royal Governor Cosby’s prosecutions of colonial New York newspaper publisher John Peter Zenger for seditious libel. Two grand juries refused to indict Zenger, and he was ultimately acquitted by a petit jury.<sup>160</sup>

Thus conceived, juries would play a primarily majoritarian role in protecting citizens against the agency threat posed by untrustworthy federal officials. At the same time, however, juries represented *local* majorities, which would often be minorities in a larger political frame. Juries could also be counted on, therefore, to safeguard the rights and values of state and local communities against overbearing national majorities.<sup>161</sup>

The minority-protecting role of juries came to the fore during Reconstruction, when congressional Republicans looked to juries to protect black criminal defendants in the South. Casting juries in this role required a telling conceptual shift in the relationship between jury representation and rights.<sup>162</sup> The right of blacks to serve on juries was initially conceived, alongside voting, as quintessentially “political” in nature, and therefore not guaranteed by the Civil Rights Act of 1866 or the Fourteenth Amendment, both of which were understood to protect only “civil” rights. Republicans quickly came to realize, however, that the civil rights of black criminal defendants could not be secured in practice without black representation on

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157. AMAR, *supra* note 12, at 84 (quoting Letters from the Federal Farmer (IV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 250 (Herbert J. Storing ed., 1981)). So important were juries that they were expressly protected not only in the original Constitution (in Article III) but also in three of the ten amendments of the Bill of Rights (the Fifth, Sixth, and Seventh). See *id.* at 83.

158. See *id.* at 81-118.

159. See *id.* at 84.

160. *Id.* at 84-85.

161. See *id.* at 88-93.

162. See *id.* at 271-74.

juries. The boundary between political and civil rights was blurred by the recognition that political rights were instrumentally necessary to achieve meaningful civil rights.<sup>163</sup> Thus, in 1875, on the dubious authority of the Fourteenth Amendment, Congress passed a statute barring discrimination against blacks in jury service.<sup>164</sup> Then, in the 1879 case of *Strauder v. West Virginia*, the Supreme Court did further damage to the political/civil rights distinction by holding that the murder conviction of a black man in West Virginia by grand and petit juries from which blacks were legally excluded violated the defendant's equal protection right to a nondiscriminatory trial.<sup>165</sup>

The same functional imperatives—accompanied by the same doctrinal slippage between the participation rights of jurors and the substantive rights of defendants<sup>166</sup>—remain at the center of constitutional criminal procedure. Consider the constitutional requirement that jury venires represent a “fair cross-section” of the community<sup>167</sup> and the *Batson* prohibition on race-based peremptory challenges.<sup>168</sup> Both have been justified not just as serving the intrinsic goal of preventing race discrimination against jurors but also as serving the instrumental goal of preventing discrimination against minority defendants by all-white juries.<sup>169</sup> Indeed, some commentators have seen the Court's disproportionate attention to minority representation on juries as a self-conscious substitute for more direct (and perhaps effective) efforts to police racism in the criminal justice system.<sup>170</sup> The suggestive evidence is that even while the post-Warren Court has been cutting back on other criminal

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163. See Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 993-1000 (1999) [hereinafter Hills, *Back to the Future*] (reviewing AMAR, *supra* note 12).

164. See AMAR, *supra* note 12, at 273 (arguing that Congress did, in fact, have constitutional authority under the Fifteenth Amendment).

165. 100 U.S. 303 (1879).

166. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 94, 119-20 (1996).

167. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see also *Duren v. Missouri*, 439 U.S. 357 (1979) (extending the fair cross-section requirement).

168. See *Batson v. Kentucky*, 476 U.S. 79 (1986); see also *Georgia v. McCollum*, 505 U.S. 42 (1992) (applying the *Batson* rule to strikes by defense counsel).

169. See Hills, *Back to the Future*, *supra* note 163, at 999-1000 (connecting fair cross-section jurisprudence to *Strauder* and Reconstruction-era conceptions of political and civil rights). Hills explains: “As the Court cannot review each jury decision to insure that no illegal prejudices entered the jury’s deliberation, if the Court is to protect the [due process rights of black defendants], it will have to do so by reforming political institutions.” *Id.* at 1000.

170. See Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993).

procedure rights, constraints on discrimination in jury selection have been proliferating.<sup>171</sup> Justice Powell's opinion in *McCleskey v. Kemp*,<sup>172</sup> disclaiming the ability of the Court to do anything directly to prevent racism in the application of the death penalty, was authored in the Term after Powell wrote the opinion of the Court in *Batson*.<sup>173</sup> Those two opinions might be viewed together as a microcosm of the Court's strategy for addressing race and criminal procedure.<sup>174</sup> On the model of political process theory, the Court may have chosen to prioritize minority representation on juries as a substitute for more directly protecting the rights of minority criminal defendants.<sup>175</sup>

The same tradeoff may be visible with respect to other representative institutions in the criminal justice process.<sup>176</sup> Consider the rise and potential demise of constitutional constraints on street-level policing. Most of the constitutional doctrine governing police searches, arrests, interrogations, and discretionary authority was created by the Warren Court as a means of combating institutionalized racism in the criminal justice system.<sup>177</sup> The development of this rights-based regulatory regime for the police was largely motivated and arguably justified by the political disempowerment of the minority groups that bore the brunt of police abuses.<sup>178</sup> At a time when blacks in many cities were not voting or serving on police forces in large numbers, there was a strong case to be made—here, again, on process-theory grounds—for compensatory constitutional rights. That same case might be turned on its head in contemporary America, where blacks and other minorities in large cities have achieved considerable political power and influence over urban

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171. See *id.* at 1812-13, 1842; Muller, *supra* note 166, at 94.

172. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

173. *Batson*, 476 U.S. 79.

174. See Herman, *supra* note 170, at 1813. Justice Powell saw the two cases in a single frame: he believed that the best hope for preventing race discrimination in death cases was minority representation on juries. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 440-41 (1994).

175. See Herman, *supra* note 170, at 1844-45; Hills, *Back to the Future*, *supra* note 163, at 1000; Muller, *supra* note 166, at 147-48.

176. The Supreme Court's decision in *Hudson v. Michigan*, 547 U.S. 586 (2006), suggests one small-scale example. In that case, the Supreme Court justified its curtailment of the exclusionary rule as a remedy for Fourth Amendment "knock and announce" violations in part by pointing to citizen review boards as an alternative mechanism of police accountability. *Id.* at 599.

177. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155-59 (1998).

178. *Id.*

police departments.<sup>179</sup> Thus, some commentators make the case that courts should stop enforcing constitutional rights to prohibit curfews, antiloitering laws, and other order-maintenance policing strategies on the grounds that these rights were originally designed to protect groups that can now protect themselves politically.<sup>180</sup>

## II. HOW TO CHOOSE?

The previous Part described a variety of political, legal, and economic contexts, encompassing a rich array of institutional forms, in which rights and votes seem to function as substitutes for one another. As the discussion in the previous Part may have also suggested, however, rights and votes are not typically viewed as *perfect* substitutes.<sup>181</sup> Notwithstanding their functional similarities, the two devices have been understood to possess somewhat different features, costs and benefits, and domains of feasible implementation. This Part draws on the examples surveyed above to identify and critically assess a number of generalizable differences between rights and votes that have been thought to influence the choice between them.

### A. Absoluteness Versus Flexibility

Votes offer only probabilistic opportunities to prevail in collective decisionmaking processes. Rights, in contrast, can function as absolute “trumps” over collective decisionmaking,<sup>182</sup> in the sense that they dispositively determine, or prevent, particular outcomes. Some things simply must not (or must) be done. Of course, not all rights are so absolute. Rights may be

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179. *Id.* at 1161–63.

180. *Id.*; see also Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197. But see Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 222 (“Voting rights and civil liberties are not fungible. Even more than the white majority, African Americans need both.”).

181. This is not to deny that, at a high enough level of theoretical abstraction, rights and votes might indeed be close to perfect substitutes. In a purely formal model of collective decisionmaking, perhaps any conceivable outcome-based concern could be equally well addressed either by rearranging the decisionmaking process to favor preferred outcomes (i.e., through votes), or, alternatively, by directly specifying these results (i.e., through rights). In the real world, however, things are not so simple. As discussed throughout this Part, practical and conventional constraints on the forms and uses of rights and votes often create significant differences between them.

182. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977).

balanced against competing interests, subject to legislative override, aimed only at particular reasons or purposes for decisions, underenforced, or undermined by weak remedies. Still, the power of rights to guarantee their holders victories that would otherwise be up for grabs in the ordinary give and take of political contestation is a distinctive potential benefit.

The flip-side of this benefit, however, is that rights tend to be less flexible than votes. Votes offer a general currency that can be used by their holders to pursue a broad range of interests, and that can be redirected toward different interests over time. In contrast, rights function by prejudging political outcomes, taking some options off the table. Because rights must be specified and fixed in place in advance of collective decisionmaking processes, rights-based protections tend to be vulnerable to novel forms of evasion or oppression and subject to obsolescence when circumstances change.

Thus, by way of explaining their preference for structural and political protections, the Framers of the U.S. Constitution argued that it would be practically impossible to enumerate every right worthy of protection, let alone to anticipate all of the fundamental liberties that might be discovered in the future.<sup>183</sup> “[A]n enumeration which is not complete is not safe,” Madison argued to the Virginia Ratification Convention, in opposition to a bill of rights.<sup>184</sup> After all, listing rights might imply that any right not on the list was left constitutionally unprotected.<sup>185</sup> A related problem was that even those rights that made the list might be impossible to express clearly or completely enough to make any difference: “Who can give [a right] any definition which would not leave the utmost latitude for evasion?”<sup>186</sup>

Similar observations about the inflexibility of rights relative to votes recur throughout the examples surveyed in Part I. For example, the priority placed by process theorists on protecting vulnerable groups through votes rather than rights is partly explained by the fact that, as Ely observes, “[n]o finite list of entitlements can possibly cover all the ways majorities can tyrannize minorities.”<sup>187</sup> Along the same lines, one argument for protecting workers through labor law is that the rights regime created by employment law “cover[s] only a fraction of what employees care about at work – only a fraction

183. See Graber, *Enumeration*, *supra* note 13, at 367-68.

184. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 626 (Jonathan Elliot ed., 2d ed. 1891).

185. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 78-79 (2010).

186. THE FEDERALIST NO. 84, *supra* note 11, at 514 (Alexander Hamilton).

187. ELY, *supra* note 60, at 81.



of what collective bargaining . . . might secure for them.”<sup>188</sup> Finite lists of entitlements may also be overinclusive. A powerful argument against judicial enforcement of the standard repertoire of constitutional rights during emergencies is that the inevitable balance between civil liberties and national security must shift when the security stakes go up.<sup>189</sup> Congressional oversight of executive decisionmaking at least holds out the promise of more finely grained and context-sensitive accommodations of liberty and security than could be crafted within the conventional confines of judicially enforced rights.<sup>190</sup> Similarly, rights-like prohibitions are disfavored in corporate law because they “mechanically limit[] the discretion of corporate managers to take legitimate business actions”<sup>191</sup> and “threaten to codify loopholes and create pointless rigidities.”<sup>192</sup>

The flexibility of rights is further reduced by conceptual conventions and administrative imperatives that in many settings place limits on the types of interests that can be protected through rights. In the abstract, it might be possible to use the form of rights to prohibit or require *any* outcome in any sort of collective decisionmaking context. In many practical settings, however, the permissible or feasible scope of rights protections is understood to be limited in various ways. Rights are understood to attach only to individuals or particular types of groups; to protect “negative” liberties as opposed to guaranteeing “positive” entitlements; to stem only from certain justifications or sources of authority; or the like. On account of these and other kinds of limitations, rights claims are typically restricted to a subset of the potential political outcomes that might be pursued using votes.

To illustrate, a further reason for the U.S. Framers’ lack of interest in rights may have been that the kinds of government misbehavior the Framers hoped to prevent would have been difficult to reduce to any set of individual rights and liberties. As Mark Graber describes, the Federalist Framers’ central constitutional aspiration was that “government pursue the common good, not that government pursue the common good by means that did not interfere with individual autonomy.”<sup>193</sup> Even more specific political desiderata may be

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188. ESTLUND, *supra* note 150, at 242.

189. See RICHARD A. POSNER, NOT A SUICIDE PACT 31–51 (2006) [hereinafter POSNER, NOT A SUICIDE PACT]; POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 44, at 21–22.

190. Cf. POSNER, NOT A SUICIDE PACT, *supra* note 189, at 37 (favorably comparing Congress’s competence at making national security decisions to that of courts).

191. Black & Kraakman, *supra* note 130, at 1931.

192. KRAAKMAN ET AL., ANATOMY, *supra* note 130, at 24.

193. Graber, *Enumeration*, *supra* note 13, at 370, 368–72. This idea once again came to the fore in constitutional jurisprudence during the *Lochner* era. Due Process and related rights were

irreducible to rights. Historical accounts of voting rights for African Americans point to a much broader range of instrumental benefits than could be encapsulated, or replaced, by conventional rights—higher welfare benefits, improvements in municipal services, increases in government employment, and the like.<sup>194</sup> Minority jurors can use their voting power to protect criminal defendants against systemic abuses that individually focused criminal procedure rights cannot reach, for instance, by nullifying convictions of minority defendants for drug offenses carrying inordinately high sentences.<sup>195</sup> At the same time, as Kahan and Meares argue, rigid and outdated criminal procedure rights may be all too effective in preventing innovative community policing strategies embraced by minority communities through political decisionmaking processes.<sup>196</sup>

In all of these contexts, the flexibility of political power contrasts unfavorably with temporally and conceptually rigid rights. This contrast will be greater in some contexts than others. Rights can be revised and updated with varying degrees of difficulty and regularity—whether by constitutional amendment, statutory reform, or judicial reinterpretation. In U.S. constitutional law, courts routinely adjust the scope and content of textually fixed rights to new circumstances, for instance by shrinking civil liberties during wartime and by extending constitutional protection to women and gays and lesbians to reflect changing social norms. Conceptual limitations on the kinds of interests or entitlements that can be provided through the vehicle of rights also vary in their restrictiveness. Beyond traditional “negative” or “liberal” rights, constitutions in many countries now specify “second generation”

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understood to protect against “partial” legislation directed at particular classes or toward “private” ends. Laws designed to further the public good were constitutionally unobjectionable—even when these laws interfered with the life, liberty, or property of individuals. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

194. See Klarman, *Puzzling Resistance*, *supra* note 65, at 801-03; Pildes, *Politics of Race*, *supra* note 79, at 1377 (reviewing empirical studies of the link between minority representation and local government responsiveness).
195. For a normative defense of nullification by black jurors in some cases, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 679 (1995), which argues that “[t]he decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process.”
196. See *supra* notes 177-180 and accompanying text.

or “positive” rights to social and economic goods.<sup>197</sup> The South African Constitution, for example, guarantees access to adequate housing, food and water, health care, education, and social security.<sup>198</sup> The South African Constitution, among others,<sup>199</sup> also guarantees social and cultural rights, aimed at ensuring the ability of minority communities to preserve their languages and cultures.<sup>200</sup> In other contexts, as well, rights can be stretched to cover a relatively broad range of interests.

All of that said, there probably does remain a significant, generalizable difference between the flexibility of voice in political decisionmaking processes and claims to particular outcomes from those processes. After all, the main reason ongoing decisionmaking institutions exist is that community members cannot anticipate or adequately inform themselves about all of the decisions that will arise in the future and how they would prefer those decisions to be made. These informational barriers typically make it impossible to specify all of the relevant decision-outcomes—or rights-based prohibitions on acceptable outcomes—in advance. At the conceptual level, it remains a tenet of legal orthodoxy that the domain of rights and adjudication is much more limited than the domain of legislation and regulation. The creation of novel forms of rights, and judicial creativity within the permissible forms, can narrow the gap. Still, in many contexts, the relative practical and conceptual inflexibility of rights will lead vulnerable groups to favor votes.

In other contexts, however, these groups will benefit more from the absoluteness of rights. The relative weights assigned to flexibility and absoluteness will depend on, among other variables, a group’s distribution and stability of preferences, as well as its intensities of preference, across interests

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197. See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1638-1766 (2d ed. 2006); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008) [hereinafter TUSHNET, *WEAK COURTS*].

198. S. AFR. CONST., 1996, ch. 2, §§ 26-27, 29. On the South African Constitutional Court’s approach to enforcing these rights, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 216-29 (2004); and TUSHNET, *WEAK COURTS*, *supra* note 197, at 242-47.

199. See, e.g., Fali Sam Nariman, *The Indian Constitution: An Experiment in Unity amid Diversity*, in *FORGING UNITY OUT OF DIVERSITY* (Robert A. Godwin et al. eds., 1985) (describing the Indian Constitution).

200. The Bill of Rights grants everyone “the right to use the language and to participate in the cultural life of their choice,” S. AFR. CONST., 1996, ch. 2, § 29, and the right “to receive education in the official language or languages of their choice,” *id.* § 30, and the Constitution establishes a body called the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* to help secure these rights. *Id.* ch. 9, §§ 185-86.

and issues. Groups that have numerous or shifting interests across a broad range of issues will be drawn to votes. But groups that care intensely about protecting a few fundamental and enduring interests, and that are not interested in trading off these interests for benefits along other dimensions, may do better with rights (assuming that their interests can be cast in the form of rights). For example, civil libertarians who believe that rights against detention without trial should not be sacrificed at any price will not be assuaged by assertions of congressional power resulting in rights-sacrificing compromises. Along similar lines, critics of process theory emphasize that even fair political representation may not be enough to protect fundamental prohibitions against racial or religious discrimination and argue that such prohibitions should not be viewed as commensurable or exchangeable with other values and interests in the pluralist marketplace of ordinary politics.<sup>201</sup> The inflexibility of rights takes them off the table for purposes of political compromises and tradeoffs. For some groups this will count as a major disadvantage. For others, however, the absoluteness of rights will provide a valuable kind of security that votes cannot match.

### *B. Durability*

Democratic decisionmaking structures and processes (i.e., votes) are commonly believed to be more stable, durable, and deeply entrenched against political change than rights.<sup>202</sup> Consequently, the conventional wisdom holds, all else equal, votes offer minorities more secure and longer-lasting protection. The contrast along this dimension is a relative one. Everyone understands that democratic arrangements have been overthrown by military dictators or undermined by the systematic disenfranchisement of groups of voters. Blacks in the Redemption era South were stripped of the ballot and their rights with seemingly equal facility. Nonetheless, in many different contexts, the relative durability of votes as compared to rights has been recognized as an important and even decisive difference.

A clear initial example is the Madisonian strategy of constitutional design. Recall that Madison and other Federalist Framers dismissed rights as merely

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201. See, e.g., Ackerman, *supra* note 61, at 742-46.

202. Durability in the sense discussed in this Section operates along a different dimension than flexibility, as that term was understood in the previous Section. As we saw in Section II.A, votes are generally designed to be more flexible than rights. With respect to durability, however, the question is not how rights and votes are designed but whether, or for how long, they will keep operating as designed. There is no tension, then, in describing votes as both more flexible and more durable than rights.

“parchment barriers” against politically dominant majorities while apparently believing that structural protections for minorities and individual rights-holders would be more politically sustainable.<sup>203</sup> And recall the similar belief of Southern whites that a Senate or some other structural guarantee of a political veto over national policy would provide greater security for slavery than any kind of rights-based protection.<sup>204</sup>

Contemporary constitutional theorists seem to have inherited and embraced the Madisonian view, and they have seen it confirmed over the course of U.S. history. Thus, John Hart Ely celebrates the Madisonian architecture of a constitution that is “overwhelmingly concerned” with the processes of political decisionmaking, leaving “the selection and accommodation of substantive values . . . almost entirely to the political process.”<sup>205</sup> Moreover, as Ely sees it, “the few attempts the various framers [of the Constitution and amendments] *have* made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by interpretative pretense.”<sup>206</sup> He concludes that “preserving fundamental values is not an appropriate” — or, evidently, a realistically possible — “constitutional task.”<sup>207</sup> Writing in a more critical register, Sanford Levinson bemoans a number of structural features of U.S. democracy (bicameralism, equal state representation in the Senate, and the Electoral College system, among others) that in his view have become increasingly dysfunctional but that are firmly fixed in place by the Constitution and practically impossible to change.<sup>208</sup> Levinson views constitutional rights, in contrast, as relatively unproblematic because “[i]t is always the case that courts are perpetually open to new arguments about rights — whether those of gays and lesbians or of property owners — that reflect the dominant public opinion of the day.”<sup>209</sup>

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203. See *supra* notes 19–20 and accompanying text.

204. See *supra* notes 30–34 and accompanying text.

205. See ELY, *supra* note 60, at 87.

206. *Id.* at 88.

207. *Id.*

208. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

209. *Id.* at 5. Along the same lines, John Ferejohn and Larry Sager conceptualize structural constitutional provisions relating to “procedures or mechanisms of governance” as “external” commitment devices that prevent majorities from reneging on their “internal” commitments to constitutional rights. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1945 (2003). Of course, this constitutional bootstrapping strategy can work only if structural commitments are more stable than the

The presumptively greater durability of democratic decisionmaking structures has influenced the choice between rights and votes in a number of other contexts, as well. Scholars of comparative constitutional design warn against heavy reliance on judicially enforced rights to protect minorities on the Madisonian grounds that determined majorities will undermine rights-based protections by politicizing or overriding purportedly independent courts.<sup>210</sup> Acemoglu and Robinson's theory of democratization as a credible commitment to redistribution is premised on the similar assumption that votes will be more difficult to take away than substantive entitlements. After all, if the elites could undo broad-based enfranchisement and democratic decisionmaking processes as easily as they could retract redistributive policies, then democratization would accomplish nothing.

Beyond constitutional law, Bernard Black and Reinier Kraakman offer a "self-enforcing" approach to corporate law for emerging capitalist economies in which judicial enforcement is unreliable.<sup>211</sup> Their basic strategy is to focus on "structural" rules creating corporate decisionmaking processes that empower minority shareholders and other vulnerable stakeholders to protect themselves through voting and other mechanisms. This is in contrast to a "prohibitive model," which would grant these vulnerable stakeholders rights against particular corporate behaviors that create the potential for abuse. The essential premise of Black and Kraakman's approach is that rules about structure and process, such as shareholder voting requirements, will constrain corporate insiders more effectively and command greater compliance than rights against specific corporate abuses.<sup>212</sup>

Oddly, no one seems ever to have explained *why* we should expect democratic decisionmaking processes to prove more politically stable or durable than rights. Madison and his fellow Framers never spelled out why the structure of government outlined in the Constitution would be more than a parchment barrier against powerful groups whose interests would be better served by a different political decisionmaking process. Antebellum white

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rights that they are supposed to protect. Ferejohn and Sager explicitly embrace this Madisonian premise. In contrast to politically precarious rights, they view structural rules and arrangements as "substantially self-executing" because structural dictates somehow "inspire reflexive conformity with their stipulations." *Id.* at 1948-49.

210. See Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Postconflict State*, 6 ANN. REV. L. & SOC. SCI. 301, 311-16 (2010) [hereinafter Choudhry, *After the Rights Revolution*]; see also *infra* notes 335-336 and accompanying text (discussing democratic limitations on judicially enforced rights).

211. See Black & Kraakman, *supra* note 130, at 1978.

212. This is so even when the rights are specified in "considerable detail." *Id.* at 1929, 1936.

Southerners may have had good reason to worry that the property rights of slaveholders could be ignored or interpreted away, but it is unclear why they would have any less reason to worry that the South's veto gate in the Senate would be bypassed through unilateral executive action once the North took control of the presidency.<sup>213</sup> The analytic structure of Acemoglu and Robinson's theory of democratization similarly suggests no reason why broad-based enfranchisement would be any more stable than simply an elite promise of better treatment. If the masses cannot muster enough ongoing political power to secure a stream of redistribution, then how will they maintain sufficient power to defend democracy against an elite takeover?<sup>214</sup> The same explanatory gap exists in other theoretical frameworks premised on the relative resilience of democratic decisionmaking processes against opposition and change.<sup>215</sup>

There may be ways of filling this gap. Recent work in law and the social sciences has begun to provide a theoretical foundation for the intuition that political decisionmaking processes will tend to be more stable than the substantive outcomes they are supposed to secure.<sup>216</sup> For now, though, it may be enough to recognize the existence of this longstanding and widespread intuition. In settings where political actors believe that decisionmaking structures and processes will prove more resilient than rights, that may be an important reason for preferring one to the other.

### C. Democratic Limitations

Normative and functional imperatives of democracy place limitations on both votes and rights as tools for protecting vulnerable groups. In a given context, these limitations may rule out, or severely constrain the efficacy of, one or the other device. On the votes side, there may be a fine line between making minorities politically powerful enough to protect their core interests

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213. Calhoun and others recognized this possibility. See CARPENTER, *supra* note 36, at 89-97.

214. Acemoglu and Robinson recognize the importance of this question in passing. See ACEMOGLU & ROBINSON, *supra* note 108, at 178.

215. To make matters more confusing, one of the examples of rights and votes discussed in Part I seems to rest on the opposite assumption. Ran Hirschl's hegemonic preservation theory of the rise of constitutionalization and judicial review portrays judicially enforced rights as more durable than elite political control over government decisionmaking – though without explaining why we should expect democratic majorities who have taken control of the rest of government to tolerate a hostile judiciary that continues to represent otherwise disempowered elites. See HIRSCHL, *TOWARDS JURISTOCRACY*, *supra* note 97.

216. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

and making them *too* powerful, putting them in a position to extract more than their fair share or undermining the workability of democratic governance. There are also limits in many contexts to the feasibility of enfranchising “outsiders” in democratic decisionmaking processes, even when their interests are significantly affected. On the rights side, countermajoritarian prohibitions on political decisionmaking often trigger normative objections in the name of democracy. Placing rights in the path of majority rule may also generate political pushback against enforcement. (These concerns have been raised more commonly and urgently with respect to rights, though, as the discussion below will suggest, they might well be applied to countermajoritarian voting arrangements as well.)

To begin, one obvious limitation of voting as a means of protecting the interests of minorities is that, in systems of essentially majoritarian governance, minorities will not have enough votes to win. When it comes to very small outlier groups, political representation is unlikely to offer any meaningful protection at all. There are some exceptions: for example, juries and other decisionmaking bodies that operate on the principle of unanimity can empower even a lone dissenter to determine or significantly influence the result. More commonly, however, significant influence over political decisionmaking processes is reserved for somewhat larger groups. Rights, on the other hand, can be used to protect very small groups and even isolated individuals against majoritarian decisionmaking.<sup>217</sup>

More substantial minorities are likely to do better in democratic politics, though how much better depends on the design and dynamics of the political process. Some of the examples in Part I are telling in this regard. Madison’s model of pluralist politics in a large republic—featuring shifting coalitions of multiple, diverse factions, none of which dominates as a stable majority—suggests one optimistic scenario.<sup>218</sup> If minorities can form coalitions with other groups through pluralist bargaining, then they may be able to exercise considerable power even in a basically majoritarian system. Thus, in Ely’s ideal, well-functioning democracy, racial minorities would have the opportunity to

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217. Consider in this regard Mill’s description of free speech rights: “If all mankind minus one, were of one opinion, . . . mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” JOHN STUART MILL, ON LIBERTY 18 (David Spitz ed., Norton 1975) (1859). In most contexts, it will be hard to imagine a democratic decisionmaking process that would allow Mill’s lone individual to protect himself against the rest of mankind.

218. See THE FEDERALIST NO. 10, *supra* note 11, at 82–84 (James Madison).



join majority coalitions on the same terms as other groups.<sup>219</sup> Minority groups might also do quite well by positioning themselves as swing voters. Truman's landmark civil rights initiatives of the late 1940s, spurred by the need to bid against Republicans for the political allegiance of black voters, is one illustration.<sup>220</sup> Finally, if minorities can use logrolling or other means to exercise disproportionate political power over issues on which their intensity of preference is the greatest, then they may be able to further their fundamental interests even while being outvoted on most other issues. Minority communities in large cities exert disproportionate power on issues of crime, violence, and drugs precisely because the stakes for them are so high.<sup>221</sup>

But interest group pluralism is not always enough to secure the position of minorities in majoritarian political systems. To illustrate, John C. Calhoun believed that Madisonian pluralism had been undermined by political parties, which had unified various factions in their attempts to establish a cohesive, politically dominant national majority. Indeed, Calhoun saw the organization of stable and potentially tyrannical majority coalitions as an inevitable feature of majoritarian political systems: "If no one interest be strong enough, of itself, to obtain [a majority], a combination will be formed between those whose interests are most alike . . ." <sup>222</sup> Such combinations will be bound together by their shared interest in reaping the rewards of controlling the government.<sup>223</sup> And, Calhoun added, once a majority coalition becomes dominant and its members no longer anticipate taking their turn out of power, they will have no reciprocity-based incentive to temper their treatment of vulnerable minorities.<sup>224</sup>

The prognosis for Madisonian pluralism becomes even less promising when competing groups are constituted and mobilized along relatively stable lines of race, ethnicity, religion, or class. In societies divided along these lines, minority groups will anticipate permanent exclusion from control of the government and severe mistreatment as a result. Calhoun viewed the economic and ideological division between North and South over slavery in this light.<sup>225</sup> The objections of Southern slaveholders to unfettered majoritarian democracy

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219. Only when minorities were "barred from the pluralist's bazaar" by prejudice would courts need to step in to compensate for their political exclusion. ELY, *supra* note 60, at 152.

220. See Klarman, *Puzzling Resistance*, *supra* note 65, at 799-801.

221. See Kahan & Meares, *supra* note 177, at 1162-63.

222. CALHOUN, *supra* note 41, at 14.

223. See READ, *supra* note 41, at 13.

224. See *id.* at 11-12.

225. See *id.* at 13-15.

echo in the objections of de Klerk's NP in South Africa on behalf of the white minority. In the contemporary United States, critics of majoritarian democracy point to the analogous predicament of racial minorities, who find themselves routinely outvoted by cohesive white majorities.<sup>226</sup> Thus, Lani Guinier contrasts the ideal of "Madisonian majorities," which comprise shifting coalitions that take turns in power, with the reality of deep racial divisions and racial-bloc voting patterns that render whites in many jurisdictions a "self-interested majority [that] does not need to worry about defectors."<sup>227</sup> Moreover, she argues that the solution offered by the Voting Rights Act—redrawing election districts so that minorities form a majority in some districts—amounts to mere tokenism if a handful of minority representatives are routinely outvoted by legislative majorities.<sup>228</sup>

Calhoun, de Klerk, and Guinier all agree on the basic solution to this problem of "permanent minorities." Each proposes democratic decisionmaking arrangements that selectively boost the political power of the relevant minority groups. As described in Part I, Calhoun and de Klerk both advocated for consociational arrangements such as concurrent majority requirements and plural executives.<sup>229</sup> For her own part, Guinier has proposed cumulative voting—familiar from the corporate context<sup>230</sup>—for elections in multimember districts and for decisionmaking in legislative bodies. Cumulative voting would empower minority groups to vote strategically to elect some of their candidates of choice and then to enact or block legislation of critical importance to them.<sup>231</sup> Guinier also considers the possibility of imposing supermajority voting requirements (or, the equivalent, a minority veto) for "critical minority issues."<sup>232</sup>

Other institutional mechanisms for empowering minorities in democratic decisionmaking processes appear in the various contexts surveyed in Part I. Recall that a number of features of the Madisonian constitutional design—including bicameralism and the separation of powers, which effectively create supermajority requirements for legislating—were conceived as protecting minorities against unfettered majority rule (as well as protecting majorities against tyrannical officials). Leveraging Congress's role in the separation of

226. LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 78 (1994) [hereinafter *GUINIER, TYRANNY*].

227. *Id.* at 4.

228. *Id.* at 42-43.

229. See *supra* notes 90-95 and accompanying text.

230. See *supra* notes 131-134 and accompanying text.

231. *GUINIER, TYRANNY, supra* note 226, at 107-08, 149.

232. *Id.* at 108.

powers as a check on the executive in times of war and crisis is just one of many examples of how these elements of the constitutional design might be used to protect minorities against majoritarian overreaching. In corporate law, beyond cumulative voting, supermajority and minority approval requirements are used to empower minority shareholders in corporate decisionmaking. And, again, there is the unanimity requirement of the criminal jury—viewed by Calhoun and Guinier as a prototype of consensus-based democracy and a caution against pure majoritarianism when critical interests are at stake.<sup>233</sup>

As the jury example makes clear, it is always possible to design a collective decisionmaking process that empowers even the smallest minority to block adverse outcomes. Yet the kinds of special representation or decisionmaking power that are necessary to protect minorities' fundamental rights and interests may be viewed as normatively objectionable or functionally unworkable. Minorities may use their disproportionate power not just to protect their critical interests—in the manner of rights—but to extract more than their fair share of benefits or to deadlock the decisionmaking process.<sup>234</sup> Thus, Calhoun struggled to defend his concurrent majority model of national governance against the charge that it would produce some combination of deadlock<sup>235</sup> or minority rule.<sup>236</sup> Regarding deadlock, Calhoun conceded that opposing interests possessed of a mutual veto over national policymaking might be unwilling to yield “when there is no urgent necessity” for action.<sup>237</sup> But, he argued, “[w]hen something *must* be done . . . the necessity of the case will force to a compromise.”<sup>238</sup> Here again, Calhoun invoked juries, which, he argued, usually managed to reach unanimity, owing in part to the necessity of a verdict and in part to the “disposition to harmonize” that jurors felt by virtue of their involvement in a deliberative, consensus-based decisionmaking process.<sup>239</sup> As for the minority rule objection, Calhoun portrayed the minority veto merely as a negative “check” on majority rule, analogous to judicial review, not as an affirmative power for the minority itself to dictate policy.<sup>240</sup>

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233. See *id.* at 107-08; READ, *supra* note 41, at 166-69 (discussing Calhoun).

234. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 185-86 (1989) [hereinafter DAHL, *DEMOCRACY AND ITS CRITICS*].

235. See READ, *supra* note 41, at 162-64.

236. *Id.* at 172-78.

237. CALHOUN, *supra* note 41, at 50.

238. *Id.*

239. See *id.* at 51 (emphasis omitted).

240. See READ, *supra* note 41, at 172-73.

The counterarguments are obvious.<sup>241</sup> Minorities empowered with a general veto over collective decisionmaking may well choose to hold out for unreasonable demands. Majorities that will suffer disproportionately from inaction may be forced to concede, and if they do not, the result may be mutually destructive gridlock. These risks were salient in many of the contexts surveyed in Part I. In the South African constitutional debates, for example, objections to a white minority veto were lodged both on principled grounds of the right of the majority to rule and on the prudential ground that it would lead to gridlock.<sup>242</sup> The failure of consociational arrangements in countries like Yugoslavia (under its 1974 constitution) has, in fact, been blamed on the governance deadlock created by the mutual veto power of uncooperative ethnic groups.<sup>243</sup> In the United States, proponents of unfettered executive power during emergencies worry that greater congressional involvement, whatever its benefit to rights-holders, will substitute dangerous delays, obstructionist harassment, and political dealmaking for efficacious executive decisionmaking.<sup>244</sup> Guinier neglects to mention that no major jurisdiction mandates cumulative voting for corporate boards, in large part because “controlling shareholders fear both strategic behavior (hold-ups) by minority shareholders and higher decisionmaking costs arising from the risk of conflict and possible deadlock on the board.”<sup>245</sup> The efficacy of the U.N. Security Council is severely limited by the veto power of the five permanent member states. Collective bargaining under labor law sometimes results in costly strikes

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241. On the general vices of giving “a minority a negative upon the majority” through supermajority or unanimity rules, see THE FEDERALIST NO. 22, *supra* note 11, at 147 (Alexander Hamilton); and DENNIS C. MUELLER, PUBLIC CHOICE III, at 72-76 (2003).

242. See READ, *supra* note 41, at 197. These arguments were countered by Lijphart and other proponents of consociational democracy, who in turn invoked Calhoun’s arguments in defense of the democratic innocuousness and practical workability of the minority veto. See *id.*

243. See, e.g., *id.* at 213 (“As a result [of holdouts,] the federal government was completely unable to make effective economic policy, which worsened the very ethnic and nationality conflicts the consensus system was intended to diffuse.” (citing SUSAN L. WOODWARD, BALKAN TRAGEDY 60 (1995))).

244. See POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 44, at 47. More generally, there is a longstanding debate between the proponents of legislative-executive separation of powers, who emphasize the benefits of raising the transaction costs of governance in terms of preserving liberty and preventing tyranny, and admirers of Westminster-style parliamentary government, who see the separation of powers as a recipe for ineffective, gridlocked government. See Levinson & Pildes, *supra* note 58, at 2325-29. A microcosm of the same debate exists about the virtues and vices of bicameralism, federalism, and the minority-empowering, consensus-driven norms of the U.S. Senate.

245. KRAAKMAN ET AL., ANATOMY, *supra* note 130, at 56.

and shutdowns. And, of course, the jury unanimity requirement, idealized by Calhoun and Guinier among others as a paradigm case of consensus decisionmaking and minority inclusion, is also known to generate high decision costs, hung juries, and dubious acquittals.<sup>246</sup>

In contexts where the costs of granting minorities sufficient decisionmaking power to protect their critical interests are too high, rights may emerge as a preferable alternative. In other contexts, democratic principles and functional imperatives may preclude any voice at all for minorities in the relevant decisionmaking processes.

Consider the plight of nonresident aliens vulnerable to indefinite detention by the U.S. government as enemy combatants in the war on terrorism. Given that noncitizens cannot vote in U.S. elections, there is a strong case to be made on process theory grounds that nonresident aliens whose liberty and other fundamental interests are threatened by the U.S. government should receive rights protection to compensate for their lack of representation.<sup>247</sup> The Supreme Court recently took a step in that direction, holding in *Boumediene v. Bush* that noncitizen detainees at Guantanamo Bay are constitutionally entitled to habeas corpus.<sup>248</sup> From a process theory perspective, the obvious alternative to rights-based protection for aliens is enfranchisement. In theory, a strong case might be made for enfranchising everyone whose interests might be affected by a democratic decisionmaking process—a principle that would entail “giving virtually everyone everywhere a vote on virtually everything decided anywhere.”<sup>249</sup> In practice, however, virtually no one thinks it would be a good idea to open the U.S. political process to everyone in the world.<sup>250</sup> Extending

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246. Similarly, jury nullification has been frowned upon by courts on the grounds that “[t]o assign the role of mini-legislature to the various petit juries, who must hang if not unanimous, exposes criminal law and administration to paralysis, and to a deadlock that betrays rather than furthers the assumptions of viable democracy.” *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

247. See, e.g., ELY, *supra* note 60, at 161–62; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002).

248. 553 U.S. 723 (2008).

249. Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHI. & PUB. AFF. 40, 68 (2007). Democratic theorists have long puzzled over principled criteria for establishing the appropriate boundaries of the *demos*. See, e.g., DAHL, *DEMOCRACY AND ITS CRITICS*, *supra* note 234, at 193–209; Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in *LIBERAL DEMOCRACY* 13 (J. Roland Pennock & John W. Chapman eds., 1983).

250. Some do believe that it would be a good idea to create a world government to supersede the U.S. political process. That would make it possible to enfranchise everyone affected by government decisionmaking, i.e., everyone in the world. See Goodin, *supra* note 249, at 64–65. But this possibility remains infeasible, if not dystopian.

rights protections to nonresident aliens whose fundamental interests are significantly threatened by U.S. policies may thus be the only practical alternative to leaving these people unprotected.<sup>251</sup>

Similar limitations on the desirable or feasible scope of the political community appear in a number of the examples from Part I. Corporate law could, in theory, provide for the representation of workers, creditors, and consumers on boards of directors. In fact, some European jurisdictions do mandate worker representation on corporate boards. But this is regarded as a “remarkable experiment in corporate governance,” and it has not been extended to other parts of the world or to other stakeholder groups.<sup>252</sup> Judicially enforced duties of corporate officers and directors to non-shareholders is the more common approach to protecting these constituencies.<sup>253</sup> Global governance institutions must confront more severe limitations on the representation of those affected by their decisions. In the short term, at least, there is no realistic prospect of creating full-fledged participatory or representative democracy at the international level, or even at the European regional level.<sup>254</sup> It bears emphasis that one important barrier to enfranchising the stakeholders of international regulatory bodies is the formal limitation of treaty-making authority to *states*, which necessarily leaves private individuals and groups at least one political layer removed from direct control of treaty-based organizations. More broadly, the formidable difficulties of extending democracy beyond preexisting, state-level political communities has led a number of theorists to seek “compensatory” mechanisms for legitimating transnational governance institutions—prominently including rights.<sup>255</sup>

To summarize the discussion thus far, some combination of normative and functional barriers may make it costly or infeasible to provide minorities with sufficient power in democratic decisionmaking processes to protect their fundamental interests. Where votes are ineffective, expensive, or entirely off the table, we might expect rights to play a greater role.

In other contexts, however—and especially in constitutional ones—it is rights that are thought to be ruled out or rendered ineffectual by democratic imperatives. Most obviously, commitments to popular sovereignty and self-

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251. Cf. *id.* at 62-63, 66-67 (raising the possibility of limiting the power of a collective decisionmaker to make decisions affecting those who are not represented, or compensating the unrepresented for harms inflicted upon them by such a decisionmaker).

252. KRAAKMAN ET AL., *ANATOMY*, *supra* note 130, at 62.

253. See *id.* at 66-67.

254. See *supra* Section I.H.

255. See Búrca, *Developing Democracy*, *supra* note 115, at 240-48.

government often cast doubt upon the democratic legitimacy of rights-based limitations on majority will. So long as rights are conceived as constraints on democratic decisionmaking, they must answer to those who would prioritize democratic self-determination above all else. Of course, democratic concerns are exacerbated where, as in most constitutional democracies, unelected judges are authorized to interpret and enforce rights. In U.S. constitutional law, the infamous “countermajoritarian difficulty” is associated with constitutional rights in general, but with the institution of judicial review in particular. As judicially enforced bills of rights have spread to other countries as part of the standard package of liberal democratic constitutionalism,<sup>256</sup> democratic concerns about both rights and judicial enforcement have likewise come to the fore.<sup>257</sup> These concerns are certainly hard to miss in Ran Hirschl’s portrayal of courts in South Africa, Israel, and other countries enforcing constitutional rights to protect the wealth and privilege of politically dispossessed elites against democratic majorities.<sup>258</sup>

A further source of concern about countermajoritarian rights is that they might not be very effective. Recall Madison’s dismissal of countermajoritarian rights as parchment barriers against the overwhelming force of majority rule, and the more general doubts about the durability of rights (relative to votes) discussed above. Among contemporary constitutional lawyers and theorists, such doubts are often mitigated by an abiding faith in the countermajoritarian capacity of judicial enforcement. If popular majorities and the political branches of government cannot muster the will to heed constitutional prohibitions, then we can count on courts to enforce them. Yet invoking courts as an enforcement mechanism just pushes the question back to why popular majorities and other powerful political actors are willing to pay attention to what judges say—why “people with money and guns ever submit to people armed only with gavels.”<sup>259</sup> Without some further explanation of how courts

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256. See Choudhry, *After the Rights Revolution*, *supra* note 210, at 304; Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 423-30 (2000) [hereinafter Hirschl, *Looking Sideways*].

257. See, e.g., Reynaud N. Daniels & Jason Brickhill, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 PENN. ST. INT’L L. REV. 371 (2006); Hirschl, *Looking Sideways*, *supra* note 256, at 434-40; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 662-69 (2005).

258. See HIRSCHL, *TOWARDS JURISTOCRACY*, *supra* note 97, at 11-12.

259. Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 26 (2007) (observing that “[t]he Court cannot stand outside of politics and exercise a unique role as guardian of constitutional

can stand in the way of a determined popular majority, judicial review is merely a *deus ex machina* response to Madisonian skepticism about the viability of countermajoritarian rights.

One might wonder, for example, how courts on Hirschl's model of "juristocracy" manage to sustain their authority to protect the interests of elites against dominant political majorities intent upon redistribution. Other theorists have been less sanguine about the power of judges. Donald Horowitz advises constitutional designers in divided societies like South Africa to invest in electoral structures that will encourage political appeals across ethnic groups rather than relying upon "fragile" judiciaries susceptible to political manipulation or override.<sup>260</sup> Even the relatively strong judiciary in the United States has very seldom attempted to enforce rights that stand in the way of the strongly held preferences of national political majorities.<sup>261</sup> Recall, in particular, the earlier discussion of the unwillingness of courts throughout U.S. history to enforce rights and liberties to constrain executive power during times of war and crisis, and the corresponding preference of some commentators to mobilize presumptively more legitimate and powerful political institutions like Congress.<sup>262</sup>

Concerns about both the democratic legitimacy and countermajoritarian capacity of rights are widespread. Whether these concerns should be focused distinctively on rights is less clear, however. With regard to democratic legitimacy, if deviations from majority rule are sufficient to raise doubts about democratic legitimacy, these doubts should extend to political structures that give minorities more than their proportionate share of decisionmaking power. There is no obvious reason why countermajoritarian constitutional rights should be viewed as any more threatening to democratic values than, say, bicameralism or the U.S. Senate. Moreover, to the extent democratic concerns are focused on judicial review, we should keep in mind that courts in the

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verities" because "the Court's judgments will have no force unless other powerful political actors accept the . . . priority of the judicial voice").

260. DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 158-60 (1991).

261. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); see also ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) ("It is hard to find a single historical instance when the court has stood firm for very long against a really clear wave of public demand."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.").

262. See *supra* Section I.C.



United States and other constitutional systems enforce not just rights but also the rules governing elections, separation of powers, and other “voting”-side institutions.<sup>263</sup> Countermajoritarian arrangements and judicial review can and do exist on both sides of the line between rights and votes. With regard to countermajoritarian capacity, doubts about the efficacy of rights point back to the puzzle of why we should expect democratic political structures to be any more resilient against opposition.<sup>264</sup> If politically dominant majorities have no interest in protecting a minority group, they might well ignore or repeal its rights (or override judicial enforcement efforts). But majorities might just as readily disenfranchise or otherwise politically disempower minorities. Here again, rights and votes appear to be on a par.

In sum, there is a set of generalizable considerations, grounded in democratic theory and practice, that may militate against votes and in favor of rights in certain categories of cases. Where minorities are too small or for other reasons politically inefficacious, it may be infeasible to structure a system of representation and political decisionmaking that affords them adequate protection for their interests—at least not without also granting them unjustifiable holdout power over a broader range of issues or creating prohibitive decision costs. Additionally, some groups may be categorically ineligible for political representation, leaving rights as the only viable option. (This limitation of votes might be analogized to conceptual limitations on the scope or substance of rights protections.<sup>265</sup>)

There is another set of considerations, also grounded in democratic theory and practice, that is often invoked to criticize rights and to exalt the relative virtues of votes. Countermajoritarian rights, and especially judicially enforced rights, are said to raise distinctive concerns about democratic legitimacy and practical efficacy. On this score, however, there is reason for skepticism. Again, political decisionmaking structures and processes can be every bit as countermajoritarian as rights. And judicial interpretation and enforcement of the rules governing these decisionmaking structures and processes should share whatever democratic deficits are attributed to courts’ interpretation and enforcement of rights. Along democratic dimensions, then, the juxtaposition of rights and votes illuminates commonalities as well as differences.

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263. See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* (3d ed. 2007).

264. See *supra* notes 213-216 and accompanying text.

265. See *supra* notes 247-255 and accompanying text.

*D. Expression and Acculturation*

Beyond their direct, material consequences, rights and votes may also have important expressive, constitutive, and acculturative implications. The two devices are thought to send different messages about membership in the political community and to have different effects on the development of moral personality and political culture. Rights and votes are also thought to contribute to the essentialization or integration of minority groups in different ways.

In addition to the instrumental value of the ballot in furthering the interests of those with political power, enfranchisement and political participation often are associated with at least two kinds of intrinsic benefits.<sup>266</sup> The first is the expressive value of inclusion in the political community.<sup>267</sup> Voting is understood to be emblematic of “social standing” and “civic dignity.”<sup>268</sup> At least since Aristotle, exclusion from political life has been viewed as a form of dishonor or denigration,<sup>269</sup> and inclusion is a large part of what has distinguished full-fledged members of the polity from slaves and second-class citizens.<sup>270</sup> Securing the ballot thus represents an important victory in the “politics of recognition.”<sup>271</sup> In addition to the expressive benefits of voting, political participation has long been viewed through a civic republican lens as a crucial component of both individual character formation and communal solidarity.<sup>272</sup> John Stuart Mill believed that participation in democratic governance fostered qualities of both self-reliance and public-spiritedness.<sup>273</sup> Other democratic theorists have emphasized the benefits of

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266. See Ellen D. Katz, *Race and the Right To Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 512-14 (2000) (describing the expressive and self-identification benefits of voting and political participation).

267. See Gardner, *supra* note 84, at 905-06.

268. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2-3 (1991); see DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 219 (1989).

269. See Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC. 307, 314 n.20 (1998) [hereinafter Waldron, *Participation*].

270. See SHKLAR, *supra* note 268, at 15-17.

271. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1144 (2005).

272. On republicanism and political participation, see generally Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

273. See John Stuart Mill, *Considerations on Representative Government*, in ON LIBERTY AND OTHER ESSAYS 202, 303-24 (John Gray ed., Oxford Univ. Press 1991) (1861).

active political participation in developing personal autonomy and responsibility, reflective moral agency, and deliberative capacity—qualities that are valuable for both the individual and society.<sup>274</sup>

Rights, too, come with some positive associations. In fact, rights in the liberal tradition have been understood to reflect and further some of the same values as votes—autonomy, free will, rational agency, and equality.<sup>275</sup> At the same time, however, there is a long and robust tradition of skepticism about the expressive meaning and constitutive effects of rights that stands in contrast to the seemingly universal and unambiguous affirmation of the value(s) of political participation. Rights have been attacked by socialists and conservatives alike for their atomistic, anticomunal connotations. As Marx famously argued, “none of the so-called rights of man goes beyond egoistic man, . . . withdrawn behind his private interests and whims and separated from the community.”<sup>276</sup> In Marx’s view, liberal rights reflect and perpetuate a culture of selfishness, present a false picture of isolated human nature, and paper over massive inequalities of economic and political power with empty guarantees of formal equality.<sup>277</sup> Contemporary communitarian theorists on both the left and right have echoed these themes.<sup>278</sup> In addition to promoting selfishness and hindering solidarity, rights are blamed for heightening social

274. See DAHL, *DEMOCRACY AND ITS CRITICS*, *supra* note 234, at 91-93.

275. See, e.g., DWORKIN, *supra* note 182, at 277 (grounding rights in the moral imperative that government treat its citizens with “equal concern and respect”); Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 1, 11 (Jeremy Waldron ed., 1984) (“Rights have been seen as a basis of protection not for all human interests but for those specifically related to choice, self-determination, agency, and independence.”); Waldron, *Participation*, *supra* note 269, at 330-32 (associating the idea of rights with individual agency, autonomy, and competent judgment).

276. KARL MARX, *ON THE JEWISH QUESTION* (1843), *reprinted in NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 137, 147 (Jeremy Waldron ed., 1987).

277. See Jeremy Waldron, *Karl Marx’s ‘On the Jewish Question,’ in NONSENSE UPON STILTS*, *supra* note 276, at 119, 126-29. Marx took a more sanguine view of democratic rights, which are “only exercised in community with other men.” MARX, *supra* note 276, at 144; see also Waldron, *supra*, at 129-32 (elaborating Marx’s views about democratic politics).

278. See Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991*, at 370, 374 (1993); Leif Wenar, *Rights*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (rev. July 2, 2011), <http://plato.stanford.edu/archives/fall2011/entries/rights>. Important critiques of rights-based liberalism from a communitarian perspective include ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); and 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 187-229* (1985).

conflict, inhibiting dialogue, undermining responsibility, and generating a culture of passivity, dependence, and entitlement.<sup>279</sup>

These kinds of expressive and constitutive concerns have been cited as reasons for preferring votes to rights in a number of the contexts discussed in Part I. For example, election law scholars argue that protecting racial minorities with constitutional rights invites the depiction of these groups and their members as “objects of judicial solicitude, rather than as efficacious political actors in their own right.”<sup>280</sup> These scholars are inclined to view bolstering the voting weight of racial minorities (for example, by drawing majority-minority districts pursuant to the Voting Rights Act), in contrast, as valuable forms of “empowerment” affording minorities “the status of insiders” and the opportunity to enjoy “the sense of efficacy or agency associated with being in charge” that routinely comes with being in the majority.<sup>281</sup> Theorists of comparative constitutional design likewise view political power, in contrast to judicially enforced rights, as “an essential vehicle for distributing the expressive resources . . . of recognition.”<sup>282</sup> Discussing the constitutive implications of rights and votes in the context of the European Union, Joseph Weiler sounds the familiar warning that the EU’s emphasis on human rights and judicial enforcement—in conjunction with the absence of meaningful opportunities for democratic participation at the level of EU governance—risks undermining the virtues of its citizens by fostering self-centeredness and undermining their sense of political duty and responsibility.<sup>283</sup> Scholars of the law of the workplace sound similar notes when they contrast labor law’s conception of workers as “citizens of the workplace[,] actively participating in its governance,” with employment law rights, which they see as “rendering employees the passive beneficiaries of the government’s protection.”<sup>284</sup>

279. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

280. Heather K. Gerken, *Keynote Address: What Election Law Has To Say to Constitutional Law*, 44 *IND. L. REV.* 7, 13 (2010) [hereinafter Gerken, *Keynote Address*] (quoting Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 *YALE L.J.* 1329, 1332 (2005)).

281. *Id.* at 10–12.

282. Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES*, *supra* note 86, at 173, 177 [hereinafter Pildes, *Ethnic Identity*] (citation omitted).

283. J.H.H. Weiler, *Europe Against Itself: On the Distinction Between Values and Virtues (and Vices) in the Construction and Development of European Integration* (Mar. 26, 2009) (unpublished manuscript), <http://www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf>.

284. ESTLUND, *supra* note 150, at 11.

These examples capture a clear central tendency in comparisons of rights and votes, but the expressive and constitutive implications of each seem highly contextual.<sup>285</sup> For example, Lani Guinier views “tokenistic” approaches to minority voting rights that limit themselves to “the election day ratification of black representatives” as disempowering in much the same way that Marx viewed rights.<sup>286</sup> Somewhat similarly, conservative critics of redistricting under the Voting Rights Act view the intentional creation of majority-minority districts as “hand-outs” to needy and dependent minorities, indistinguishable from affirmative action and other “special rights.”<sup>287</sup> More broadly, the expressive and constitutive implications of rights and votes must depend heavily on the particular form taken by each. Guinier views some voting strategies as respectful and empowering, others as belittling and tokenistic. On the rights side, communitarians would certainly take a different view of second- and third-generation rights to the redistribution of economic and social resources than they do of rights in their traditional, negative-liberty incarnations.

In contexts involving racial, ethnic, or religious groups, another type of ideological variable is thought to influence the relative attractiveness of rights and votes. A recurring warning in these contexts is that institutionalizing group differences in democratic politics will undermine social stability by increasing the salience of ethnic identity, exacerbating group conflict, and impeding the development of a shared national identity. In the debates surrounding the design of the South African Constitution, for example, consociational power-sharing arrangements were criticized—and ultimately rejected—on the grounds that they would entrench ethnic divisions and conflicts.<sup>288</sup> Rights, in contrast, tend to be viewed as more conducive to breaking down group identity and facilitating assimilation. Thus, writing in the context of comparative constitutional design, Sujit Choudhry describes bills of rights as “encod[ing] and project[ing] a certain vision of political community” by calling upon citizens “to abstract away from race, religion, ethnicity and language, which have previously served as the grounds of political identity and political division, and to instead view themselves as citizens who are equal bearers of constitutional rights.”<sup>289</sup>

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285. See Anne Phillips, *Democracy Versus Rights?* (Sept. 2007) (unpublished manuscript) (on file with author).

286. GUINIER, *TYRANNY*, *supra* note 226, at 69.

287. See Gerken, *Keynote Address*, *supra* note 280, at 10-14.

288. See Murray & Simeon, *supra* note 94, at 420.

289. Choudhry, *After the Rights Revolution*, *supra* note 210, at 10-11, 16-22.

Here again, however, this stark contrast seems to presuppose that the rights in question are traditionally liberal, individualistic, and anticomunal. That breed of right continues to predominate,<sup>290</sup> but it is not the only possibility. In U.S. constitutional law, rights-based affirmative action programs have triggered the same concerns about racial essentialism and balkanization as the use of racial gerrymandering to increase minority political representation.<sup>291</sup> We might likewise expect the kinds of group-differentiated, or “polyethnic,”<sup>292</sup> rights found in the South African Constitution and elsewhere to create acculturative effects similar to those of group-differentiated political arrangements.<sup>293</sup> Commentators describe the South African Constitution as dealing with ethnic difference through a strategy of “recognition without empowerment,” combining an accommodationist approach to minority rights with an integrationist approach to democratic politics.<sup>294</sup> But it is not at all clear why the risks of entrenching ethnic identity and conflict that are avoided in the political sphere are not reintroduced in the social and cultural sphere. Perhaps there is something about ethnic specificity in politics that is particularly dangerous, more so than in the realm of sociocultural rights. But what that something might be remains to be identified.<sup>295</sup>

Any contrast between the acculturative consequences of rights and votes also would seem to depend heavily on the institutional mechanisms through which minority political representation is accomplished. It is not hard to see

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290. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 2-4 (1995) (describing the dominance of universal social and cultural rights over group-specific rights to protect minorities).

291. *Compare Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (“So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race.”), *with Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.”).

292. See KYMLICKA, *supra* note 290, at 7.

293. *Cf. id.* at 176-81 (discussing the acculturative effects of political, social, and civil rights for minorities and arguing that *all* types of rights may facilitate social solidarity and stability).

294. See Murray & Simeon, *supra* note 94, at 411; Pildes, *Ethnic Identity*, *supra* note 282, at 193-95.

295. The design of the Constitution of India is similar and raises the same puzzle. In the Indian Constituent Assembly deliberations, special political safeguards for religious minorities—including reserved seats in legislatures and cabinet representation—were seriously considered but ultimately rejected for fear of undermining national unity and secularism. Yet the Constitution includes cultural and educational rights for religious minorities. See Bajpai, *supra* note 105.

how systems of consociational power-sharing among ethnic groups could entrench and exacerbate ethnic divides. But approaches that structure politics explicitly along ethnic lines are not the only ways of empowering minorities. In fact, the leading rival to consociationalism in comparative politics takes quite the opposite approach.<sup>296</sup> Donald Horowitz and his followers advocate “vote pooling” mechanisms that create incentives for parties and politicians to appeal for support across ethnic group lines.<sup>297</sup> Horowitz’s approach also relies on voluntary constituencies and thus allows for changes in ethnic identification over time, permitting voters to reassess in each election what their ethnic allegiances, if any, will be.<sup>298</sup> The primary ambition of this strategy of electoral design is to moderate the strength of ethnic group identification and foster cross-ethnic cooperation. Lani Guinier’s proposal of cumulative voting as a tool of minority empowerment in U.S. elections is supposed to work in much the same way, with similarly ameliorating consequences for racial essentialism and separatism.<sup>299</sup> When it comes to racial and ethnic acculturation, then, there may be as much variation among different kinds of structures for securing political representation—and also among different kinds of rights—as exists generally between the broad categories of rights and votes.

### *E. Summary*

Rights and votes are comparable and to some extent interchangeable tools for protecting minorities and other vulnerable groups, but they are not identical. Institutional designers and political and economic actors have perceived a number of generalizable differences between the two devices.

Perhaps most importantly, voting arrangements generally provide a more flexible and open-ended form of political power than rights. Whereas rights are typically specified in advance of collective decisionmaking processes and limited to blocking (or requiring) certain enumerated outcomes, voting arrangements typically empower groups to pursue a broad range of interests

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296. See Choudhry, *Bridging*, *supra* note 86, at 15–26.

297. See Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT & DEMOCRACY* 15, 20–30 (Andrew Reynolds ed., 2002); see also Choudhry, *Bridging*, *supra* note 86, at 22–23 (describing Horowitz’s approach).

298. See Pildes, *Ethnic Identity*, *supra* note 282, at 191.

299. See GUINIER, *TYRANNY*, *supra* note 226, at 16 (“As a solution that permits voters to self-select their identities, cumulative voting also encourages cross-racial coalition building. No one is locked into a minority identity. Nor is anyone necessarily isolated by the identity they choose.”).

that can change fluidly over time. Groups with transitory interests or with multiple interests of relatively equal weights will tend to benefit more from voting arrangements that allow them to revise, prioritize, and trade off their various interests than from rights that single out several of these interests for absolute protection and freeze them in place. On the other hand, groups that have intense and enduring interests in a small number of outcomes may prefer the greater security of rights. From the perspective of an institutional designer, the choice between rights and votes might be seen as protecting groups against particular forms of unfair treatment versus entitling groups to a certain overall share of beneficial outcomes. In settings where a group needs special protection only along certain dimensions, such as religious freedom or a minimum wage, rights will be the natural solution. In settings where a group is potentially vulnerable along numerous dimensions or where there is concern for the group's general welfare, institutional designers may turn to votes.

The relative "breadth" of voting power (in contrast to the "depth" of rights) has further implications. Empowering minorities to protect their fundamental interests through votes ordinarily requires that they be granted disproportionate influence over collective decisionmaking processes. But the generality and fungibility of votes means that minorities can use this influence not just to look out for their fundamental interests but also to deadlock the decisionmaking process or secure more than their fair share of favorable outcomes across the board. The fact that political power extends across a broad range of issues also places limits on which groups will be enfranchised in the first place. Groups may be vulnerable to certain exercises of collective decisionmaking power without possessing any stake or legitimate claim of participation in others. In these respects, rights have the advantage of being more narrowly tailored and limited in scope than votes.

Other widely shared intuitions about the differences between rights and votes seem on closer inspection less clear-cut. One deeply rooted assumption is that democratic decisionmaking structures and processes tend to be more durable and deeply entrenched against revision or override than rights or substantive entitlements. Constitutional theorists and political strategists since Madison have doubted that rights would be more than parchment barriers against determined majorities, while at the same time hypothesizing that these same majorities can be effectively thwarted by a constitutional structure of government that stacks the deck in favor of countermajoritarian political outcomes. What has never been explained, however, is why the structures and processes of democratic decisionmaking—equally derived from parchment and equally at odds with the interests of the politically powerful—will prove any more durable than rights.



Another common assertion, pitched at a normative level, is that rights are an antidemocratic impediment to collective self-governance in a way that voting arrangements are not. Yet here, again, it is unclear what is supposed to make the difference between rights and votes. Both can be cast in countermajoritarian forms, and both are interpreted and enforced through the democratically dubious institution of judicial review. Likewise, claims that votes have the distinctive capacity to empower groups, build solidarity, and increase the salience of group identity seem to depend on contingent features of certain types of voting regimes that are also features of certain kinds of rights. The expressive, constitutive, and acculturative implications of both rights and votes appear to be highly sensitive to the particular form taken by each, complicating (if not falsifying) claims of categorical differences.

### III. BEYOND “RIGHTS VERSUS VOTES”

The main thrust of this Article has been to portray rights and votes as ubiquitous alternatives, inviting more finely grained comparisons of their relative costs and benefits. This Part adds complexity to that basic picture along two dimensions. First, rights and votes can operate not just as substitutes but also as complements. Political power may increase the value of rights, and rights may contribute to political power. Second, rights and votes are not the only politico-legal mechanisms that exist for protecting minorities and other vulnerable groups. Decentralized governance arrangements, like federalism (or outright secession), can be viewed as a third generally comparable means of accomplishing the same goal.

#### *A. Rights and Votes as Complements*

Inasmuch as rights and votes serve the same functional purpose of protecting the interests of minorities and other vulnerable groups, it is useful to think of the two devices as substitutes. Yet rights and votes also appear to function as complements. The existence of one can increase the value or likelihood of the other.

One obvious source of complementarity is that political power may be needed to enforce or preserve rights. Of course, groups typically must possess some measure of social or political power in order to secure rights in the first place. But if that power dissipates over time, the group's rights may become vulnerable to repeal or nonenforcement. Consider the position of white elites in South Africa bargaining over the post-apartheid constitutional design. The NP and its constituents had plenty of political power at the constitutional bargaining stage, and they used that power to insist on some measure of rights

protection. But the NP had good reason to fear that once they yielded ongoing political power to the black majority, the rights they managed to secure as part of the constitutional bargain would be ignored or retrenched. Minorities and other groups in the position of the NP may therefore insist upon ongoing political power as a means of preserving their rights.

The practical dependence of rights on votes is visible in numerous contexts. Black disenfranchisement in the Jim Crow South was accompanied by the effective nullification of civil rights, whereas enfranchised blacks in Northern cities used their political muscle to secure new civil rights laws and compliance with existing constitutional and statutory bans on segregation and discrimination.<sup>300</sup> In the criminal justice system, black representation on juries might be similarly understood as the only practical way of preventing judges and other jurors from discriminating against black defendants.<sup>301</sup> Likewise, unionization of workers may be the best way of ensuring that employment law rights actually get enforced.<sup>302</sup> In the U.S. system of constitutional law, controversial rights may be sustainable only so long as a majority of sympathetic Justices can be maintained on the Supreme Court. If the beneficiaries of these rights do not have sufficient political power to prevail in the politics of presidential elections and judicial appointments, their political defeats will become constitutional ones. The business interests who lost out in national politics to Roosevelt's New Deal coalition also ended up losing their *Lochner*-era economic liberty rights.<sup>303</sup>

In these and other contexts, the preservation or enforcement of rights depends on the ability of the beneficiaries to exercise ongoing political power. It may be tempting to conclude that rights protection *always* depends on sustaining sufficient political power to resist retrenchment—that rights are worthless without votes. But that would be a considerable overstatement. Majorities and other politically powerful groups may choose to respect the rights of the less powerful for myriad reasons, ranging from intrinsic commitments to fair play and social justice to instrumental concerns about

300. See Klarman, *Puzzling Resistance*, *supra* note 65, at 789-803.

301. See Hills, *Back to the Future*, *supra* note 163, at 997-1001 (viewing *Strauder v. West Virginia*, 100 U.S. 303 (1880), in this light and arguing more generally that the Fourteenth Amendment's attempt to protect civil rights without also guaranteeing political rights was doomed to fail).

302. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2691 n.22 (2008) (citing sources).

303. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067-83 (2001) (describing this dynamic and elaborating it into a theory of constitutional change through "partisan entrenchment").

reciprocal treatment should power relations ever shift. Moreover, minorities and other groups lacking in formal political power may have other sources of leverage. For example, they might be able to threaten economic disruption, social unrest, or secession.<sup>304</sup> On Acemoglu and Robinson's model of democratization, the masses only need democracy because they are assumed to be incapable of threatening revolution whenever elites renege on redistributive promises.<sup>305</sup> Formally disempowered groups that *can* maintain a credible threat of taking to the streets may be able to preserve their rights. A sustained direct action campaign by formally disenfranchised civil rights demonstrators in the Jim Crow South led to the enactment of the 1964 Civil Rights Act.<sup>306</sup> The same is true of groups that can threaten to take their wealth and leave. Even after ceding political power to the black majority, white elites in South Africa maintained a credible threat of leaving the country with their wealth.<sup>307</sup> By analogy, minority shareholders in corporations may have sufficient economic power to secure rights in corporate charters even without possessing voting power or board representation within the corporation. Rights without any political support will indeed collapse, but sufficient support can sometimes be generated even where minorities and other vulnerable groups lack formal political power.

Switching the causal arrow of complementarity, rights may be a significant *source* of political power. In some settings, rights serve as rallying points for collective political action. Thus, notwithstanding Madison's general skepticism about the utility of countermajoritarian constitutional rights, he did believe that rights could be useful in guarding against the agency problem of representative government. When tyrannical officials were acting contrary to the interests of their constituents, Madison explained, rights could serve "as a

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304. Such forms of "de facto" political power might be contrasted with "de jure" political power of the sort that qualifies as "votes" in the analytic framework of this Article. See ACEMOGLU & ROBINSON, *supra* note 108, at 21. Alternatively, these forms of political power might themselves be classified as types of "votes," in which case it becomes more credible to argue that votes (in this more expansive sense) typically will be necessary to sustain rights.

On secession as an independent mechanism of minority protection (as opposed to a threat that can be leveraged into sociopolitical influence within the original political community), see *infra* Section III.B.

305. See *id.* at 25.

306. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 421-36 (2004).

307. Within the white elite, fear of the consequences of democratization was most intense among Afrikaner farmers, whose wealth was tied up in land. Financial and industrial elites could more easily escape expropriation by a democratic majority by moving their capital abroad. See CARLES BOIX, DEMOCRACY AND REDISTRIBUTION 12 (2003).

standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community.”<sup>308</sup> Throughout American history, political movements in support of racial minorities, women, gays and lesbians, and other disadvantaged groups have rallied around claims of constitutional and statutory rights.<sup>309</sup> In the employment law context, workers in some settings have organized themselves around the enforcement of statutory rights, engaging in the kinds of collective political action that labor law was initially designed to facilitate.<sup>310</sup>

A stronger version of this kind of complementarity arises in settings in which certain rights are necessary to the effective exercise of political power. It has long been recognized, for example, that meaningful democratic participation is impossible without a robust right to freedom of political speech.<sup>311</sup> Many rights have the effect if not the purpose of increasing the political efficacy of their beneficiaries in much the same way as free speech. Rights to property, freedom of association, and free exercise of religion, for example, will tend to help in obvious ways with political organizing, lobbying, and campaigning. The same is true of antidiscrimination rights, inasmuch as the ability of minorities to exercise political power will be undermined by discrimination in society at large.<sup>312</sup> Thus, Ely argues along these lines that

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308. Madison, Letter to Jefferson, *supra* note 17, at 162. The idea that violations of constitutional rights might mobilize majorities to punish their misbehaving representatives has been recast by contemporary legal theorists and social scientists as an explanation for the efficacy of constitutional law more generally and for the political stability of an independent judiciary. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

309. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001). On the other hand, the recognition of rights can also be politically *disempowering*. Judicial recognition of rights can create a backlash against the causes these rights were supposed to benefit. See Michael J. Klarman, *Why Backlash?* (August 2010) (unpublished manuscript) (on file with author); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (assessing the backlash hypothesis in the context of *Roe v. Wade*, 410 U.S. 113 (1973), and the politics of abortion). Even where judicially recognized rights do not create political backlash, they may lead to complacency or demobilization by the beneficiaries. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339 (1991) (presenting evidence that *Roe* led to the demobilization of the pro-choice movement).

310. See Sachs, *supra* note 302.

311. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

312. See Tushnet, *Politics of Equality*, *supra* note 71, at 889 (recounting arguments to this effect made by congressional Republicans in the debates leading up to the Fourteenth Amendment).

social “prejudice” against minorities impedes their political power and should be viewed as analogous to disenfranchisement for purposes of process theory.<sup>313</sup> Similar democracy-facilitating arguments have been made on behalf of welfare, privacy, and education rights, among others.<sup>314</sup>

Finally, rights and votes can also operate as complements at an ideological or expressive level. Social acceptance of the agency, capacity, or equality of certain groups may lead to both political enfranchisement and recognition of rights. In Jeremy Waldron’s view, to grant someone a right is to recognize her capacity for disinterested moral deliberation and autonomous decisionmaking—a capacity that also militates for her inclusion in democratic processes.<sup>315</sup> A similar connection between the rights and political capacity of African Americans was asserted by congressional Republicans during debates over the 1866 Civil Rights Act. John Bingham, among others, made the case that “equality with respect to civil rights was premised on a theory of humanity that entailed equality with respect to political . . . rights.”<sup>316</sup> Reversing the same relationship, Reva Siegel argues that we should carry over the enlightened understandings of women’s autonomy reflected in the Nineteenth Amendment to how we think about women’s equality rights under the Fourteenth Amendment. In Siegel’s view, women’s suffrage signified “equal citizenship” and an end to their subordination in the household. She argues that those same constitutional commitments should lead us to embrace rights protecting women against domestic violence and other forms of repression “in and through the family.”<sup>317</sup> More generally, where rights and votes rest on the

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313. See ELY, *supra* note 60, ch. 6.

314. See COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 14 (2007). On education rights, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting). The more a right’s value comes from its instrumental utility in enhancing political efficacy, the more it might make sense, within the analytic framework of this Article, to reclassify the right at least partially as a form of “voting” power. If the value of free speech is primarily in facilitating political participation, then perhaps free speech “rights” are better understood as equivalent to votes. The many “hybrid” rights that carry both intrinsic and politically instrumental value, including rights to property and nondiscrimination, straddle and perhaps problematize the rights/votes dichotomy.

315. See Waldron, *Participation*, *supra* note 269, at 330-34. Waldron says that democratic participation “calls upon the very capacities that rights as such connote, and it evinces a form of respect in the resolution of political disagreement which is continuous with the respect that rights as such evoke.” *Id.* at 334.

316. Tushnet, *Politics of Equality*, *supra* note 71, at 888-89. The quoted language is Tushnet’s.

317. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1041 (2002).

same foundational values, we might expect to see them expand (or contract) in tandem.

*B. A Third Option: Exit and Autonomy*

Albert O. Hirschman's famous juxtaposition of "voice" and "exit" strategies suggests a broader frame that might be placed around rights and votes as tools for protecting minorities.<sup>318</sup> If votes are analogized to voice in democratic decisionmaking processes, then a number of political (and other organizational) arrangements might be analogized to exit. In particular, federalism and other systems of decentralized government effectively permit groups to exit a single, centralized collective decisionmaking process by claiming autonomy over certain issues. Secession and complete political independence are simply more extreme versions of the same basic strategy.<sup>319</sup>

The functional parallels between federalism and similar exit strategies on the one hand and rights and votes on the other have been noticed in a number of the contexts discussed throughout the Article. The Madisonian design of the U.S. Constitution and the Bill of Rights as it was originally understood both relied upon federalism and the preservation of state and local institutions of self-government to protect citizens against the tyranny of federal officials. In this regard, federalism was viewed as a direct substitute for rights.<sup>320</sup> Federalism has also self-consciously substituted for, or worked together with, votes. For Calhoun and other antebellum Southerners, representational strategies such as the Senate veto over national policymaking stood alongside federalism and states' rights as dual political and constitutional bulwarks

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318. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

319. It is possible to view at least some types of rights as continuous with, or a special case of, federalism and secession. To the extent rights function to grant individuals or groups autonomy over a certain sphere, they can be understood as delegations of decisionmaking authority in much the same way as decentralized or independent governance arrangements. This is the analogy invoked by H.L.A. Hart's description of right holders as "small-scale sovereign[s]." H.L.A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162, 183 (1982). A further step in this direction is to recognize that rights protecting individual autonomy against government interference often have the practical effect of empowering nongovernmental groups—families, schools, unions, churches, and the like—to exert more sway over individual choice. In this light, rights switch from one collective decisionmaking process (the traditionally governmental one) to another (which might be described as "private government"). See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003).

320. See Hills, *Back to the Future*, *supra* note 163, at 983-87.

against abolitionism.<sup>321</sup> The South's ultimate attempt at secession took the exit strategy a step further.

Similar comparisons between rights, votes, and exit are legion. The protection of first resort for corporate shareholders against managerial and majoritarian misfeasance is neither rights nor votes but exit in the form of selling their shares.<sup>322</sup> Constitutional designers and theorists concerned with protecting ethnic and religious minorities routinely consider federalism and partition along with political representation and rights.<sup>323</sup> In the case of South Africa, self-interested white elites pushed hard for federalism, in addition to both power-sharing in the national government and robust rights protections, as a further constitutional safeguard against dominance by a black African majority.<sup>324</sup> The basic framework for the international order, the Westphalian system of sovereign states, was conceived primarily as a solution to religious conflict. The state system thus can be viewed as an alternative to liberal rights for protecting individual liberty and freedom of conscience.<sup>325</sup> More broadly, much of the value still attributed to state sovereignty in global governance regimes and within confederations like the European Union comes from the role of states in shielding the vital interests of their citizens from international

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321. See READ, *supra* note 41, at 95-97.

322. See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1278 (1982) ("The ability freely to sell one's shares, . . . the so-called 'Wall Street Rule,' is without question the single most important safeguard to all shareholders that managers will act in their best interests."); see also KRAAKMAN ET AL., ANATOMY, *supra* note 130, at 23-28 (presenting rights, votes, and exit as alternative strategies for protecting shareholders).

323. See KYMLICKA, *supra* note 290, at 26-33. Lijphart sees federalism and power-sharing in the national government as complementary parts of the consociational design package. See LIJPHART, PLURAL SOCIETIES, *supra* note 87, at 25-47; see also DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 601-52 (2d ed. 2000) (presenting federalism alongside minority-empowering electoral systems as "substitutab[le]" techniques for managing ethnic conflict); Pildes, *Ethnic Identity*, *supra* note 282, at 173-76, 184-85, 198-200 (viewing democratic representation schemes, judicially enforced rights, and federalism as alternative tools for protecting ethnic minorities in constitutional design).

324. See Murray & Simeon, *supra* note 94, at 431-32. While the South African Constitution did create a system of multilevel government, the provinces were not set up as ethnic enclaves or strongly empowered as autonomous decisionmaking bodies. See *id.* at 432-34. *But cf.* Robert P. Inman & Daniel L. Rubinfeld, *Federal Institutions and the Democratic Transition: Learning from South Africa* (Nat'l Bureau of Econ. Research, Working Paper No. 13733, 2008) (describing how the South African system of federalism was structured to create one province in which white elites were sufficiently dominant to hold the black Africans in that province "hostage," giving the white elites leverage in negotiating with the majority-controlled central government).

325. See Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769 (2006).

control. In each of these contexts, some form of exit or autonomous decisionmaking arrangement is presented as a viable alternative to either increasing the political power of minorities within centralized decisionmaking processes or granting them rights against the outcomes of such processes.<sup>326</sup>

Conceiving of exit together with rights and votes as generally substitutable strategies for protecting minorities (and other vulnerable groups) seems like a useful extension of the rights versus votes framework.<sup>327</sup> The next step, ideally, would be to understand the considerations that lead institutional designers and political actors to opt for federalism and other exit strategies instead of, or in addition to, some combination of rights and votes. The remainder of this Section will offer some preliminary observations toward that end. While a full-fledged framework of analysis of that kind is beyond the reach of this Article, some preliminary observations may help lay the groundwork.

Starting with the most extreme possibility, the decision to divide a larger political community into two or more smaller ones (or not to merge several smaller communities into one larger) implicates a tradeoff between the benefits of scale and the costs of heterogeneity in the population.<sup>328</sup> For present purposes, the most salient costs of maintaining a larger political community are those suffered by minorities whose interests would be sacrificed in a larger political community. The magnitude of these costs will depend on the extent to which the interests of the minority differ from those of the majority and also on the extent to which some combination of political representation and rights can provide sufficient security against majoritarian exploitation. On the other side of the balance are the benefits of size, such as greater security and wealth owing to military and market economies of scale. In addition, joining a relatively prosperous community may offer relatively disadvantaged groups the

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326. The relevant arrangements obviously differ in significant ways. In some cases, groups literally exit a decisionmaking community, by seceding or selling shares (or refuse to enter a community, by remaining independent or not buying). In other cases, decentralized government arrangements create (or preserve) a unified decisionmaking community over some domain of issues while allocating other, specified issues to semi-autonomous sub-communities. The particular allocations of issues between centralized and decentralized decisionmakers differ both quantitatively and qualitatively. The number, scope, and composition of the decentralized decisionmaking units also vary across contexts. For present purposes, however, the important commonality is that vulnerable minorities in larger collective decisionmaking bodies can become autonomous majorities in smaller ones.

327. See Hills, *Federalism*, *supra* note 325 (identifying and comparing factional competition in national politics, rights, and federalism as alternative “liberal” solutions to the problem of deep divisions in society).

328. See ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 3-4, 18-23 (2003). *But see* THE FEDERALIST NO. 10, *supra* note 11 (James Madison) (developing a theory of how heterogeneity could be a benefit of scale).



promise (and relatively advantaged groups the threat) of redistribution of wealth and opportunity.<sup>329</sup>

Decentralized governance arrangements offer an intermediate possibility—or an array of possibilities, varying with the extent to and lines along which decisionmaking authority is divided—between complete political autonomy and unification. Minority groups might hope that a system of federalism would allow them to capture all the benefits of membership in a broader community while retaining autonomous decisionmaking authority over any issue that could threaten their critical interests. In practice, however, decentralized governance arrangements can seldom offer such a perfect solution. For one thing, the need to parcel out decisionmaking authority on every issue between the central and subsidiary governments tends to generate high administrative costs, if not continual disagreement and conflict. For another, granting minority communities autonomous authority over some issues almost invariably empowers them to impose external costs on members of the broader community. At the same time, the authority retained by the centralized government and by the other subsidiary governments almost invariably empowers them to threaten the fundamental interests of the minority community.

The American experience in the antebellum period illustrates the costs of federalism as an approach to minority protection. The system of constitutional federalism that gave Southern states autonomy to preserve slavery not only imposed increasing moral costs on Northern abolitionists but also empowered the South to block *any* assertion of national power, even in policy areas with no direct connection to slavery. Southerners' prophylactic insistence upon states' rights and limited national powers rendered the federal government nearly impotent.<sup>330</sup> At the same time, from the perspective of white Southerners,

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329. See ALESINA & SPOLAORE, *supra* note 328, at 4, 53–57.

330. Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1140–44 (2001); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 19 (1995) [hereinafter Weingast, *Market-Preserving Federalism*]. Compare the ANC's concerns about federalism in South Africa: "[W]ith an agenda for economic and social development that would require a strong and effective central government, the ANC and its allies were deeply suspicious of federalism." Murray & Simeon, *supra* note 94, at 432. Similar concerns have been voiced about the federal structure of the new Iraqi Constitution. Critics "insist that only a centralized government with a strong 'capacity' can perform vital nation-building tasks" such as "defeat[ing] the insurgency; fend[ing] off avaricious neighbors, particularly Iran; and protect[ing] minorities throughout the state." John McGarry & Brendan O'Leary, *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT'L J. CONST. L. 670, 679 (2007).

constitutional federalism alone could not prevent national majorities, or majorities in other states, from attacking and potentially eradicating slavery. Even if the rest of the country refrained from attempting to abolish or restrict slavery within the Southern states, it might well have the ability to undermine slavery from outside their boundaries. Southerners feared, for example, that abolitionist agitation and assistance would encourage slaves to rebel or escape, and that a ban on slavery in the federal territories would eventually suffocate the slave economy.<sup>331</sup>

Taking account of these costs and benefits, the exit/autonomy approach to minority protection might be compared to rights and representation along many of the dimensions identified in Part II. With respect to absoluteness and flexibility, secession and federalism share some of the advantages of political representation. Like representation, exit and autonomous decisionmaking arrangements afford minorities ongoing and adaptable control over some slate of issues, not limited to pre-specified forms of rights. Moreover, in favorable contrast to representation but similar to rights, minorities who comprise a majority in their own (subsidiary) government possess not just *some* influence over political outcomes but decisive control. On the other hand, the political autonomy of these controlling minorities is necessarily limited in domain or capacity, and it entails the sacrifice of any voice at all in the decisionmaking processes of the other governance units—even when the decisions made by those units might have important spillover effects.

With respect to democratic limitations, federalism, like other strategies to bolster the political power of minority groups, increases the transaction costs of centralized governance and places limits on broader majority rule. Secession, too, increases the transaction costs of cooperative governance among separate states by requiring international rather than intrastate agreements.<sup>332</sup> In any event, the potential for constituting minorities as (semi-)independent political decisionmaking communities is limited to groups of viably self-sufficient size

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331. See READ, *supra* note 41, at 96 (describing the views of Calhoun). Southerners also feared that Lincoln would undermine slavery by bribing Southerners with federal patronage or by appointing abolitionist customs officials, judges, and postmasters in the South. See 2 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT 1854-1861*, at 439 (2007).

332. See ALESINA & SPOLAORE, *supra* note 328, at 11. As with other forms of political empowerment, vesting minorities with a credible *threat* of secession gives them hold-out power and raises the risk of gridlock. See Tom Ginsburg, *Public Choice and Constitutional Design*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 261, 272-73 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

who are, or can become, geographically concentrated within the boundaries of an available territory.<sup>333</sup>

Along the dimension of durability, federalism, like democratic representation, is widely believed to provide a more secure and longer-lasting barrier against majoritarian dominance than judicially enforced rights.<sup>334</sup> This was Madison's view, and it has retained currency through the present. Federalism is commonly portrayed as "self-enforcing" in a way that substantive rights and entitlements are not.<sup>335</sup> Thus, just as Acemoglu and Robinson assume that enfranchisement of the poor serves as a more reliable commitment to redistribution than assigning them rights or entitlements, Barry Weingast and other theorists of "market-preserving federalism" argue that government decentralization is a more reliable method of *preventing* excessive redistribution than specifying property rights.<sup>336</sup> Here again, although no one has fully explained why we should expect federalism to be any more stable than property rights, the premise of "structural" durability—encompassing both centralized and decentralized decisionmaking structures and processes—remains influential.<sup>337</sup>

Finally, federalism might be compared to rights and votes with respect to their expressive and constitutive effects on minority groups and on the relationship of these groups to the broader polity. Empowering minorities to control some decisions may provide a form of recognition and empowerment more meaningful than mere enfranchisement.<sup>338</sup> On the downside, like group-differentiated political arrangements in divided societies, federalism is believed to exacerbate ethnic conflict and undermine national unity by hardening group identities and channeling political loyalties toward ethnically controlled

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333. Of course, the possibilities and limitations of decentralized or independent governance will also be affected by shared histories, traditions, and political identities. These ideological factors may induce otherwise heterogeneous groups to form or remain loyal to a unitary political community.

334. On the assumption that state borders are more difficult to transgress than intrastate boundaries, secession might be a still more durable arrangement.

335. See, e.g., Sunita Parikh & Barry R. Weingast, *A Comparative Theory of Federalism: India*, 83 VA. L. REV. 1593 (1997); Weingast, *Market-Preserving Federalism*, *supra* note 330, at 3.

336. See Weingast, *Market-Preserving Federalism*, *supra* note 330.

337. Weingast does provide some context-specific reasons for why systems of federalism became stabilized in several different countries during specific time periods. See *id.* at 10-21.

338. See Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 64 (2010).

subsidiary governments.<sup>339</sup> Proponents of nationalism and integration view ethnicity-based decentralization as a step in the wrong direction. On the other hand, granting self-government to strongly identified minority groups may be the only way of preventing outright secession.<sup>340</sup> Moreover, giving minorities effective control in some districts or policy domains may actually diminish the salience of group identity by replacing intergroup with intragroup contestation.<sup>341</sup> In any event, as with rights and votes, the particular form that decentralization takes may be more important than the fact of decentralization alone.<sup>342</sup>

There is more that could be said about the costs and benefits of exit and autonomous decisionmaking strategies in comparison to rights and votes, and about how these strategies might substitute for and complement one another. For now, though, perhaps it is enough to recognize that these three kinds of strategies can be used individually or in combination to protect minorities, and that their relative costs and benefits can be assessed along a number of common dimensions.

## CONCLUSION

The basic point of this Article is a simple one. Instead of thinking of rights and votes as conceptually different and competing political and legal categories, in many contexts it may be more illuminating to view them as alternative tools for accomplishing similar functional goals. Both can be used, individually or in combination, to protect minorities and other vulnerable groups against the adverse outcomes of collective decisionmaking processes. Viewing rights and votes as the political and legal equivalents of wrenches and pliers naturally leads to questions about the comparative costs and benefits of the two tools. Where would it be better to use one rather than the other, or how might they be best combined? Are there other tools that might contribute to the job as well? The Article has attempted to sketch some general answers to these

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339. See PHILIP G. ROEDER, *WHERE NATION-STATES COME FROM: INSTITUTIONAL CHANGE IN THE AGE OF NATIONALISM* (2007); see also Sujit Choudhry & Nathan Hume, *Federalism, Secession, and Devolution: From Classical to Post-Conflict Federalism*, in *RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW* 366-67 (Tom Ginsburg & Rosalind Dixon eds., 2010) (describing this viewpoint and collecting additional sources).

340. See KYMLICKA, *supra* note 290, at 181-86; see also Choudhry & Hume, *supra* note 339, at 367-78 (describing this viewpoint and collecting additional sources).

341. See Heather K. Gerken, *Dissenting by Deciding*, 57 *STAN. L. REV.* 1745, 1794-95 (2005).

342. See Choudhry & Hume, *supra* note 339, at 36-42 (describing the views of Horowitz and others on designing a successful system of ethnically accommodative federalism).

questions, but the real value of the exercise may be in encouraging more focused, fact-intensive analyses in specific settings of interest.

There may be many such settings beyond the somewhat arbitrary collection cataloged above. To suggest just several, much of the law and theory of class action is concerned with how to protect the interests of individual class members given agency problems with class counsel and the existence of other litigants with competing interests. The range of potential solutions to these problems of class “governance” can be usefully taxonomized and analyzed as (1) rights, in the form of judicial review of the substantive fairness of class settlements or the adequacy of representation of class members; (2) votes, in the form of empowering class members to hire and fire lawyers, participate more directly in the conduct of the case, ratify settlements, or acquire separate representation for subclasses; and (3) exit, in the form of allowing or facilitating opt-out.<sup>343</sup> In contractual settings, parties may specify their substantive obligations by explicit terms in the contract, in effect creating “rights”; or, substituting “votes,” they may leave substantive obligations to be filled in over time through bilateral or collective decisionmaking processes. The latter strategy is characteristic of “relational” contracts<sup>344</sup> and also of more complex arrangements, such as those in which firms manage a joint project by contracting for ongoing governance structures (as well as by providing opportunities for exit).<sup>345</sup> Similar tradeoffs between ex ante specification of substantive entitlements and allocation through ongoing governance arrangements are implicated by the choice between individual property rights and common property regimes,<sup>346</sup> and by the choice between organizing production through contracting among independent entities or through vertical integration into a firm.<sup>347</sup>

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343. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376-77 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341-42.

344. See generally IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

345. See Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1402-10 (2010).

346. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 1-28 (1990); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

347. See OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* (1995); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND*

An advantage of the framework developed in this Article, then, is its generality. But, of course, generality has its downsides as well. Beyond the inevitable breadth-for-depth tradeoffs that readers will have noticed throughout, some obviously important questions defy least common denominator treatment. For one, the Article has made no attempt to supply a positive theory of when rights, votes, or some combination of the two have been or will be deployed in any given setting. Such a theory would require knowing more than simply the relative costs and benefits of the various institutional design possibilities. We would also need to know more about the institutional design *process*. Institutional design decisions about rights and votes (and exit) are themselves political decisions, made through collective decisionmaking processes of their own, with prior allocations of voting power (and perhaps also rights). Think, for example, of the constitutional design process in South Africa, the Delaware legislative process (along with other sources of corporate law rules), or the multilateral treaty negotiations that generated the United Nations and the European Union. In order to predict or explain the outcomes of such second-order decisionmaking processes, we would need to know which sociopolitical actors are empowered to participate, their interests and relative influence, and how the costs and benefits of various institutional design possibilities would be distributed among them. Given how contextual these variables will be, it is hard to see how a positive theory of rights and votes (and exit) could ever be generalized.

For similar reasons, the Article has not attempted to supply any normative theory of which groups *should* be empowered through voting or protected by rights. Here again, it is hard to imagine what a theory spanning so many contexts could possibly look like. Certainly we do not always want to protect “minorities” or other vulnerable groups. And even if we did, some further criteria would be necessary somehow to prioritize among the infinitely many candidate groups, figure out what to do about dissident factions within a group (the problem of “minorities within minorities”), and more. Determining which groups are entitled to—or, from a positive perspective, have the power to demand—special treatment seems like an unavoidably contextual enterprise.

Before such fact-specific, contextual analyses can proceed, however, rights and votes (as well as exit) must be brought into the same frame of analysis. That has been the modest ambition of this Article.

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