Further Beyond the Republican Revival: Toward Radical Republicanism

Paul Brest†

The contemporary revival of civic republicanism,[1] with its focus on citizenship, political equality, and deliberative decisionmaking, is surely a good thing. Intellectually, it promises escape from the dead end in which pluralist constitutional theory finds itself.[2] Politically, it moves toward fulfilling the deepest human impulses that underlie liberalism.[3]

Nonetheless, I want to suggest that we must go far beyond the current revival if we are serious about achieving republican aims. Most fundamentally, we must design and carry out programs of genuine participatory democracy in the multifold spheres of human activity. Toward this end, we must dispute the autonomy of conventionally "private" spheres, and confront the connection between economic and political equality—lest our theorizing be wholly arid and fantastical. Most radically—at least for legal scholars—we must abandon our obsession with courts and work toward the decentralization and democratization, not only of "ordinary" politics, but of constitutional discourse and decisionmaking itself. I will discuss the first points only briefly: though essential parts of the civic republican agenda, they also are more familiar than the last.

Let me begin by reviewing why citizen participation in a "deliberative democracy"[4] is desirable and—to anticipate my main point—why judicial exclusivity in constitutional matters is not.[5] One reason, and a central theme in the tradition of civic republicanism since the Athenian *polis*, is that participation in the public sphere realizes an important aspect of human nature and creates the foundation for a genuine community.[6] Al-

---

† Dean and Richard E. Lang Professor, Stanford Law School.

1. Although the term "civic republicanism" is redundant, conversations with colleagues and students suggest the need to distinguish republican thought from the ideology of the party of Ronald Reagan. I borrow the adjective from the Renaissance strain of republicanism known as "civic humanism." *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 58-60 (1975).

2. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Law Scholarship*, 90 YALE L.J. 1063 (1981); Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

3. *See, e.g.*, J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 43-66 (1873).

4. "Deliberative democracy" is Cass Sunstein's evocative term. *See* Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

5. The following argument is made at greater length in Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 1, 75 (1986).

6. *See* Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288

though I agree that participatory citizenship is a good in itself, I shall focus on the instrumental argument—"hypothesis" or "hope" may be the more accurate term—that participation tends to produce just laws or, more broadly, a just society. As Hannah Pitkin writes:

> [A]ctual participation in political action, deliberation, and conflict must make us aware of our more remote and indirect connections with others, the long-range and large-scale significance of what we want and are doing. Drawn into public life by personal need, fear, ambition or interest, we are there forced to acknowledge the power of others and appeal to their standards, even as we try to get them to acknowledge our power and standards. We are forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning. We are forced, as Joseph Tussman has put it, to transform 'I want' into 'I am entitled to,' a claim that becomes negotiable by public standards. In the process, we learn to think about the standards themselves, about our stake in the existence of standards, of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.[7]

William Nelson has similarly argued that democracy "moralizes" the process of government by requiring citizens and representatives to formulate conceptions of the common good in the course of justifying their claims.[8]

Elsewhere, I have called the process by which this moralizing or externalizing occurs "*discursive participation*"—participation that induces us to listen to other people's positions and justify our own.[9] Discursive participation induces us to assume the "moral point of view" that lies at the heart of most ethical-political systems.[10]

Political discourse—including legal and constitutional discourse—takes place in a wide variety of institutions, including conventionally "private" organizations like the family, corporation, union, and civic association as well as in referenda, elections, conventions, school boards, city councils,

---

(1966); *see also* H. ARENDT, ON REVOLUTION (1963); J.S. MILL, *supra* note 3, at 46; Keim, *Participation in Contemporary Democratic Theories*, in NOMOS XVI: PARTICIPATION IN POLITICS 1 (J. Pennock & J. Chapman eds. 1975).

7. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 347 (1981) (footnote omitted) (quoting J. TUSSMAN, OBLIGATION AND THE BODY POLITIC 78-81 (1960)).

8. *See* W. NELSON, ON JUSTIFYING DEMOCRACY 117-19 (1980).

9. *See* Brest, *supra* note 5, at 194.

10. The moral point of view is central to consequentialist and deontological theories. Discursive participation is no less essential to a feminist ethics of caring and responsibility. "Justifications" here may consist of thick descriptions of our perceptions and feelings, which may then be revised based on others' expressions of their perceptions and feelings. Without discourse, we are in danger of partial or myopic vision and in danger of reaching conclusions premised on incomplete understanding of their consequences for others. Republicanism is open to diverse modes of discursive participation. *See infra* note 40 and accompanying text.

legislatures, and courts. It may take place in connection with paradigmatic political activities such as lobbying or voting; or as part of "direct action" such as a labor strike or a civil rights sit-in;[11] or it may consist simply of talk among citizens.[12] Modern history may not justify great optimism about discursive participation in many of these institutions.[13] Nonetheless, it is at least ironic that much of the legal scholarship of the republican revival, rather than working to promote participation and discourse in those forums, is as court-centered as the pluralist scholarship from which it distinguishes itself.[14] In striking parallel with the work of contemporary (and essentially conservative) public choice theorists,[15] liberal republicans treat the judiciary as the primary if not the only place where deliberative democracy can take place. Sometimes with resignation, they treat the judiciary as the "trace of the People's absent self-government."[16]

To be sure, some republican programmatic proposals are aimed at improving discursive participation in other institutions. For example, in *Beyond the Republican Revival*, Cass Sunstein argues for campaign finance regulation and proportional representation as means of assuring that all voices are heard in the political process.[17] His arguments concerning rationality review and statutory construction are designed to encourage deliberation within legislatures. Sunstein also states that "the existence of realms of private autonomy must be justified in public terms,"[18] and notes "the close connection between republican systems and economic equal-

---

11. Civil rights activists in the 1960's engaged in endless deliberation about both the morality and constitutionality of civil disobedience. In conversation, my colleague Bill Simon has observed that Walker v. City of Birmingham, 388 U.S. 307 (1967), which holds that a person may be convicted for violating an unconstitutional injunction, devalues constitutional discourse and decisionmaking by citizens. *Cf.* R. DWORKIN, *Civil Disobedience*, in TAKING RIGHTS SERIOUSLY 206 (1977).

12. Citizens' discourse during the recent Iran-Contra and Bork nomination hearings are examples. One should not undervalue talk, even when it has no immediate political aim. Apart from its intrinsic educational aspects, citizen talk may eventually influence political decisions. Indeed, it may have contributed to Judge Bork's defeat.

13. *See, e.g.*, Brest, *Congress as a Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986). For some contemporary theoretical explanations of the problem, see J. ELSTER, SOUR GRAPES 33-42 (1983); Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

14. Much of the republican scholarship also seems to assume a naive view of judicial deliberations. For a more skeptical view, see B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

15. *See, e.g.*, Riker & Weingast, *supra* note 13. *Cf.* Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

16. *See, e.g.*, Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 65 (1986) (discussion of Bruce Ackerman); *see also id.* at 65-77; Michelman, Democracy, Social Groups, and the Judiciary (unpublished paper 1987) (on file with author). *But see* Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (building the foundations for a "dialogic constitutionalism").

17. Sunstein, *supra* note 4, at 1576-78, 1585-89.

18. *Id.* at 1551.

ity."[19] But he seems to shy away from the radical programmatic implications of these observations.

Civic republicans must broaden their focus beyond the judiciary, and indeed, beyond government institutions. A civic republican conception of citizenship supposes that people must be engaged in framing the rules and administering the institutions that govern all aspects of their communal lives. These institutions include the workplace as well as governments;[20] the fact that workers have little power over many of the decisions that immediately affect their lives is itself a serious participatory loss. Because industrial democracy can provide the foundation for active citizenship in conventionally "public" realms, its consequences reach beyond the workplace. As T.B. Bottomore writes:

> Can we accept that democratic government which requires of the individual independent judgment and active participation in deciding important social issues, will flourish when in one of the most important spheres of life—that of work and economic production—the great majority of individuals are denied the opportunity to take an effective part in reaching the decisions which vitally affect their lives? It does not seem to me that a man can live in a condition of unalterable subordination during much of his life, and yet acquire the habits of responsible choice and self-government which political democracy calls for.[21]

John Stuart Mill spoke of the meaninglessness of a "political act to be done only once in a few years, and for which nothing in the daily habits of the citizen has prepared him."[22] More recently, in a cross-cultural study of political participation, Gabriel Almond and Sidney Verba noticed that "political participation on the local level plays a major role in the development of a competent citizenry. . . . [It] may act as a training ground for political competence . . . [on] the national level."[23] What they said about local government applies a fortiori to the workplace.

The civic republican aims of participatory democracy are also undermined by economic inequality. Economic need compromises the independence that civic republican theorists deem a prerequisite to civic virtue[24]

---

19. *Id.* at 1552.

20. Republican citizenship may also affect the quintessentially private realm of the liberal family. *See* C. Pateman, Women and Democratic Citizenship, Jefferson Memorial Lectures, U.C. Berkeley, February, 1985; *see also* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (critiquing public/private distinction). *See generally* Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM (1981) (republicanism linked to liberal feminism); N. HARTSOCK, MONEY, SEX, AND POWER: TOWARDS A FEMINIST HISTORICAL MATERIALISM (1983).

21. Bottomore, *The Insufficiency of Elite Competition*, in FRONTIERS OF DEMOCRATIC THEORY 127, 135 (H. Kariel ed. 1970). *See generally*, C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); R. MASON, PARTICIPATION AND WORKPLACE DEMOCRACY (1982).

22. J.S. MILL, ESSAYS ON POLITICS AND CULTURE 229 (G. Himmelfarb ed. 1962).

23. G. ALMOND & S. VERBA, THE CIVIC CULTURE 188–89 (1963).

24. *See* J.G.A. POCOCK, *supra* note 1, at 381; Michelman, *supra* note 16.

and produces political inequality. "[O]f all the factors that social scientists have used to account for differences in political participation," Robert Dahl has written, "differences in social and economic status are the most important."[25] "Those who are better off participate more, and by participating more they exercise more influence on government officials."[26] Unequal resources produce unequal influence in determining which issues get on the political agenda and, indeed, which even seem open to discussion.[27] Campaign finance regulations barely begin to remedy the systematic ways in which inequalities of wealth distort the political process.[28]

Of course, there is room for disagreement, even among civic republicans, about the effects of, and remedies for, economic inequality and privatization of important realms of communal activity. But it seems obvious that these must be central items on the civic republican agenda. Why aren't they?[29] One answer is: "We'll get there, but first we must lay the theoretical foundations; legal scholars may properly begin to explore the implications of republican theory in the areas most familiar to us." If so, then surely it's about time to get on with our business. With due respect to Cass Sunstein, one of the most brilliant contemporary republican legal theorists, many of the proposals in *Beyond the Republican Revival* were made some time ago by mainstream pluralist theorists like Gerald Gunther and John Hart Ely.[30]

Another possible answer is that our expertise as legal scholars lies in the realm of legal doctrine, especially judge-made doctrine, and that macro issues of political and economic policy are best left to political scientists. Even if our realm were thus limited, however, there would remain considerable room for doctrinal work. Legal scholars have urged courts to require worker involvement in "management" decisions,[31] and in his justly renowned article, *On Protecting the Poor Through the Fourteenth Amendment*,[32] Frank Michelman argued for an equal protection theory

---

25. R. DAHL, DEMOCRACY IN THE UNITED STATES 450 (3d ed. 1976); *see also* E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 31–32 (1960) (political system has upper-class bias).

26. *Id.* at 449 (emphasis deleted).

27. *See* R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 47 (1982).

28. *See, e.g.*, C. LINDBLOM, POLITICS AND MARKETS 203–14 (1977); S. LUKES, POWER (1974); M TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW ch. 9, 280–92 (1988).

29. I will leave to a footnote the possible answer that the civic republican revival is just another waystation in liberal constitutional law scholars' perennial quest for a defensible role for the judiciary.

30. *See* J. ELY, DEMOCRACY AND DISTRUST (1980); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

31. *See, e.g.*, Atelson, *Management Prerogatives, Plant Closings, and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83 (1982–83); Klare, *Labor Law and Workplace Democracy*, CHIC. LAW., May 1987, at 24; Forum, 4 INDUS. REL. L.J. 450 (1981); *see also* Lynd, *Towards a Not-for-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property* 22 HARV. C.R.-C.L. L. REV. 13 (1987); Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988).

32. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through*

that would provide "minimum protections" for the necessities of life—protections that are preconditions for civic republican citizenship.[33] The courts' rejection of such arguments does not reduce their intellectual power—though it may suggest, as a practical matter, that the case should be made in other forums as well.

So we come to "other forums"—the focus of the remainder of this comment. In particular, I shall argue against the court-centeredness of constitutional scholarship—a myopia that, as I have said, pervades the work even of civic republican scholars.[34] *Constitutional discourse and decisionmaking are the most fundamental prerogatives and responsibilities of citizens.* Therefore, at the same time as civic republican scholars urge courts to help democratize non-judicial institutions, we must counteract the ideology and practices of judicial exclusivity. This may seem paradoxical. It is at least complicated.

Even if constitutional decisionmaking took place only in conventions or at other extraordinary historical moments,[35] it would be important for citizens to be involved in constitutional discourse at ordinary times—for the methods or habits of "constitutional thinking" likely cannot be developed on the spur of the moment. But constitutional decisionmaking does *not* take place only at rare moments. If modern court-centered scholarship has taught us anything, it is that the Constitution is constantly being made and remade—through each act of interpretation.

The question, then, is whether *only* the courts may participate in this ongoing process. The answer for civic republicans must be no—both because of the intrinsic importance of participation in such fundamental decisions and for an instrumental reason: Even if courts remain the primary agencies of constitutional change, judge-made doctrines are influenced by publicly held values and conventional morality.[36] To the extent that citi-

---

the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).

33. *Id.*; *see also* Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

> Without basic education—without the literacy, fluency, and elementary understanding of politics and markets that are hard to obtain without it—what hope is there of effective participation in the last-resort political system? On just this basis, it seems, the Supreme Court has itself expressedly allowed that 'some identifiable quantum of education' may itself be a constitutional right. But if so, then what about life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaught of social debilitation? Are not these interests the universal, rock-bottom prerequisites of effective participation in democratic representation—even paramount in importance to education and, certainly, to the niceties of apportionment, districting, and ballot access on which so much judicial and scholarly labor has been lavished? How can there be those sophisticated rights to a formally unbiased majoritarian system, but no rights to the indispensible means of effective participation in that system? How can the Supreme Court admit the possibility of a right to minimum education, but go out of its way to deny flatly any right to subsistence, shelter, or health care?

Id. at 677.

34. *See supra* note 16 and accompanying text.

35. *See* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

36. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (relying partially on fact that major-

zens' opinions are unreflective or misinformed, they will exercise a pernicious influence on constitutional decisions.

Civic republicans must therefore work to re-create[37] a space for citizens and non-judicial institutions to participate in constitutional discourse and decisionmaking. While courts can assist in the process, their role in the political system must change in the very process. For James Bradley Thayer was surely right that "[t]he tendency of a common and easy resort to [judicial review] is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[38]

The conflicted role of the judiciary is nicely illustrated by the situation in *Board of Education, Island Trees School District v. Pico*.[39] There, the Supreme Court, while saying that local school boards "must be permitted to establish and apply their curriculum in such a way as to transmit community values,"[40] held that the appellant could not ban books from the school library because of opposition to the ideas they expressed. From one (civic republican) point of view, the Court correctly opted for freedom of expression: preparation for self-government may require that citizens be educated to engage in the critique of received values.[41] But this ignores another (civic republican) value, poignantly expressed in dissent by Chief Justice Burger:

> [L]ocal control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people."[42]

On the one hand, judicial intervention may break up undemocratic pat-

---

ity of electorate thinks homosexual sodomy is "immoral and unacceptable" to find act not constitutionally protected); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Functions of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (examining ethical function of courts); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-54 (1973) (claiming judicial principles are derived from conventional morality).

Public opinion also affects the composition of appellate courts. President Reagan's unsuccessful nomination of Judge Bork to the Supreme Court and the electoral defeat of Rose Bird as incumbent Chief Justice of the California Supreme Court are two recent visible examples of this.

37. I say re-create because there have been times during our history when constitutional discourse was not the near-exclusive domain of courts. Consider the debates over the constitutionality of slavery before the Civil War. *See* W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977); *see also* D. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966); *cf.* N. POLLACK, THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE (1987) (discussing populism and populist emphasis on Constitution).

38. J.B. THAYER, JOHN MARSHALL 45 (1901).

39. 457 U.S. 853 (1982).

40. *Id.* at 864.

41. *See, e.g.*, L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981).

42. *Pico*, 457 U.S. at 891 (Burger, C.J., dissenting) (footnote omitted).

terns of political power,[43] and judge-made constitutional doctrine may enrich the vocabulary in which the local debate takes place. On the other hand, aggressive judicial intervention may frustrate the outcome of citizen participation in one of the few institutions where citizens can exercise power. The bounds of the schools' socializing mission presents a fundamental constitutional issue—an issue too important to be left entirely to the courts.

In fact, the library book issue engaged the populace of Island Trees in public discourse to an extent that few political issues do. But who in fact constituted the polity of Island Trees? Who controlled the agenda? Who participated in public discourse, and who was heard? And what should a civic republican make of the fact that the ultimate decision was one that tended to close discourse? Thus, we encounter the perplexities of a program for participatory consitutional decisionmaking. One way—perhaps the only way—to encourage citizens to engage in constitutional discourse is to uphold decisions like the one made by the Island Trees school board. But to act as if its decision were the product of undominated discursive participation is to pretend that the aims of democratic constitutional reform have already been achieved.

Extending the domain of constitutional decisionmaking beyond the judiciary raises other questions as well. The traditions of adjudication virtually assure that constitutional discourse within the judicial system will differ noticeably from constitutional discourse in non-judicial institutions. Citizens' and school board members' discussions about whether to ban library books will never look like the lawyers' or judges' elaboration of doctrine in the *Pico* case. But this does *not* mean that adjudication ought to set the standard by which other forms of constitutional discourse and decisionmaking are measured. Different modes of discourse—even constitutional discourse—may be appropriate to different institutions. One cannot anticipate what these modes might be under different scenarios of participatory constitutionalism,[44] let alone how the various groups charged with making and interpreting the Constitution should treat each others' decisions.[45] But constitutional discourse might sound quite different under a civic republican practice of citizenship.[46]

Consider an example that ties together the themes of this Comment. The question of who should participate on what terms in local, state, and

---

43. *See* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 52–56 (1983) (developing the concept of destabilization rights).

44. This is especially true because of republicanism's relatively open epistemology. *See, e.g.*, Michelman, *supra* note 16, at 23–31 (identifying practical reason as key to understanding civic dialogue); Sunstein, *supra* note 4 (same).

45. For a discussion of the latter issue in today's polity, see Brest, *supra* note 13.

46. Extending the responsibility for constitutional decisionmaking beyond the judiciary also blurs the boundary between constitutional law and ordinary legislation. For much of the activity of constitutional interpretation involves moral reasoning or, if you like, political decisionmaking from the moral point of view, which bears a close resemblance to the civic republican legislative process.

national governments has been the subject of important constitutional decisionmaking during the past several decades.[47] The condition of the labor movement and the Court's rejection of the view that corporations are quasi-public entities bound by the Constitution[48] make the question of participation in the workplace seem fanciful at this time. For republican scholars and citizens, however, the question of participation in the workplace is a potential constitutional issue of no lesser magnitude than participation in government bodies.[49] Treating economic and industrial democracy as central parts of our work may help eventually to put these issues on the agenda—whether as "political" or "constitutional" questions doesn't really matter.

There is, of course, reason for skepticism whether civic republican citizenship, and especially participatory democracy in the conventionally public spheres of politics, are at all possible in post-industrial society. Classical theorists thought that the republican virtues could flourish only in very small communities. Participatory democracy has had few modern successes and many failures.[50] But, if only because the alternative is so bleak, there is every reason for republican legal theorists to join with other scholars[51] and practitioners[52] to work to realize a genuinely participatory deliberative democracy.

47. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (examining election contribution and expenditure restrictions); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down poll taxes); Katzenbach v. Morgan, 384 U.S. 641 (1966) (striking down English literacy requirement).

48. *See* Berle, *Constitutional Limits on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952) (discussing manners in which courts do and do not police corporations).

49. *Cf.* Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041 (1984) (discussing importance of labor laws that allow worker participation in workplace government). For the history of relationship of workplace democracy and republicanism in the United States, see D. MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS (1967); S. WILENTZ, CHANTS DEMOCRATIC (1984); Fink, *Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order*, 74 J. AM. HIST. 904 (1987); Forbath, *The Ambiguity of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767.

50. *See, e.g.*, B. BARBER, THE DEATH OF COMMUNAL LIBERTY (1974); J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980).

51. *See, e.g.*, B. BARBER, STRONG DEMOCRACY (1984).

52. *See, e.g.*, S. LYND, THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS (1982).