Introduction

There is a tension between democracy and constitutionalism. Everyone knows that.

Democracy requires that the people play a critical role (even if very indirectly) in determining laws and other public policies. Constitutionalism insists that government be restrained to respect the rights of its individual citizens, even if that respect requires invalidating or rewriting democratically enacted laws. I use the notion of “constitution” in a descriptive way: not to designate a particular text but, instead, as the beliefs, norms, and expectations (possibly written down) that specify who has authority to take public actions, how they may do so, the limits of their authority, and how these officials are selected. A constitution is superior to ordinary laws in two senses: a constitution specifies how laws may be made; and laws contradicting the constitution ought (somehow) to be changed.¹

I will argue that the conflict between democracy and constitutionalism is rooted in incommensurable values and is partly manifested as a cultural clash:² that there is a subculture of

¹ This does not imply that judges have the power to overturn legislation. The paradigmatic case is the 1715 enactment of the Septennial Act, which undermined the existing British constitution. While that was a constitutional “wrong” there was nothing legally to be done except to recognize that, in 1715, the constitution had changed.
² Earlier I defined a constitutional culture as the supporting norms for a two level normative system. The same definition applies to a subculture. The higher level norms may be encoded in text or they not be. The existence of a constitutional culture does not imply the existence of a two level legal system. As in the UK, higher level (constitutional) norms may not be legal norms. High level (constitutional) norms are legal norms only if the are enacted as ordinary laws. John Ferejohn, Jack Rakove, and Jonathan Riley, Cultural Culture and Democratic Rule, Cambridge University Press, 2001, pp. 10 ff.
democracy and a subculture of liberalism.\textsuperscript{3} The first is concerned with collective action; the second seeks to protect (some) individual rights.\textsuperscript{4} Democratic subculture is, I argue, embodied in what I call (American) folk democracy (described below). The liberal subculture embodies traditional American notion of citizens as rights bearers with its strong libertarian emphasis. I take liberal culture to be sufficiently familiar that I do not try to describe it here. Subcultural conflicts can be manifested in political conflict among competing groups. Or, such conflicts may be embedded in a person’s belief system and be felt “internally” by everyone. Indeed, most of us embrace liberal democracy: a system whose great and incomplete achievement is to struggle to reconcile these two demands as far as possible.

In this paper I argue for a “two values” view of democracy. A democracy (I say) is a governmental form that accords equal respect for its citizens as moral agents, capable of acting together and bearing responsibility. We may hope and seek to assure, as far as possible, that a democracy will realize the value of equal concern. I claim that both have status as moral values: equal respect is owed either as a vindication of autonomy or dignity (or both); equal concern for our interests is due because our each of our lives is a source of value. But equal respect also has a political value of a certain kind that seems (to me) separable from its moral worth. It is grounded in two ways: in the noble effort to rule ourselves as a democracy of equals; and in the chronic worry that the powerful, if they can, will sometimes abuse their powers.

Historically, the demand for equal respect has usually centered on the demand for the vote and a demand for equal access to public office. The Athenians permitted any citizen to vote and speak freely in the assembly (and in other votes such as ostracisms). To assure equal access

\textsuperscript{3} This idea is not really new. Benjamin Constant’s famous distinction between the liberties of the Ancients and those of the moderns makes a similar distinction, as does Isiah Berlin in his (parallel) distinction between positive and negative liberties.

\textsuperscript{4} The rights in question varied historically but always included rights of property and religion.
to office the Athenians used lotteries to assure that every citizen could serve as a magistrate, or as a juror, if he wanted to. At least among its citizens, the Athenian constitution went to great lengths to provide equal respect. We can see other examples throughout history: the debates at Putney, when soldiers demanded the vote exemplified an unrequited claim for equal respect. The American colonists who rejected taxation without representation were making a similar demand more successfully.

Modern democracies permit everyone an equal (formal) role in choosing representatives who then make laws and policies (directly or indirectly by delegating authority), and they permit any citizen to run for office. The demand to vote is, nowadays, the demand for the secret ballot -- the right to vote however one wants, without giving any reasons to anyone – and (aspirationally) a demand that access to office not be discriminatory. Of course equal respect requires more than the ballot, otherwise equality may be undermined by the ways that people are put into districts or how their votes are counted (and in myriad other ways as well). Achieving equal access to office is complicated by the fact that trying to assure it directly may come into conflict with liberal values. Whatever the complications, in both cases equal respect is provided formally: by entitling the people (as equals), either as individuals or as collectivities, to take the actions they choose, and to have those actions have effect.5

One feature of the equal respect norm is that it leads naturally to a mathematics of equality: to adding up equal votes (so each counts for one and no more than one no matter who casts it). The extensive literature on voting in committees, on rules of order in assemblies, and of social choice theory, illustrates the mathematical complexities that arise from the equal respect perspective. We can think of equal respect as leading to or justifying a kind of proceduralism:

5 As I see it, this does not require that votes have equal weight or influence. I will sidestep the issues such a requirement might raise.
the requirement that valid laws produced be traceable, through majoritarian procedures, to votes of citizens, however complicated the pathway. The key feature of proceduralism is that (as with positivism generally) the substance of an asserted law plays no role in determining its legal validity. Only its pedigree counts.

Equal respect envisions the citizen as autonomous, capable of forming a will and acting on it in private life (liberal equality). It sees majority voting – or lawmaking generally – as a struggle among free and equal citizens to make public choices that (via possibly complex procedures) eventually produce law and policy. A strong version of equal respect sees these public decisions as forming a public “will” and act on it. There are technical problems, of course, in seeing the product of this struggle as a will in the same way that we might attribute a will to a person. Whether or not we take the strong view, the norm of equal respect demands that, however we characterize the final product of public decision making, it needs to be respected as “law.”

A democracy, like any government, ought to exhibit equal concern for its subjects, by treating each of them as a source of value and taking account of (certain of) their interests equally. This is a substantive moral demand, not a formal one. It is the idea that each citizen – indeed each person whether citizen or not – has certain interests which not should ignored by her government. She is owed concern for those interests on account of her being a person in the jurisdiction of the state. She is owed as much concern for her interests as anyone else is owed for theirs. Equal concern, so understood, may not follow from the provision of equal respect. Indeed, if one thinks that democracy may sometimes require that matters are voted on then it is hard to see how equal concern could “follow” from equal respect. Achieving equal concern

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6 Equal concern is one feature of good government. Good government requires more than this: it should facilitate security and economic prosperity as well. We prefer equal concern at a high level of flourishing than at a low one.
requires an interrogation into what interests each of us have that deserve consideration and what kind of consideration is required. Equal concern is not a mechanical norm in the way that equal respect might be understood. We cannot simply add up peoples’ interests in order to make laws. Determining a person’s genuine or publically respectable interests – the subject of equal concern -- is a complex political act. Constitutions normally (somehow) set out a limited set of interests of individuals which are owed equal concern. Historically these tend to include some versions of religious rights (or rights of conscience or belief), rights of expression or speech, collective rights to associate with others, rights to property (owning and alienating), and a few others as well. These rights (often specified in bills of rights) are thought to be constitutionally essential. Some have argued that there are many others.

Why should we think that laws made in the procedural way demanded by equal respect would automatically reflect equal concern for the interests of each citizen? Determining the demands of equal concern requires reasoning and deliberation. As a realization of equal respect, however, voting is unreasonable: if someone has a right to vote on something, her vote cannot be made conditional on reasons without, essentially, eliminating that right altogether. There seem to be two possible answers: one is that the people, when voting, seek to implement equal concern and that they are successful in doing so. Many people have found both parts of this answer hard to believe. This seems to me what animates constitutionalism – the second answer. We want a government that takes account of each person’s interests (at least those that are constitutionally

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7 It is not clear whose views are authoritative as to a person’s interests. Some philosophers have proposed leaving the whole matter to the individual. That anarchic approach is probably unworkable as a strategy for a constitutional system.
8 This does not settle the issue. Suppose in a constitutional system embodying versions of all those rights, some legally accrue large fortunes and others remain poor. In that system what does it mean to test a purported statute according to an equal concern norm? Take Anatole France’s example: the law in France forbids the rich as well as the poor to sleep under bridges. Does that law conform to equal concern? This example is pretty much the same as facially neutral laws that differentially affect people whose religions require various religious rituals (killing chickens; smoking hashish, etc.). Achieving equal concern is always problematic for reasons of this kind.
protected by rights), and we doubt that the procedural struggle would automatically accomplish this. Other institutions, more likely to successfully realize equal concern, are needed to do the job. On one view we should count on the legislature for the remedy. On another, we need to depend on courts. Constitutionalists of either kind face two objections: that there is no other institution capable of reliably implementing equal concern. And, any institution charged with realizing equal concern would undercut democracy by denying equal respect.9

So, there is the problem. Democracy is concerned with equal respect for autonomous persons. In this respect it places its great weight on political equality – that each person has equal access to the public forum and has a vote that counts for as much as anyone else’s. In the modern context of representative democracy, its critical focus is on vindicating equal respect though what is now called the “law of democracy.” Constitutionalism is concerned with more than that: making sure that each person’s interests are accorded equal concern. Its critical focus is on substantive interests and whether and how they may be owed constitutional protection. Moreover, the reach of equal concern as a constitutional value extends beyond the citizens who are owed equal political respect: it must also include infants and incompetent adults and, I think,

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9 One could object to this formulation by claiming that part of concern for a person is concern for that a person’s autonomy. It would, on this view, reflect a lack of concern if one were to respect her non-autonomy interests but ignore her claim to, say, a voice or a vote in expressing her interests. Our concern for infant children might, in this way, seem to not to amount to full concern for infants as whole people. I agree with this objection to some extent. We treat such cases as somehow exceptional. In the case of infants we treat this situation as temporary. In the case of adults who cannot (for physical reasons) act as agents in their own behalf, we take it as a more or less minor embarrassment: temporary also but for reasons of mortality.

I don’t think the objection really alters the picture very much even if it is conceded. Equal respect as I define it does not apply to all autonomy interests a person has, but only to those autonomy interests involved in acting together with others in making binding collective decisions. I think it is plausible to say that we can be required out of equal concern to respect private autonomy interests that permit people to retain responsibility for their lives and those of their friends and family. At least if that respect is extended to persons with the capability to exercise it with some prospect of success. The case of infants is an example where this condition (a line admittedly hard to draw) fails. I think the problem persists: even if we recognize the importance of treating autonomy as an interest like any other, there seems little reason to believe that respect for autonomy would automatically produce a situation in which all of a person’s (constitutionally protected) interests are treated with equal concern.
residents generally, whose voices may (at times) be denied the respect that is extended to citizens.

I believe we need to have a deliberative conception of democracy if we are to resolve this problem and that it should take a particular shape. I want to start by arguing that equal respect must be seen as a free standing “political” value, independent of equal concern. Then I argue that equal respect rests on culturally embedded democratic beliefs and expectations (which I call folk democracy). Folk democracy presents the demand for democratic recognition as non-negotiable: as a free standing value that is not to be compromised with others. Importantly, folk democracy contains an embryonic democratic theory which supports deliberative practices capable of furthering equal concern. Third, I criticize the key supportive element undergirding a prominent theory of equal respect: the idea that citizens must be seen as authoritative as to their interests. In the fourth part I argue that a better democratic theory must enrich the idea of equal respect, taking deliberation, especially deliberation within political institutions, seriously. But I don’t think such a theory can remain a “democratic” theory without keeping equal respect in first place, alongside of equal concern, however unreasonable its results may sometimes be. The argument is for a ‘nondeal’ theory of deliberative democracy in which deliberative labor is institutionally distributed. The hope is that the result will be that people will get a better handle on what to want from government. Part Five takes up the issue of deliberation in practice – which must necessarily yield some ground to the functional demands of various institution. The final part contains some tentative ideas about possible reforms.

1. Equal Respect: Political or Moral
Ronald Dworkin famously argued that norms of equal concern and respect are fundamental to democracy. However, he saw these two ideas as aspects of the same value: political equality. Equal respect should, he argued, be interpreted in such a way as to produce equal concern. He suggested three reasons why we ought to be guided by the norm of equal respect: it recognizes human autonomy or agency in explaining how it is the case that we live by our own laws – laws that each of us had some role in authoring (however remote). Second, equal respect is a dignity interest. Even if few of us play any plausible causal role in making the laws, all of us are to be respected as having the same “dignity interest” to appear and act as citizens. The third is that equal respect is a way (the best way) to bring about a deeper and more important value: equal concern.

Dworkin argues that, in a democracy, each of us is entitled to play a causal role of some kind in lawmaking even if few have more than a tiny effect in fact. Even a democratic minimalist might admit some version of this while seeing it is mostly as an empty (ideological) assertion (it can be understood as agreeing with Schumpeter: few make the laws but everyone can vote for which few are put in this role; put this way this would permit weighted voting as long as everyone has a nonzero weight). Dworkin’s second argument seems more powerful. As individuals, each of us has a claim to equal status as citizens: to have equal rights to speak and vote, and have our votes counted equally (whether or not our votes have any consequence). These two arguments provide a (weak) sense in which “we” (collectively) are the author of our laws, and a stronger sense in which each of us has a dignity interest in equal citizenship.

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Dworkin’s final argument is more controversial if interpreted as a causal claim. But Dworkin takes another line: he says democracy is an interpretive concept and that it ought to be interpreted in its best light: namely as promoting equal concern. This means that we are entitled to only as much equal respect as is consistent with achieving equal concern. As I understand it this means that democracy (understood in its most attractive light) must be understood to promote equal concern. He concludes from this formulation that, because no version of majority rule could plausibly produce equal concern, majority rule, is neither a plausible nor attractive interpretation of democracy. This amounts to saying (I think) that if we have a system that relies on majority rule we are not governing ourselves as a democracy.12

We may make use of majority rule to decide some issues; but we cannot use it to decide on matters of principle such as where rights are involved. This notion is at the core of Dworkin’s unqualified defense of American style judicial review.13 In effect, he argues that the right response to the fact that voting can produce bad outcomes: “ok, then, there should not be voting

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12 Waldron argues that the UK parliamentary system is a kind of counterexample to some interpretation of this claim. I think that Dworkin would say (possibly has said) that somehow either the voters in the UK or their representatives, or both, are able to restrain themselves to produce policies consistent with equal concern. Waldron, in developing the UK objection, puts most weight on the deliberation by representatives: arguing that the mps tend to have good publically conducted debates that lead to well-formed legislation (which tends to exhibit equal concern).

13 Another example Dworkin offered was of an affirmative action gerrymander (one aimed at giving more voice to African Americans). He said, there was nothing wrong with putting a thumb on scale in favor of the neglected interests of certain citizens in order to ensure that their interests were given more equal weight. It is not obvious that this example provides an example of judges correcting legislative action. Should we understand judicial or constitutional review in modern democracies as imposed by a (remote or dead) constitutional designer (the founders); or is it better to see it as self imposed by the people? Hamilton in Federalist 78, argued that, when a judge reviews a statute for constitutionality, he is obliged to put the constitutional rules produced by “the people” at a higher level than the statute produced by their representatives. Jack Rakove has argued that the state conventions that ratified the Constitution (giving it legal effect) were in fact elected on a wider franchise than any of the state legislatures, implying that Hamilton’s claim had some substance, at least for the Founding generation. Dworkin’s affirmative action gerrymander was authorized in a congressional statute and was, in that sense, self-imposed by regular democratic processes. Judges were, of course, enlisted by the statute to help enforce its terms and they played a role in implementing its requirements. On the whole it seems an example of democracy (the system of equal respect) doing what it should in order to further equal concern. Not really a good example for Dworkin. I don’t see that it is inconsistent with democratic rule for the people (or, in this case, the Congress) to impose a restriction on themselves or their representatives (as many democracies have done by establishing central banks and other such systems). Indeed, would it not be undemocratic to tell the “people” that they had no power to do that?
on matters of principle.” Moreover, there should not be voting on whether something is a matter of principle. Such decisions are to be taken in forums (like courts) capable of acting for and giving reasons. So, we can accord people equal respect when it comes to voting over things which are not matters of principle (it is hard to say how much of politics that would include), while leaving matters of principle to reasonable fora to decide. Dworkin calls his a “dependent” conception of the values of political equality – the limits of equal respect are set by (or depend on) the requirement of equal concern -- as opposed to a ”detached” view which sees these as values to be pursued separately.

I think there are three problems with Dworkin’s solution: first, there is no reason to think that any institutional configuration could satisfy both norms simultaneously. Dworkin’s solution amounts to putting equal concern as the priority and then permitting as much equal respect as possible, as a secondary objective. Second, I do not see that unqualified form American style judicial review would necessarily improve matters from the standpoint of equal concern. Whether it would or not seems a contingent matter. Other forms of judicial review (those found in Germany, Canada or the UK for example) might be as able to provide for equal concern without trespassing as heavily on equal respect. Finally, it is not obvious that “correcting” democratic institutions is best done by putting considerations of equal concern at the back end of the process – having judges fix the mess caused by the legislature or the people.

14 In his last book, Justice for Hedgehogs, Dworkin may have reached a similar conclusion. In any case he gives a much more tepid endorsement of (American style) judicial review than he had earlier. He says merely that “I am denying...that judicial review is inevitably and automatically a defect in democracy. But it does not follow that any democracy has actually benefitted from the institution... If I had to judge the American Supreme Court only on its record during the last few years, I would judge it a failure. But I believe that the overall balance of its historical impact remains positive. Everything now turns on the character of future Supreme Court nominations. We must keep our fingers crossed.” p. 399. This is the wrong conclusion. If the best defense of American JR is to “cross our fingers” and hope for the best, it seems better to try to reform the institution, or its institutional context, to make it perform better (in some sense). I try to suggest some ways that that might be done.
I don’t think we are as free as Dworkin thinks we are, to relegate equal respect to second place. The demand for equal respect is a political demand, at least in part: It has been fought for from (at least) the foundation of Athenian Democracy, through the Social Wars in Rome, the Putney Debates, the American Revolution, and into the present century. When equal respect has been won, it should be seen as a political achievement; not something that will be surrendered easily. As theorists, we may wish to reject or limit equal respect if it fails to produce justice: who can oppose justice or good government after all? It seems to me, however, that some version of equal respect is essentially nonnegotiable for most western states. (whether it is so in China and elsewhere I don’t know).

Dworkin is right that any form of voting is problematic as a way to implement equal concern. That is a reason to pick among versions of voting systems those that are more likely to produce more equal concern as has been advocated by many people (following John Stuart Mill). It is also a reason to build deliberative capacities into legislative and executive institutions. He is also right that the inadequacy of voting is a reason to adopt some form of constitutional review (though, perhaps unlike Dworkin, I think that it is best if that power is rarely used). But American style review is defective in various ways that other systems of constitutional review may not be. It often comes close to undermining equal respect altogether.

Why not find ways instead to attempt to get more focus on equal concern earlier in the political/legislative process? We have reason to adopt or enhance deliberative practices in the political branches and in civil society as well. The point of doing this is to make it more likely that governmental process will tend to produce policies and laws expressing equal concern, without the need for a court to act. In many ways some of this is already being done: Congress adopts cognitive processes both internally (design of committee systems) and externally
(congressional agencies such as CBO and the Library of Congress, etc) to guide the creation and modification of laws. Other branches do the same: witness the extensive deliberative practices throughout the executive branch for example. Other mechanisms work in civil society (political parties, interest groups, the press, etc). The point is that we can, and commonly do, try to augment and ameliorate necessarily flawed systems of voting by developing the deliberative capacities in and around decision making bodies (electorates, legislatures, agencies as well as courts).

But another problem is that powerful and independent American courts may sometimes work to undercut attempts of other institutions to develop and exercise deliberative capacities in various ways, either by extending too little deference to their judgments and arguments, by moving to resolve substantive issues prematurely. This is an old complaint -- traceable to Thayer and Bickel and many other writers who have often asked for judicial self restraint. These complaints have largely been ineffective. I don’t think that room can be made for deliberative practices in other institutions, without structurally reforming courts and modifying their place in the governmental system.

Seeing equal concern and equal respect as distinct norms – moral and political -- offers a better account of our legal and constitutional practices than Dworkin’s univocal account. While both values are constitutionalized in the United States to some extent, democratic law has been reluctant to compromise equal respect, even a little, to achieve more equal concern. The Supreme Court’s one man one vote jurisprudence, its limits on campaign finance regulation, its (growing) resistance to permitting (legislatively authorized) affirmative action gerrymanders, exemplify this apparent reluctance. While I disagree with these decisions I can see why, given its intense focus on equal respect, the Court has drawn such formal and brittle lines. But the consequence
of this focus may well have been to make it more to achieve equal concern. In this respect I agree with Dworkin that equal concern has to be a primary normative objective. But I don’t think we are free to ignore or override democratic demands to extent that Dworkin does.

Moreover, I think the “two values” approach captures some intuitions that we have when, for example, a court strikes down or rewrites a duly enacted statute. Dworkin argued that such an action is no cause for moral regret – at least not if the court’s action vindicated a rights violation in the statute. I think, however, that there is a cause for regret that the people, or their elected representatives got things wrong. It would have been better had they deliberated more or more deeply and developed a statute that satisfied equal concern, allowing the court to remain on the sideline. That is not a moral regret but it is a democratic regret.

I think we have both prudential and moral reasons to minimize democratic regret. I doubt that it is possible to remove the “tragic choice” aspects of politics, especially of liberal and democratic politics. Put another way: I don’t think it is possible to eliminate politics – conflicts over deeply held and often irreconcilable values. The two values are deeply different from each other and each is deeply attractive its own way: and reconciling them is a never ending and never settled political project. Respect is a demand for dignity, status, or autonomy: a democracy claims to honor this value by distributing respect equally: it is, in that sense, the fundamental democrat value. Equal concern seems a matter of justice and is not at all specific to any particular governmental form. The struggle to honor both norms must be fought repeatedly both in low as well as high politics.

The two values view brings into focus the general question: how are we to get our democracy to perform best as a government? I think judicial review plays helpful part in this by getting the people or the legislative majority to slow down and reconsider their decisions.
Sometimes democracy can produce very rash and unjust decisions and it ought to be possible to appeal to another forum. I am all for that. But whether or not that justifies the kind of judicial review we have in the United States seems doubtful. In effect the American system combines a very difficult to amend constitution, a chronically gridlocked legislative process, with majority appointed judges with lifetime tenure. This is recipe for regular judicial interventions in lawmaking. One might respond that, fortunately, the Court is characteristically divided so that there tends to be some degree of “built in” institutional self-restraint. I would say that that is fortuitous and not at all built in. We certainly do lack for historical examples of the lack of judicial restraint.

The two (independent) values approach might also help explain some (otherwise puzzling) judicial practices: Jeremy Waldron has criticized the use of majority rule by courts, each of whose members have no obvious claim to representative constituencies. Why should each judicial vote count the same? Shouldn’t the best argument prevail even if it receives few (or no) votes? Good question. In fact, however, multimember courts typically provide an institutional fix for this problem by adopting the practice of publishing (often multiple) opinions, permitting each judge to present a justification for her vote. Whether a decision is a precedent may turn on the number of votes. But the “moral” weight of the decision for future courts often rests as much on the content of the opinions. It seems to me that Waldron’s question arises

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15 It is not clear in the American case that in fact justices are not seen as representatives in a political sense. The battle over appointments, especially critical ones such as the appointment of Justice Alito to replace O’Connor are fiercely fought precisely because it was clear that the Court’s political composition (who it represented in fact) was shifting.

16 Indeed, I think the real problem is not the Court’s use of majority rule to resolve disputes but its quick resort to it. For various reasons, the Supreme Court seems to have resolved on decision making practices that one former justice called the “rule of five.” There is an oral argument and then a relatively brief conference at which the justices line up for one side or another and opinions are assigned. It takes some months for opinions to be written but the voting lineup rarely shifts. Other constitutional courts have adopted very different modes of decision making: deliberating face to face in order to seek consensus; seeking to craft opinions for the whole court; and discouraging (or even prohibiting) the publication of multiple opinions. Perhaps because of the way they are appointed justices have rarely found this kind of consensus seeking practice acceptable except in special and temporary circumstances.
whenever there is voting, as in the legislature or the electorate. What reason is there to think that votes will produce substantively good decisions? The answer we give for the electorate or the legislature is procedural: the majority has a right to rule grounded in equal respect and not at all on the content of its decisions. Waldron is right that this is not an answer for courts. Judges are not, as judges, entitled to equal respect. But as Waldron himself has acknowledged elsewhere, majority rule has various attractive features: equality of votes, neutrality among alternatives, positive responsiveness, and decisiveness. The court’s use of majority rule may nevertheless be attractive insofar as it satisfies the last three properties, even if there is no reason to endorse judicial equality.

2. Folk Democracy: Practice and Theory

The requirement of equal respect is reflected in our common sense (cultural) ideas about democracy. As such it is a central element in what political scientists and historians have called American political Culture. We insist (in principle anyway) that citizen is to be treated as an

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17 There seem to be two ways to justify practices of judicial review as practiced by American courts (including the use of majority rule in appellate courts). One is substantive: decisions reached by courts tend, in fact, to favor equal concern (or some other substantive good). Alternatively it might be argued that the distinctive institutional features of courts give them advantages in reaching good decisions (relative to other institutions). Courts are, it might be argued, set up to provide an individualized forum in which a person can (as a right) articulate specific complaints about a failure of due concern for her interests (arising either from private or official action). Courts are required to provide a definite answer to such complaints in a timely fashion (this is a reason for a decisive voting rule). Moreover, for various reasons, they are expected to explain the decision (to the litigants, to other judges and lawyers, to the public). For this reason courts are comparatively likely to be sensitive to failures of equal concern exhibited by legislation or its application to persons. Either kind of justification seems open to challenge as a matter of contingent facts.

18 See Waldron, Dignity of Legislation, relying on Kenneth May’s axiomatization of majority rule.

19 The distinctive liberalism of American political culture was memorably described by Louis Hartz (The Liberal Tradition in America, New York, Harcourt, Brace, 1955); he argued that the relative absence of ideologies, the embrace of individualist values, and the failures of socialism were distinctive to the United States and were traceable to the absence of a feudal past. Its darkly democratic aspects were nervously articulated in Richard Hofstadter’s Paranoid Style of American Politics, which exhibits a bit of shell shock over postwar McCarthyism and finds its roots in earlier populist movement. Hofstadter’s focus was on chronic American suspicion of hidden elites and tendency to slide into nativism and xenophobia. He underplays the more uplifting, and I think enduring, aspects of the populists’ insistence on being taken to be an equal with aristocrats. Still, his description if it does nothing else shows that democracy is a two edged sword and that its achievement is no guarantee of good government.
equal by our political institutions. They should all have the chance to vote in regular elections, to articulate their views in the public forum. Their votes should be weighed equally as well. These ideas are embedded in our common understanding of democracy. In the next section I present a stylized description of this model – folk democracy – which consists of commonly shared understandings about what democracy is and requires.

**Folk Democracy**

Folk democratic understandings developed very early in American life, certainly by the time of the revolution, and were reflected in the Anti-Federalist opposition to the Constitution. These ideas were strongly in evidence by the time of Tocqueville’s visit when they underlay the creation of Jacksonian party based democracy and they have surfaced periodically in populist and progressive reform movements. The root of folk democracy is a kind of “cultural” skepticism about a distant national government, influenced by cosmopolitan elites, and suspicion of delegations of power.

Folk democracy sees the citizen not only as the unique source of political authorization but also as competent to effectively pursue and protect her interests at the ballot box. In this sense, it regards majority decisions taken in elections as the core of legitimate democratic rule. Though this populist basis is its hard core, folk democracy is not necessarily hostile to representative government. Indeed, the anti federalists, in the debates over the Constitution, employed it as a way of critically accepting representative institutions. The antifederalist wanted shorter terms and smaller districts than did the Federalists, but they were prepared to accept a government by elected representatives as long as those representatives were sufficiently “close” to the people.

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20 Constitutional opponents saw the proposed Constitution as an attempt by elites to introduce a kind of aristocratic rule with infrequent elections and a powerful and distant national government which would undermine and usurp the democratic state governments. While the constitutional framers were successful in overwhelming these critics, their views came increasingly to prevail in public opinion. See especially Gordon Wood’s fine treatment of the rapid development of democratic beliefs and understandings in the early republic. The Radicalism of the American Revolution, New York: Vintage Books, 1991, as well as Gerald Leonard, The Invention of Party Politics, Chapel Hill, University of North Carolina Press, 2002.

21 The slogan, “no taxation without representation” arose in the 1760s in response to the effort of the British to tax the colonists for defending them against the French and hostile native Americans. For a brilliant account of the rise
The notion of democracy is not found in the American constitutional text and neither is the notion of judicial review. But events after the Founding period rapidly began to put both democracy and judicial review into the constitutional fabric. This process was episodic and uneven but over the course of US history the constitution as understood both in courts, by other officials and by Americans generally, has come to embrace both “amendments.” The case of democracy is familiar. Soon after the Constitution was ratified, the founding generation was largely ejected from both federal and state office by more popular politicians. Madison himself played key a role in this when he campaigned with Thomas Jefferson to force the Federalists from office in 1800. But the process proceeded, after some detours, culminating with the election of Andrew Jackson in 1828 and the creation of mass political parties. Over the course of the 19th and 20th Centuries the rise of populist and then progressive movements transformed the character of democracy in various ways, making way for elements of direct rule in some states, and generally enhancing the powers and status of elected and appointed officials.

The rise of democracy (as a constitutional principle) went faster, further, and much deeper than Madison may have contemplated. By the time Tocqueville arrived in America in the late 1820s, he already found a much more democratic society and culture than the original framers had experienced. Much of this change was cultural and sociological but penetrated politics from bottom to top: a new class of people (men, mostly) had supplanted the white stockinged elite; property barriers to voting had fallen, and the “people” increasingly expected to be listened to by politicians. By then Andrew Jackson had been elected – partly due to the popular outrage over the denial of the office to him in 1824 -- and the franchise had expanded greatly. Highly organized mass political parties, built on patronage mostly distributed to the

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23 Gordon Wood vividly documents many of these developments in *Radicalism*, in his telling, the “revolution” went on for far longer and was much deeper and socially transformative than previous authors understood.
lower middle classes, had begun to evolve and to reach into the capitals as well as outwards, bringing in a new class of unelected political leaders and party managers. Moreover, from the time of Jackson and Tocqueville, democracy made an increasingly powerful claim to be the central interpretive principle in constitutional law.24

In the case of judicial review, progress was more uneven. Soon after the ratification federal courts began policing state legislation but, aside from a couple of notable exceptions, courts were mostly reluctant to interfere with congressional statutes until after the civil war. At that point the courts began a period in which regulatory innovations by any government were viewed suspiciously by judges setting up a regular conflict between the legislatures and the judiciary. This phase largely ended by 1940, when the Supreme Court, turned away from regulating regulatory laws and began to use the Constitution to protect civil liberties and rights. While this rights protection focus was very broad – expanding procedural and substantive protections against federal as well as local governments – a primary legal focus was the jurisprudence of equal respect: the law of democracy.

Of course, in none of these areas did the Court act alone; congress and some state legislatures enacted powerful new statutes and, to varying extents, governments sometimes enforced new rights protecting rules aggressively. But, as important were the slowly evolving cultural expectations that equal respect was owed to every citizen – of whatever race, religion, ethnicity or gender. To some extent this development was based on the expectation, discussed earlier, that implementing equal respect would lead naturally to realizing equal concern. That, in effect, more democracy would lead to better government. Would that that was true.

**Folk Democratic Political Theory**25

The key idea in the folk theory just described is that government power is best exercised directly (by the people) insofar as that is possible. From the perspective of folk democracy the

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right to vote is the fundamental democratic right. The assumption is that that the people – indeed, each person – are competent to make choices among candidates (or choose among policies where popular referenda are available), and that those choices are to be accorded full and equal respect by officials and other citizens, independently of their content. As long as each person’s vote is fully respected (in the ways worked out in democratic law), it is thought, policy making will then (mechanically) reflect equal concern for each person’s interests. In effect, folk democracy assumes that we will get equal concern for our interests if only we can fully implement the requirement of equal respect for our votes.\textsuperscript{26}

Folk democracy insists that representatives remain close to the “people” by exposing themselves and their records in frequent and fairly conducted elections. Elected representatives, because they are “close” to the people, are expected act on behalf of their constituents and to explain and justify their plans and actions to them when running for election. The reasons offered by an elected representative are primarily directed to her voters (in support of her claim to act on their behalf and in their interests) as part of her appeal to take actions on their behalf.

But elected representatives cannot do everything in a complicated society: they need to delegate many tasks to specialized administrative agencies. As with representatives, agencies are required to give reasons for certain of their actions but, of course, the occasion for these justifications is not an election but might be a congressional hearing, a judicial proceeding, or an irate phone call from a congressperson. These reasons are directed both to the legislature (which created and funds the agency) and to the public. But the most important justifications are found in written records of policy making, which form a record that can be examined and contested in courts. Rules or adjudications issued by an agency are supposed to be closely related to the written records of its proceedings. In addition to these controls, agencies are also subject to direct and arbitrary political control by Congress and the President, which may choose to abolish or reorganize the agency of their own (electorally justified) reasons.

\textsuperscript{26}I will not address, here, the gap between the citizen and person that this definition raises.
Finally we reach the courts. Individual judges are generally highly insulated from political accountability, though the judiciary itself is much less insulated, as appointments and funding, are controlled by the political branches. Judges are usually required to give reasons or justifications for their decisions, and the reason giving process is regulated both internally (by other judges, either by higher courts, or by other courts who pay greater or lesser deference to their rulings) or externally by those who do or do not comply with judicial orders or, more generally, with judicially interpreted law. As with agencies, the justifications offered by courts are supposed to be closely tied to the proceedings leading to the decision. But unlike administrative agencies, courts are generally required to provide open and timely trials and to furnish elaborate procedural rights to the parties before them. And judicial decisions are subject to appeals to higher courts, and judicially created rules may be overturned in Congress as well. In these respects the justificatory burden on courts is higher than that for administrative agencies.

Folk democracy, so far as I have sketched it, rests on the supposition that political authority ultimately rests, directly or indirectly, with the people. If power is to be exercised other than directly it must be understood as delegated by “the people” in some sense. Folk democracy makes no claim about how much delegation can be justified; it says only that, when authority is delegated to elected or unelected officials, there is an expectation of justification or reason giving in return. In that respect, folk democracy embodies a requirement of explicit accountability in the sense that it demands that exercises of delegated powers be justified to those subject to them. This demand for reasons is an expression of democratic respect: to be required to give reasons for a decision is to recognize the moral claims of citizens to respect as autonomous agents. At the same time, folk democracy insists on reserving a vital kernel of authority to the people: the power to remove officials from office (directly or indirectly) without any explanations given or required.

What kinds of reasons are required from those exercising delegated powers? Let’s distinguish between reasons directed upwards (or sideways) – toward others agents wielding delegated power – and reasons directed downward toward those whose powers have been
delegated. Folk democracy is especially concerned with the latter. Downwardly directed reasons must explain why people ought to respect a decision and support the political actor that produced it. Typically such reasons are directed to showing that the people conferred the authority to take the action, that the action was reasonable in some (weak or strong) sense, and that the action did not needlessly trample on individual interests. Reasons of this kind aim to articulate views that each person, acting disinterestedly, could reasonably accept as her own, or at least as reasonably authoritative for her.

According to the “folk” democratic understanding, then, there is an increasing democratic “deficit” as one moves up chain of delegation toward courts and away from the people. At the same time, folk democratic theory implicitly recognizes a kind of deliberative deficit that increases as one moves in the opposite direction. It sees in the exercise of delegated authority a requirement of accountability or justification which, in turn, requires that institutions exercising deliberative powers have adequate deliberative capacities to discover genuine interests, seek to balance those interests justifiably, and to present public justifications for their actions.  

In this respect folk democracy has a deliberative component: officials exercising state authority are required to present justifications for their actions in order to compensate for their lack of democratic legitimacy. This is a weak deliberative requirement in several senses. Folk democracy assumes that as long as each person is assured of the right to speak and assemble, she has sufficient voice to assure that her interests are taken into account. If, however, the opportunity to speak is in fact unequally distributed, the reason giving requirement would merely

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27 In some ways folk democratic theory resembles consent theories, for example, which see delegation as unjustified unless grounded on some kind of popular consent, real or hypothetical. What consent theories have in common is that they see delegated authority as somehow defective relative to authority directly exercised by the people, in needing further justification. This justification can be provided legalistically – where the authorities show that their actions are justified under the terms of the consent. Or justification may be provided by showing how official actions tend to be in the public interest by, for example, taking advantage of specialized knowledge or simply being more intelligent. Such delegations may be necessary or advantageous in some ways, but it is always possible that the rulers might depart from what was consented to and pursue their own projects instead. Agency problems are endemic to consent theory as they are to folk theory. Indeed, the most rigorous consent theory (Rousseau) regards the agency problem as so severe that no delegation of legislative power is admissible.
tend to justify public actions reflecting that inequality. Secondly, folk democratic deliberation is mostly concerned with justifications to citizens -- why should I vote for you, or respect your decisions? This “externalist” justificatory the focus is also the foundation Rawls’ theory in Political Liberalism. It is less concerned with what I call internal deliberation – the kind of deliberation practiced by those involved in making a decision about what action to take. In internal deliberation it is to be expected that when a group is making a collective decision, its members should present and listen to reasons from one another. Each should be willing to alter her views when presented with persuasive arguments. This Habermasian idea is not really visible in folk democratic theory.

Internally directed deliberation – giving reasons for prospective actions to co-deciders – ought normally to produce reasons that can be given externally as justifications (ex post) to outsiders. We generally expect decision making practices to be transparent to those outside – so that others can offer timely advice and argument. There may be, in some cases, a degree of permissible divergence between internal reasons and externally directed reasons.28 Decision making bodies may sometimes seek to close their doors and deliberate in private as did the Framers of the US Constitution in Philadelphia in 1787, as modern juries do today, as executive branch agencies often do, and as many collegial courts do as well.29 I don’t think this consideration undercuts a transparency norm but it may limit its application to certain institutional settings as it suggests that achieving transparency may entail costs in internal deliberation.30

28 In institutional situations requiring secrecy or dispatch, it may be permissible for decision makers to act non-transparently. But even where this is not the case there may be good reasons for some internal deliberations to be kept confidential. If arguments must be presented immediately in public settings – to an external audience – there may be a tendency for deliberators to play to that audience: to harden their own stances out of pride or vanity in order to protect their public reputations for steadiness and consistency. The development of public reputations in this way can interfere with the give and take of internal deliberation. To control this pathology many constitutional courts forbid multiple opinions and choose to issue a single opinion for the courts. John Ferejohn and Pasquale Pasquino, “Constitutional Adjudication: Lessons from Europe,” University of Texas Law Review, vol. 82, no. 7: 1705–1736.


30 There may be another reason for the distinction between external and internal deliberation. Suppose, for example, that the Roman Catholic Church were to debate internally about what position it should take on a public issue.
3. Citizen Sovereignty

A procedural majoritarian is committed to the idea that some proposition is a law if and only if it is agreed to in a duly constituted majority based procedure for making laws. The voters or their representatives may vote however they prefer; as long as the proper procedures are followed the product is law. There is no requirement that the lawmakers (or citizens) engage in any kind of deliberation which might lead them to reconsider or revise their initial preferences. I think there are two ways that the proceduralist may explain why decisions reached in this way ought to be respected. One is that citizens are authoritative as to their interests. Alternatively, equal respect may be given a political explanation and grounded in facts about delegation and agency: a chronic suspicion that officials are always in a position to abuse their powers and may on occasion yield to temptation. Thus, the delegation of authority is accompanied by insisting that officials return frequently to the citizens to explain their actions and beg for a renewed mandate.

Kenneth Arrow took the first path and presented an early and cogent statement of what he called citizens’ sovereignty and his view has been followed by many others. 31 He presented it as a natural extension of the idea of consumer sovereignty. 32 In the terms of this paper both consumer and citizens’ sovereignty may be understood as versions of an equal respect principle.

Internally we may suppose that the members of the Church share a comprehensive view and may wish, on that basis, to adopt a particular position on the issue. But if the church’s position is to have a chance to prevail in the wider public it needs to be argued for in terms of public reason and not in terms of the internal reasons that may have led the church to adopt the position during its own deliberation.

32 Citizen sovereignty, according to Arrow’s formulation, requires that every feasible outcome can be achieved by a suitable arrangement of citizen preferences. This amounts to saying that arrangements of preferences, by themselves, are sufficient for achieving any possible collective decision. Arrow noted in the second edition of his book that, to establish his theorem, he only needed the axiom to apply to a set of three alternatives. Kenneth Arrow, Social Choice and Individual Values, New Haven: Yale University Press, 1963. But even though the axiom played a technical role in the theorem, his intuition was broader. Social choices should depend only on desires or preferences held by citizens.
When he wrote his doctoral dissertation, Arrow may have thought that consumer sovereignty was uncontroversial as a norm: the individual is in the best position to make choices that only affect her own welfare and so here choices should not be interfered with. Even if individuals are wrong about their interests it is hard to think of any other actor who would be a more reliable repository of the authority to make consumption choices for her. Consumers have to bear the costs of their mistakes and it seems plausible that transferring their right to make consumption choices to experts would lead to worse outcomes.

It may not be true, of course, that the individual is in fact the best judge of what is in her interest in choices that only affect her. We might be willing to believe this as an empirical claim when it concerns choosing toothpastes or cereals. Even in these cases, however, the claim seems dubiously overbroad. Toothpastes (all the consumer knows) could contain carcinogens or harmful nano-particles; some brands in fact may be much better for you (or taste better, or be more effective in whitening or whatever else you want in a toothpaste) than others no matter which one you “prefer.” Things get even less compelling when considering preferences over durable goods such as houses or insurance policies – things that people purchase rarely and have little relevant experience with choosing. They simply cannot be expected to be able to compare options very well in such cases. And, what about life choices that may be expected to shape preferences or identities, such as the choice of profession, college, or mate? The issue is even more fraught if privately purchased goods in question can be dangerous to others – as are guns, cars, skateboards, etc.

Still, we think consumer preferences should be respected regardless of their contents. Direct experience may help people learn about their of course but, for reasons given, experience is incomplete as a basis for making such judgments. We assume consumers will be highly
motivated to seek out information about the consequences of their choices and to use that information to revise their preferences. Consumers are assumed seek out information from intermediaries to remedy informational inadequacies. Sometimes they can turn to government agencies for advice (sometimes found on the package) or the can seek out other authorities to help them learn what their interests actually are. Some are disposed to watch (and even believe) TV exposes of fast food or GMOs. Others read (and even buy) Consumer Reports or other publications or consult their wiser friends before making a big purchase. And government regulatory programs may limit consumer choices, for drugs and food additives, etc. so that people will not harm themselves. When purchasing things that could harm others, or risk lawsuits they may purchase insurance. Sometimes this is legally required. Choosing what is actually best for you is a hard problem for anyone; it requires deliberation.

When it comes to collective decisions things are much more troubling. Equal respect requires that society to be organized to permit people to make their own self affecting choices. When regulating private actions this is a core liberal principle, endorsed by Mill and many others. But, voting in elections intrinsically affects other people and may infringe on their interests. If equal respect demands that a citizen must be free to vote as she thinks best, equal respect can lead to very illiberal results.

For these reasons, citizen sovereignty is a much more contestable as a norm than consumer sovereignty: it amounts to saying the collective choices ought to be based only on the aggregated “desires” (Arrow’s word for preferences) of the individuals in society. No one can really think that (untutored) individuals can reliably make good judgments as to arcane matters

33 Philosophers might see the axiom as a kind of supervenience principle: if the collective choice were to change from x to y, there must be some change in the preferences of some individuals. Arrow recognized that the proof of his impossibility theorem did not require the full force of this assumption and could be done using only the weaker Pareto Principle. Still, even that principle as innocuous as at seems to economists, can be challenged on the grounds I give in the text.
of state policy or even as to who would be the best officials to put in office. As Schumpeter argued the objects of choice are very complex and remote from everyday experience. Moreover, each person’s vote counts for almost nothing. What is the benefit of trying to learn about such arcana? Indeed, if the individual citizen’s vote were to make a difference, she would not bear the consequences of her choices and so she will have no strong incentive to correct her misperceptions. You don’t get sued or arrested or even criticized for casting a malevolent or stupid vote.

Arrow, no doubt, recognized some of these issues and the citizens’ sovereignty axiom, as originally formulated, applied only to the “people” as a whole rather than to individuals. Citizens’ sovereignty, as it was originally formulated in the first edition, required only that the social decision was not “imposed” (either by tradition or some actor, outside the community). Citizen sovereignty required only that for each possible decision, x, there must be some preference configuration (or distribution of ballots) that would produce x as the collective decision. In other words the “people,” collectively, could somehow bring about x by arranging their preferences (or ballots) in a suitable pattern.

In his revised edition, Arrow showed that citizens sovereignty together with his other axioms implies the Pareto principle: if the people are unanimous in preferring x to y, the social choice must reflect that by placing x over y. The Pareto principle, unlike citizens’ sovereignty, has an individualist interpretation: if everyone but me votes for x over y, then I can, with my own vote, influence whether x is the social choice or not. And that is true for each person. It also

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34 The Condorcet Jury theorem can be seen a statistical version of this condition: if society is very “large” if there is a majority for x over y, then society will choose x almost certainly. And if this condition holds for all y, then majorities for x over y for all y implies that society must almost certainly choose x (leaving aside issues of strategic voting).

35 This is a little tricky. I don’t have the power, by the pareto axiom alone, to veto the selection of x. Rather, by placing y over x I can weaken the effect of the pareto condition where it would otherwise force the social choice of x over y, had I placed x above y.
has a collectivist interpretation: if every favors (or votes for) x over y, the social choice ought to be x. Many have found these features attractive.

While collectivist interpretation of Citizens’ sovereignty may seem plausible in a democracy, I don’t think that the Pareto principle is normatively compelling without further assumptions about the content of individual preferences. Is the fact that everyone mistakenly prefers x to y, a reason that society should choose x? Whether x is to be preferred to y by society must depend on their contents — whether x or y best furthers equal concern or some other good. Indeed, from a normative viewpoint the collectivist version of CS suffers from objections of this kind as well: why should social choice supervene on preferences rather than, say, on interests?

I think this is the reason to ground equal respect not in citizens’ sovereignty but politically, as a device for controlling representatives. It is justified not because citizens make good decisions but as a way to ameliorate chronic agency problems traceable to representation and delegation. Rather than inducing citizens to revise their views about their own interests, it works by getting official to find and implement policies that citizens will approve. From the political view of equal respect, officials need to be sensitive to voter preferences regardless of their contents. Failure to do so can cost them their jobs or careers.

4. Democracy and Deliberation

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36 The enormous literatures concerning Condorcet’s jury theorem are filled with efforts either to supply further conditions that or show that such conditions are implausible.
37 This is a harder issue for me as equal respect by itself seems to require that preferences have some effect on social decisions even if they are mistaken.
38 I think there are serious problems with the political view which are discussed in “Incumbent performance and electoral control,” Public Choice, 1986. Even where equal respect is guaranteed, elected officials can play one majority against another to their advantage.
Of course, we hope that democracy will in fact further equal concern. It is hard to sustain this hope, however, without embracing a model of democracy which makes the hope plausible. Some democratic theorists have argued that elections may (mechanically) tend to produce good public policies. To the extent that their jobs depend on elections officials will be motivated to learn about which policies will help them win elections, and to coordinate their activities to bring these about. Leaving aside the difficulties of coordination, at best this would only prove that officials will implement popular policies. Whether popular policies tend to be substantively good (satisfy equal concern) depends on something more: something producing a tendency for good policies to be or become popular. Or, at least not to remain so unpopular as to make such policies politically unacceptable to office holders.

The hope is that public deliberation will somehow help move public opinion in the direction of substantively good results. I think that a deliberative theory requires that we understand preferences cognitively, as opinions or beliefs about our interests, as suggested in our discussion of consumer and citizens’ sovereignty. Democracy requires that voter opinions as expressed in votes be respected. This is the respect due to people who are recognized as

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39 The idea that preferences are opinions (PO) about one’s interests has a diverse pedigree which it may be worth noting. Rousseau took such a view in the Social Contract when he argued that the general will is a part of each person’s private will (in a political community), noting that each individuals had a much more vivid sense of her private will (interest) than of the general will. This led Rousseau to take what is now called an “epistemic” view of voting in elections – where the point of voting is to sort out “signal” of the general will from the interfering “noise” of private interests. A similar view may be found in Gary Becker’s idea of hedonic consumption in which consumers are thought to have interests with respect to basic goods which are, to varying extents satisfied by actual commodities (over which they form induced preferences – which were beliefs or opinions). See Robert T. Michael and Gary S. Becker, “On the New Theory of Consumer Behavior,” The Swedish Journal of Economics, Vol. 75, No. 4 (Dec., 1973), pp. 378-396. From the hedonic viewpoint, induced preferences are corrigible and rational consumers would know this and be willing to revise them as they learn more about how actual commodities map into basic goods. Or, we could consider Rawls’ idea that there are primary goods over which each of us has genuine interests and which are only contingently related to the commodities or courses of action in the actual phenomenal world. It is not a new idea.

autonomous moral agents. Hopefully a citizen is motivated to form the best view she can of her interests – including those shared with others -- subject to the costs of searching for information and making complex inferences. But whether she is or not, we are still required to respect her duly expressed opinions.

I think that this view – that preferences are opinions about interests (PO) -- fits pretty well with Aristotle’s notion of practical reasoning.\textsuperscript{41} Aristotle distinguished deliberative speech – practical reasoning -- from other forms of discourse (such as, for example, forensic speech, which he described as speech appropriate to identifying and repairing an injustice).\textsuperscript{42} Deliberation (practical reasoning) is, on his account, concerned with choosing which act or policy is best. By contrast, what Aristotle called forensic speech looks backwards to identify moral harms in need of rectification (and would be guided by norms of theoretical reason). On an Aristotelian account there are two objects of deliberation: deciding which ends we should pursue (and how far to pursue them); and deciding which means are best employed to achieve those ends. These two inquiries interact: part of deciding which ends are worthwhile requires a contemplation of the means and, conversely, the choice of means is regulated by the value of the ends. There is, in this sense, a reflexive relationship between deliberating over ends and means.\textsuperscript{43} As applied here, I deliberation entails trying to form or revise opinions what about our interests are and learn and form opinions about means that might be available to achieve them.

\textsuperscript{41} Aristotle’s account of deliberation is complex as it is connected to his theory of moral education and to his theory of value. In this paper I will not take up these questions as they raise controversial issues that are extraneous to my concerns.

\textsuperscript{42} It is not clear to me that forensic speech characterizes judicial proceedings even in the Athenian courts. Courts and legislatures both engage in deliberative as well as forensic speech. In the trial of Socrates there seemed to have been deliberation about what to do with the convicted “criminal.” And in fact, Rawls’ account of the Supreme Court presents it as a exemplar of deliberative speech.

\textsuperscript{43} Here I am following work by David Wiggins (“Deliberation and Practical Reason,” Proceedings of the Aristotelian Society 76:29) and Henry Richardson (Practical Reasoning about Final Ends, Cambridge: CUP, 1997), as best I can. I believe their views track Aristotle’s complex views of ethics on moral education and, in particular, show that practical reasoning is not confined to (instrumentalist) choice among means to given ends but concerns the specification of ends as well.
Neither task is so simple that citizens (or representatives) could make much progress by themselves on complex issues, without some help and especially of organizations specialized in the production of advice (including political parties, the press, and other associations, as well as governmental organizations and of course the internet and social media as well). Plenty of assistance is available to citizens who want to use it.

In the Ethics, Aristotle concerned himself mostly with individual decision making and with asking how an individual could rationally direct his choice of means while, at the same time, revising and re-specify his ends appropriately. However, as can be seen from various parts of the Politics, his thinking is as relevant to groups and societies as to the individual. In the case of groups we need to take account of heterogeneous interests and to incompatible or incommensurable ends. But, as Aristotle recognized in the Ethics, individuals can hold incommensurate ends as well. In the case of groups, we also need to worry how discussion and argument should be regulated in ways that exhibit equal respect and are likely to further equal concern. We cannot generally expect unique answers to these questions. PO does not give reason to think that deliberation will necessarily lead to agreement or consensus. Whether it does or not depends on the underlying structure of interests.

Actual deliberation about what to do requires further distinctions that, as far as I can see, Aristotle did not make. There is deliberation about what to do in the way of formulating general rules or laws, and deliberation relevant to applying rules or constructing remedies. These modes of deliberation may be different in many ways: some being forward looking, others looking backwards to rectify harms.

44 Were this a longer paper I would explore practical reasoning from the viewpoint of an individual holding incommensurable ends. For an insightful investigation of such cases see Henry Richardson, op cit.
PO provides a critical perspective on campaigns and elections. For one thing it suggests that the epistemic view of elections has a lot to be said for it. PO does not, however, necessarily direct us to embrace Condorcet’s theory in particular or any of its recent reincarnations. Indeed, from an epistemic point of view it is not necessarily the case that elections would be very effective in determining the best candidates or in guiding us to good laws – elections are restricted to aggregating votes which remain only coarse indications of interests even after deliberation. Indeed, insofar as underlying interests are in conflict, there is reason to doubt that elections could be very efficient epistemically. Some alternative methods might be better either in determining genuine interests or in finding ways to fulfill them.

There is no reason to be optimistic about how well deliberation will work in any absolute sense. People will often fail to pay attention, reach inapt conclusions, and make poor choices. Moreover coordination in making collective choices is difficult. It may be true – I think it is -- that interests tend to be less heterogeneous and more stable than preferences. If that is so, it

45 Behavioral economists take a similar view and one reason that their policy prescriptions have been relatively successful is that they are based on rectifying some predictable “mistakes” that consumers make. To my knowledge no parallel application to politics has caught on. One could imagine such a thing: suppose it is the case that people are “too likely” to support incumbent officials when they don’t know much about the office. (we would need to develop a sense of “too likely” of course. Perhaps it could be done by comparing the judicial record of the incumbent – liberal to conservative – with the voter’s reported policy preferences). Intuitively this seems to be the case in judicial elections in California and probably elsewhere. Would a “Nudge” strategy be attractive in such a setting? One example might be term limits. I am not endorsing this but simply drawing a potential parallel between strategies to improve consumer choice and those to improve citizen choices.

46 What a person’s interests are is controversial among philosophers and, as importantly, politically. In Theory of Justice and Political Liberalism, John Rawls attempted to state which interests are most fundamental though in quite different ways. In TJ one’s fundamental interests are in securing fair shares of liberty and primary goods. In PL, the main interest is in being able to live together with others. In TOJ he places the members of the community (or their avatars) in a veiled contractual situation and regards “agreements” that would be reached in that setting as either constitutive or indicative of the principles of justice. In PL he puts civility as a regulative principle which allows people with divergent comprehensive views to assent to political/legal framework that will them to live together. I think either view could justify the following claims: each of us has an interest in an adequate level of well-being, sufficient to ground her capacities as an effective person. She has also an interest in maintaining her capacity as a moral agent to play a role in shaping the life she leads. In world of scarcity, however, not everyone’s interests can be completely fulfilled and there may be quite severe and unavoidable tradeoffs among individual and collective interests. in such circumstances, rational people would be open to reconsidering their preferences in light of persuasive arguments as to what is in their interest (which includes shared interests). But, it is not so clear that they can be as accommodating with respect to their fundamental interests and so we ought not to expect that interest
seems reasonable to hope that deliberation will reduce the extent of preference heterogeneity in an electorate or legislature.\textsuperscript{47} That may not imply that preference conflicts would be eliminated as people learn better what they “really” prefer. Real underlying interests might simply conflict; beliefs about means may polarize as well. If so, deliberation might lead to sharper and better organized conflicts among, say, political parties or interest groups. Still, whatever its results, if we are to hope that a democracy will produce good laws and policies, encouraging deliberation seems to be the only non-coercive alternative.

5. Practical Considerations

Rawls said the first virtue of government is justice (or equal concern). This seems wrong; justice is government’s second virtue. Its first virtue is political – to maintain social peace and security.\textsuperscript{48} Satisfying this political requirement is a difficult practical task. To meet it, governmental institutions are assigned different functions: each is required to make different kinds of decisions, operate on different time scales, and at different levels of generality. Some parts of government must have the capacity to act quickly or secretly, perhaps without always being able to take time to deliberate fully and openly about the consequences of their actions.

Institutions need to develop the cognitive capacities required to make effective decisions (internal deliberation) and they must provide (external) justifications of those decision to the

\textsuperscript{47} Maybe it is true that interests can be represented in a lower dimensional space than preferences can. One reading of the historical roll call scaling results of Poole and Rosenthal suggests this possibility. For some experimental evidence see Christian List, Robert C. Luskin, James S. Fishkin & Iain McLean, “Deliberation, single-peakedness, and the possibility of meaningful democracy: evidence from deliberative polls,” \textit{Journal of Politics} 75 (1):80–95 (2013).

\textsuperscript{48} For Hobbes, this minimal level was very low: he characterized the state of nature as one in which everyone lived in such total insecurity that they could not plant crops or cooperate with others, out of fear that others would invade and take their harvest and possibly their lives.
public. How are they to be motivated to do both? This might be accomplished in two ways: either the citizens must somehow come to understand their interests adequately and use their votes and voice in elections to get political leaders to further policies and laws favorable to equal concern. While the idea of citizen participation is often dismissed by hard headed realists I am not sure that pessimism is fully warranted. Citizens have, in the past, sometimes played a role in the politics surrounding inclusion of excluded groups. It is possible, for example, to see the civil rights struggles to accord full citizenship to previous excluded groups as examples in which popular deliberation played a generally supportive and sometimes leading role. Obviously the politics of civil rights has been neither smooth nor nonconflictual. Unjust exclusions continue to operate in many areas. But often there has been public support in favor of recognizing the civil rights and liberties of excluded people. Treatment of LBGT individuals has generally followed this path of extending fuller recognition, perhaps even more quickly and possibly more completely than has been the case with other excluded groups. On the other hand abortion policy has vacillated, perhaps in part because public opinion on this issue has been divided and does not seem to have moved very much over time. Still, empirical research in political science has generally been on the side of the hard heads, supporting skepticism that citizen engagement will sufficiently shape public actions.50

49 Some theorists have argued that there are general norms of publicity or transparency which may be thought necessary for accountability. I doubt that any such general norms could apply across the whole government. Practical considerations of government interfere and override. Not all of our governmental institutions are or should be expected to be fully deliberative in any ideal but all of them must account for their actions in some way.

The second option is to rely on elected or appointed officials (legislatures and administrative agencies), or others outside government (parties, the press, interest groups, leaders of large corporations, etc) to promote policies expressing equal concern. Madison’s idea in the Federalist was that elected officials would “refine and enlarge” on public opinion, conducing to wiser and juster policies. Some theorists have emphasized that inter-elite competition can produce “good” policies. Even if each political party, for example, has unattractive features, party competition may nevertheless produce good results. By the same token competition among interest groups, each of which by definition pursues a partial interest, may lead to good outcomes (according to the theory of interest group pluralism). It must be said that “invisible hand” arguments of this kind have not been fully persuasive for several reasons. Some interests are unrepresented or underrepresented in the political process. And even if all interests were represented it is not clear that political competition, even if it worked perfectly, would drive toward equal concern.

In view of the shortcomings of competitive mechanisms, is tempting to rely on courts to ameliorate defective democratic processes, both ex ante (to guarantee equal respect) and ex post (when policies are biased against some interests). John Rawls called the Supreme Court the exemplary deliberative institution because of justices are required to respond to complaints about failures of policies to provide due respect and concern or to explain why redress is not required. Rawls offer no explanation as to why the Court was singled out as special among other institutions. Indeed, he was careful to say that courts have no special obligation to base their decisions on public reason – every public official has that duty. Indeed, every citizen, when acting in her “official capacity” as a participant in democracy, has the same duty.
So, what makes courts -- and especially the Supreme Court -- different? I think the best answer is that courts, when doing constitutional review, are political institutions with peculiar characteristics. While courts make policies of the same kind that legislatures and agencies do, they face a stronger burden to provide explicit justifications for their actions than other political officials. This does not excuse those other officials (or voters) from taking justifiable actions. But they may not be required (or even permitted) to explain their actions in the same way or to the same degree that courts are required to. As folk democratic theory emphasizes, this explanatory requirement arises from the “legislative” nature of judicial relief in constitutional cases. Courts produce general forward looking rules that affect all of us (ergo omnes).\(^51\)

As folk democratic theory emphasizes (along with John Rawls), courts are not the only institution that is expected to pursue policies that can be justified in public reason. I believe that the equal concern norm would be seen as supported in this way. To a considerable extent I believe that legislative and administrative bodies already do take deliberative responsibilities seriously (both externally and internally. There are historical and political explanations for this that I cannot explore here.

6. Reconsiderations

We may characterize American democracy in this way. Elections and elected officials are largely guided by the workings equal respect as embodied in electoral and parliamentary

\(^{51}\) Hans Kelsen’s defense of the Austrian constitution court was (not to worry!) that it was merely exercising “negative” legislative powers. Later he conceded that negative legislative powers were essentially like any other (positive) legislative power. In response to this realization when new constitutional courts were established in post-World War II Europe, their members were chosen politically rather than by merit appointment in the way that ordinary judges were usually appointed. Ordinary judges, as they are civil servants, are not permitted to undertake constitutional review (at least not in theory). Folk democratic theory gives a more local (American) version of the same answer. Insofar as any American judge can exercise judicial review, we generally insist that judges must be politically appointed (whether by executives, legislatures or electorates). When a court exercises constitutional review it is also expected justify the action in judicial opinions so that others (ordinary citizens, lawyers, political officials) will have reason to comply or at least not interfere.
institutions. We hope that equal concern will be produced by policies and laws but, to the extent that they fall short, courts are left to remedy any failures through, among other devices, their powers of judicial review. I have argued that this places too much of a burden courts and does not demand enough of the political branches (or the electorate).

I consider two lines of reform. One, reforming judicial review, would be aimed at encouraging more of a dialogic relation between courts and the political branches. I do not argue for eliminating or trimming powers of judicial review at all (as in what are called “soft” forms of judicial review which are arguably becoming common in the Anglophone world). I believe the Supreme Court (and possibly) the federal judiciary as well would be well served, however, with some reformation. The second would encourage courts and legislatures to take a less rigid and formulaic perspective on equal respect. The point of this is to encourage more development of deliberative practices in the political branches.

The reforms I suggest would be aimed at shifting some of the burden of equal concern to the elected branches: by furthering deliberation or “dialogue” between judges and political officials. This might be accomplished by making US Court operate a bit more like constitutional courts in three ways. Like nearly every constitutional court, the justices on the Supreme Court ought to be term limited to a single, possibly quite long term. The reason for this is not that justices are too old to perform their jobs. As things stand, presidents have an incentive to find young judicial appointments who might be expected to serve for decades, leaving the actual composition of the court to statistical mortality. It would be better to smooth out court appointments, making some number of appointments a regular feature of each four year term. Second, in order to lower the political stakes of appointments, I think it would be better to institutionalize a supermajority requirement in the Senate, making it more likely that a successful appointment would reflect an interparty compromise (as, for example, in the German

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52 In fact there are powerful incentives for presidents to appoint the youngest judges they can in order to prolong their impact on the Court.
Constitutional court).\textsuperscript{53} Third, I think the court ought to be encouraged to deliberate together in an effort to reach common opinions as far as possible. It is not necessary to suppress multiple opinions if the justices feel strongly about it. But it would be better if justices at least sought for an opinion all could go along with rather than resorting, too quickly, to the “rule of five.”

I am sure this will sound like a bad or impractical idea (or both) in view of Article V. Bear with me for a minute. Suppose the party leaders in the Senate were to agree that a supermajority vote would be required for appointment to the federal judiciary. Demanding 60 votes would not then be seen as an effort of brinksmanship, triggering threats of the nuclear option, but would be the normal way appointments were processed. Agreement on an appointment would regularly require the assent of some part of the minority party. Suppose that system actually worked (as I hope and as it does in Germany for example) to produce “moderate” justices. This would, in turn, lower the stakes of appointments, attenuating the presidential search for the youngest possible appointees and possibly permit the appointment of older justices with longer judicial or even scholarly records. Such justices might be more likely to remain on the court for longer periods. And, as relative moderates, they might be more willing to try to search for common ground in crafting opinions. To the extent that common opinions are written, the opportunities for justices to form external clientele (or cults if you will) would be diminished and make the ego rewards of service less. This might permit such appointees to retire gracefully after, say 15 years on the Court: all this without brushing up against Article V. Probably this is all crazy and overly optimistic. It would simpler to amend the Constitution.

Even if we accept that an attractive conception of democracy must be deliberative the core demand of folk democracy -- that the people retain an essential role in forming, altering, and

\textsuperscript{53} Obviously minority party members can subject judicial appointments to “holds” or filibusters under current Senate rules. Such practices are, however, very unevenly applied and appear to the majority as a kind of illegitimate “coup” when they are attempted. Constitutionalizing a supermajority requirement would routinize the need for the majority party to get support from the minority on an appointment. Of course it is always possible that intertemporal logrolls would occur: I think something like that is the current practice: if a new justice will not shift the court median, the minority tends to The reason for this is not that justices are too old to perform their jobs. hen go along without much struggle. But if an appointment would move the appointment toward the majority ideologically, Senate rules would be exploited to fight the appointment.
removing governments – must nevertheless retain its central place. This demand represents a constraint on the exercise of practical reason to further equal concern. Folk theory insists that the people have the right to fire their officials even if they are (as they will be) inadequately informed and use it foolishly. It insists that there be frequent elections, that (notwithstanding Bush v Gore) electoral expressions by the people be paid full attention and respect by officials (officials who lose elections leave office), and that representative institutions have ample authority to legislate and delegate authority even if their decisions are bad. Finally, it insists that, beyond elections, the people retain the “constituent power:” the power to alter or abolish the whole regime and not merely the government.

Seeing folk democracy as a constraint in pursuing good government suggests that we should be reluctant to extend its requirements without powerful reasons. In this final section I want to sketch how the law of democracy might be reconfigured to address the misalignment in democratic practices described above. This has two aspects. First, democratic law ought to treat equal concern for each person’s interests as a fundamental value, at the same level as its traditional focus on equal respect. Second, because of this, it ought to encourage the development of deliberative capacities both inside and outside of government, and regulate those capacities to assure that they are equally available to all.

The law of democracy, as it stands, focuses mostly on what I have called issues of equal respect: it attempts to assure that each individual is able to express her views in elections (during campaigns as well as at the ballot box) and to have her views counted equally with others. As part of this effort it has focused as well on campaign finance and candidate entry (lockup problems) mostly in service of assuring conditions of equal respect. This developing area of law has, it seems to me has gone further than necessary at times to overextend equal respect. The single minded pursuit of equal respect has sometimes led to the transformation or even undermining of valuable deliberative institutions.

The most evident of these changes concern the nature and role of political parties. Parties in the US are very highly regulated compared with those in other advanced democracies and
much of this regulation has been in service of making them more internally “democratic” in various ways. From the time of the Progressive movement there have been successive legal assaults on parties as associations for nominating candidates and getting them elected. Parties have increasingly lost the power to choose candidates and to control campaigns. Individual candidates and donor, private associations have tended to supplant political parties as primary sites of political organization and campaign. An important way that parties have been displaced is through the libertarian approach to campaign finance adopted in recent Supreme Court decisions. Increasingly, relatively small numbers of, often anonymous, large donors have the capacity to guide the conduct of elections – recruiting candidates, supplying them with agendas and funding their campaigns.

One effect of these reforms seems to me to have been to limit the possibility that the political parties could act as deliberative mechanisms capable of developing a coherent agenda as a basis for political campaigning and getting their candidates to commit to that agenda. If we think of the political party as an intermediary that works partly by formulating and articulating a vision of the common interest disabling parties as deliberative institutions removes an important mechanism of democratic accountability. I am not saying that party competition among responsible parties was ever fully available in the United States in ways it has been in western Europe; other factors (federalism, geographic diversity, etc) may continue to prevent it from developing fully. Still, democratic law has not helped. Rather it has amplified the push toward open and, I would say, penetrable parties which can be readily captured by various narrower interest groups and cannot, in any case, get their candidates to commit to any particular agenda.

One consequence of undermining the parties’ role in elections has been to weaken them as well in the Congress. The parties have become penetrated by subgroups and caucuses which often have special and inflexible agendas. The result is a Congress that spasmodically responds

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54 Rick Pildes argues that the fundamental problem with American politics lies the fragmentation of power and especially in the drift of power away from political parties to individual members and wealthy individuals and interest groups. Richard Pildes, “Romanticizing Democracy, Political Fragmentation, and the Decline of American Government,” Yale Law Journal, Vol. 124, No. #3, 2014
to special interests, or cannot act at all, so that it is increasingly unable to play a constructive role in government. Congress ought to be a deliberative venue in which the value of equal concern is (part of) the coin of discussion. But has become a place where members pander to their constituencies and (sometimes) nurse career hopes of ascending to an executive office where they might have a better chance to move their policies forward. One result of neutering Congress has been that effective policy making drifts toward the executive (or the courts or to state governments) where it is formulated in much less open ways. One cannot blame presidents or governors for trying to move their agenda when they can and this often means finding ways around the legislatures and making policies by executive order and other means. But policies made in this way are likely to swing back and forth with party control of the executive and to be opaque and often illegitimate to the electorate.

The general thrust of deliberative law ought to be to orient our institutions and practices to vindicate the democratic promise of equal concern. This requires that individuals and civil society be able to play a substantial role in achieving equal concern where public institutions may fall short. The worry is that the existing law of democracy has not weighed such considerations adequately. I believe that the best way to do that is to recognize that our complex democracy is already deliberative in important ways. Folk democracy, as I sketched it at the start, already recognizes this in the reason-giving requirements it imposes on courts and agencies. But by accepting a libertarian conception of the first amendment it fails to pay enough attention to failures of equal concern. Indeed I think that the single minded concern with equal respect has contributed to undermining deliberative institutions.

One of the signal developments of the law of democracy was the establishment of a legal principle -- one man one vote -- which authorized the demolition of state senates as legislative institutions with distinct representational bases. Associated with this is the belief (of some legal scholars) that the US Senate is, based on the same principle, an anomalous and essentially unjustifiable institution. I get it. I have been tempted by such views. Sometimes it seems a good argument: the ante-bellum Senate permitted the continuation of slavery for many years beyond
what a unicameral population based House of Representatives would have. Score one for democracy. And certainly the Senate was the major barrier to civil rights legislation in post war America. Score two. On the other hand it seems that the US Senate has presented itself, with some success, as a more deliberative institution than the House of Representatives; and it has adopted internal rules favorable to debate in various ways. Sometimes this works out well, when the other institutions seem too disposed to rush to a precipitous (majoritarian) decision. Sometimes not so well, as when Senate rules have often made it very hard to change the legal status quo. I think the same may have been true in some of the states when they still had senates with distinct representational bases. But, whatever could have been said for such distinctively based institutions, the law of democracy abolished them. It is not clear that deliberative democratic law would have done the same.

One could argue that there was no reason that population based senates could not have set themselves up as deliberative institutions. I am not sure that that would be politically possible. Suppose, just to pick an analogy of the US Senate, that the Senate was population based so that (for example), California were to have 10 or more Senate seats (we would need to give Wyoming at least one I suppose). Suppose that these senators were chosen within districts rather than statewide (assuming that democratic law would be suspicious of at large elections as it has been in many cases). That would probably mean that San Diego, Orange Country, the Central Coast, maybe the central valley would have (quite conservative) senators, whereas downtown LA and San Francisco would elect liberals, and each would tend to have relatively homogeneous constituencies. Assuming similar situations in all of the big states, I would guess that Senate constituencies would end up looking a lot like scaled up House constituencies – ie. Relatively homogeneous compared to current Senate constituencies. Why wouldn’t such a Senate arrange its internal institutions in the same way that the House does and make more use of majoritarian

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procedures? My guess is that that would make the Senate and Congress as a whole less able to deliberate issues fully.

There is much to be said for bicameralism and for the two chambers to have distinctive representational and functional roles. For example, republicans such as James Harrington and Jean Jacques Rousseau – following the model of republican Rome – argued that the authority to craft and propose legislation ought to be confined to magistrates or the senatorial elite, even as more popular bodies retain the right to approve or reject their propositions. It seems no accident that the development of the American Constitution in Philadelphia followed roughly this model, by requiring that the Constitution be adopted (but not amended) in popular state conventions. Indeed, even the hyper-democratic Athenians normally permitted some degree of specialization in crafting proposals (the Boule or council) to be put before the popular assembly for a vote. Many modern democracies have adopted similar practices and have not generally insisted that both legislative chambers have the same representational basis. Why should courts have understood democracy to have required that the states abandon this practice? I am not endorsing this but it seems to me that deliberative considerations – had they been fully presented and thought about – might have led to a different result.

Where theorists differ is in how much and what kind of deliberation is to take place in the two venues. All would agree that the development of legislative proposals is an exercise in (Aristotelian) practical reasoning and that those involved ought to engage with each other’s arguments in what I have called internal deliberation. I think all would agree that these political leaders ought to, as well, labor to present persuasive arguments, campaigns, to the wider decision making body, and beyond that to the people themselves whose compliance with the laws is sought.

The reform agenda of the law of democracy has been mostly to vindicate equal voting rights and to enhance transparency of policy making institutions. But it seems that as these worthy goals have been advanced, there is a sense in which deliberative capacities of many institutions, especially the legislature, has eroded. Perhaps this is simply coincidence. But
perhaps, the effect of making institutions more democratic in the majoritarian sense, and more transparent, has had the effect of producing a contentious politics in which politicians seem unwilling or unable to compromise and Congress more prone to gridlock. Congress has become so transparent to outside groups – both highly organized and ideological groups, and narrow economic interest groups – that a career politician must constantly be aware of having her every move watched and evaluated by those who could challenge her in a primarily. One effect of gridlock is to shift effect power away from Congress: to the executive, the courts and the states.

On my account deliberation ought to be distributed – exercised both inside and outside of government. It seems necessary that on important decisions affecting many lives, the public needs to argue and discuss matters for some time. This may require courts in particular to move gradually in interpreting and helping to specify majority judgments as to what ends should be pursued. The oral argument in the Prop 8 case presents a good example: from the comments of several justices from the bench, the Court was disposed to refrain from issuing a general ruling on whether or not gay marriage must be made available everywhere and, instead, to let public argument and contestation occur in various states and localities. At least for a time. In their decision (Hollingsworth v Perry, 2013) this result was achieved by denying the petitioners standing to challenge the ruling of the appellate court (that Prop. 8 is unconstitutional). Of course the period for limitation in this case was shortened by the fact that a majority of the justices concluded eventually that a fundamental injustice needed to be ended fairly quickly (Obergefell vs Hodges, 2015).

This posture, in which Court plays a role in fostering deliberation, is similar to the stance it took after the Roe decision and still takes with respect to euthanasia laws. In various ways, Congress has sometimes taken a similarly restrained stance with respect to deliberations occurring in other institutional and social settings. It has usually not been willing (or able) to produce laws on the controversial social issues discussed above – an exception of course is DOMA, which, however, increasingly became a cause for regret in many congressional (and presidential) circles. There are obviously many important criticisms of gradualism or “all
deliberate speed” approach; fundamental rights are delayed or even denied in deferring to majorities.\textsuperscript{56}

The debates on these and other deeply controversial issues may not end soon or, indeed, ever. This does not mean that these issues are not, in one way or another settled at least provisionally: refraining to act is, after all, action. And, while the demand for justification is normally associated with the imposition of coercive restraints for one kind or another, we need to recognize that coercive restraints are imposed in many ways outside of formal governmental action. The legal status quo is not at all a static situation. If the state does nothing, private actors will continue to do things and the status quo will drift in ways that, generally affect our interests (common as well as private). In that sense nominally “private” actions may need to be justified as well as public ones.

\textsuperscript{56} At this point I may depart somewhat from the views expressed by Richardson who favors what he calls deep compromise in controversial areas where people hold incompatible ends. Me too. But such compromises seem exceedingly rare and I doubt that they can be counted on when needed. For that reason I think that shallow compromises of the kind defended by Cass Sunstein “Incompletely Theorized Agreements” Harvard Law Review, Vol. 108, No. 7 (May, 1995), pp. 1733-1772.) are the usually the best that can be hoped for, at least in the short run.