A Restatement of Democracy

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Debates about democracy are everywhere. Extremists, whether on the streets of Washington or Brasilia, perpetrate violence under the banner of democracy. But what do we mean when we talk about democracy? The debates, in the streets, popular media, or pages of academic journals, leave one wanting for depth and precision. This Article thus aims to provide an analytically useful model of Western democracy by surveying the vast and complex literature and distilling from that literature a series of core elements. From this exercise, this Article identifies the following four elements of democracy: majoritarianism, individual contestation, reason-giving, and deliberation. Although the endeavor to define democracy in this way may at first appear too big or unworkable, others over the past 2,500 years have already done the heavy lifting. The elements I propose draw their credibility from well-established ideas in democratic theory. Moreover, these elements are realistic. After summarizing each element and explaining its precedent, this Article provides current examples of each in existing governing institutions. Although there is substantial room for improving the democratic capacity of institutions and developing strategies in which all four elements work simultaneously, by highlighting their existence in practice, this Article aims to demonstrate the source, history, and feasibility of each element. The democracy debates will continue, but the goal of this Article is to provide an analytically useful model of democracy, which legal scholars can rely on when thinking about democratic institutions while at the same time championing an optimistic vision of democracy that can sustain constructive self-governance into the future.
## Contents

### Introduction

<table>
<thead>
<tr>
<th>I. The Democracy Debate</th>
<th>57</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. In Popular Culture</td>
<td>61</td>
</tr>
<tr>
<td>B. In the Academy</td>
<td>62</td>
</tr>
<tr>
<td>1. Minimalist Majoritarianism</td>
<td>63</td>
</tr>
<tr>
<td>2. Pluralism</td>
<td>66</td>
</tr>
<tr>
<td>3. Deliberative Democracy</td>
<td>68</td>
</tr>
<tr>
<td>4. Republicanism</td>
<td>70</td>
</tr>
<tr>
<td>5. Other Democracies</td>
<td>72</td>
</tr>
</tbody>
</table>

### Purpose, Methods

<table>
<thead>
<tr>
<th>III. Majoritarianism</th>
<th>76</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. In Summary</td>
<td>78</td>
</tr>
<tr>
<td>B. Precedent</td>
<td>79</td>
</tr>
<tr>
<td>C. Examples</td>
<td>80</td>
</tr>
</tbody>
</table>

### Individual Contestation

<table>
<thead>
<tr>
<th>IV. Reason-Giving</th>
<th>82</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. In Summary</td>
<td>82</td>
</tr>
<tr>
<td>B. Precedent</td>
<td>84</td>
</tr>
<tr>
<td>C. Example</td>
<td>85</td>
</tr>
</tbody>
</table>

### Conclusion

<table>
<thead>
<tr>
<th>V. Deliberation</th>
<th>94</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. In Summary</td>
<td>94</td>
</tr>
<tr>
<td>B. Precedent</td>
<td>95</td>
</tr>
<tr>
<td>C. Example</td>
<td>96</td>
</tr>
</tbody>
</table>

### Conclusions

<table>
<thead>
<tr>
<th>A. A Democratic Metaphor</th>
<th>97</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. A Synthetic Constitutional Example</td>
<td>99</td>
</tr>
<tr>
<td>C. A Parting Thought</td>
<td>100</td>
</tr>
</tbody>
</table>
THE looming death of democracy is not the place to begin. The place to begin is the first-year law school classroom.

As a teacher, I spend time helping law students understand doctrine in an analytically useful way. It is easy enough to grasp, for example, that if parties are mistaken about an important aspect of an agreement, one party may be able to void the contract. The problem is that understanding a concept like this does not always prepare students to apply the doctrine effectively. Lawyers, therefore, verbalize doctrine with discrete elements, not just general concepts. When confronted with facts from the real world, it is not enough to know that a mutual mistake can void contractual obligations. Instead, lawyers must carefully walk through each element of a legal rule and consider the facts in light of those elements. We must look at the facts and ask whether there is “[(1)] a mistake [(2)] of both parties [(3)] at the time a contract was made [(4)] as to a basic assumption on which the contract was made [and (5), that the mistake] has a material effect on the agreed exchange of performances.”

These elements are analytically useful. They provide a roadmap or recipe lawyers can follow when looking at real-world facts. Was there a mistake in this case? Did both parties make the mistake? And so on. Concepts are important, but discrete elements are necessary for analyzing the real world.

The importance of useful analytical frameworks dominates (or should dominate) first-year law school courses where we teach students to “think like lawyers.” Useful analytical frameworks do not, it seems, carry quite the same weight in more existential discussions about, among other things, the future of democracy. They should.

Now, as promised at the outset, we can return to the impending death of democracy.

Debates about democracy—its life or death—occur in two registers. In the more frenzied upper register, there is the popular debate that we could see too plainly in the streets of Washington, D.C., as on January 6, 2021, or in Brasilia, on January 8, 2023. These are debates about elections and the flashpoint is a belief that the elections were unfair. Thus, on one side we have significant groups of dissenters who do not trust the outcome of elections and therefore see democracy dying. On the other side we have those who do trust in the outcome but look at the dissent.

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2. Restatement (Second) of Conts. § 152(1).
particularly the destructive and violent dissent, as a threat to democracy. But sides believe that “democracy is in danger.”

In the more obscure lower register is the ponderous philosophical debate about what democracy means. As with the popular debate, there are voices in this lower register that believe in a minimal democracy that is only about voting and elections. Other voices urge that democracy is about pluralistic competition, deliberation, non-domination, contestation, among other ideals.

The two registers of the democracy debate are very different in their tenor and their goals. What they have in common is that they can leave us wanting. The outraged popular debate leaves us wanting depth. It leaves us asking whether the outcome of the last election is really the best indication of the life or death of democracy. The complex philosophical debate leaves us wanting clarity and, most importantly, precision in understanding exactly what democracy is and how we sustain it.

Perhaps because we talk about democracy so much, we rarely pause to think carefully about democracy. This Article aims to pause and think.

It aims to provide some depth to the popular debate and some precision to the philosophical one. To do this, I attempt to approach Western democracy as we would approach common-law doctrine: defining a meaningful concept out of widespread expectations, largely in political theory, and then distilling that concept into useful elements. The U.S. Constitution is also a persuasive resource in this endeavor. Although it does not explicitly define democracy, it gives significant structure to our democratic order. I therefore check my proposed elements of democracy against the Constitution to test whether each element is plausible in the existing legal system. Finally, because the goal of this exercise is to develop useful elements that can help us analyze the democratic capabilities of real institutions, I look for examples of each element in existing institutions to confirm that each is plausible and to help illustrate what each element means in practice.

This is both a descriptive and a normative endeavor. This Article describes leading theories of democracy and the shared building blocks across theories as well as practical examples of each. However, I also interpret these building blocks in a way that I believe gives rise to a vision of democracy that is realistic, satisfying, and that most would recognize as a form of “good governance.” This is yet another way in which this effort is like a common-law restatement. It does not seek to uncover permanent truths. Instead, it seeks to identify common elements that develop over time, trace that historical development, and suggest additional changes that will support good governance.

At base, democracy is a justification for coercion. Democracy describes the structure of institutions and practice of decision-making that are necessary to convince us that coercion is legitimate even if we object to it. Democracy, therefore, allows us to identify coercive decisions that we oppose but nevertheless recognize as legitimate. This Article argues that there are four elements to Western democracy that give rise to decisions we can accept as legitimate: (1) majoritarianism, recognizing that elections provide the basic animation to democratic institutions; (2) individual contestation, assuring that even when majorities become entrenched, individuals have the opportunity to challenge policies and forcefully articulate their identities; (3) reason-giving, requiring that decision-makers express the purposes of, at a minimum, coercive actions; and (4) deliberation, requiring that government decisions are the result of forethought. We can look for these elements in different institutions at different scales, but in any institution and at any scale, democracy requires a combination of these elements.\(^\text{15}\)

Importantly, although this Article is about democracy—a big word—it is really a small venture. I am not attempting a pure philosophical...
reasoning but a practical assessment in the best common-law tradition.\textsuperscript{16}
I am asking how we can articulate a version of democracy that is effective and satisfying (unquestionably a normative task). I am answering that question by describing and distilling the work of others (a descriptive task). I am looking for useful elements to help us analyze institutions for their democratic potential. I am relying on political theorists, the Constitution, and legislators each having already done the heavy lifting. Put back in terms of the common law, we might say that the political theorists are the Blackstones, Corbins, and Prossers who have helped shape the doctrine from the outside while the U.S. Constitution and existing institutions are the case law that develop and demonstrate the doctrine in action, and this Article is the Restatement (First) of Democracy.

The next Part of this Article develops the democracy debate further, providing a summary of the various democratic ideals that have gained traction over the years. It also lays out the purpose of defining democracy. Part II explains my method of analysis. Parts III through VI present each element of democracy in turn, describing the element, connecting it to precedential sources in the U.S. law and democracy literature, and then providing a real-world example of each democratic element in practice. Part VII concludes.

I. THE DEMOCRACY DEBATE

Democracy is important. Whether one believes democracy is fleeting, firm, flourishing, or failing, it is undeniable that the word, at least, gets a lot of attention. This Part will outline that attention at two levels. First, and briefly, Section A acknowledges the newly animated public debate about democracy, which has been swirling since candidate and then-President Trump conceived ideas of widespread election fraud in the United States. The purpose of this brief discussion is to recognize how important the idea of democracy is in political debate. And yet, even though democracy is a key term of the debate, participants have not clearly defined it. Second, Section B dives into the long-standing academic discourse on the meaning of democracy. Unlike the popular debate, the academic one is often specifically about the meaning of democracy. Alas, the academic debate, while thoughtful and enriching, can leave one bewildered, especially about how to translate the deep concepts of democracy into practical, useful tools for analyzing institutions in the real world. After setting out the background in this Part, the following Parts explain how we can use that background to define a more useful democracy.

A. In Popular Culture

Costumed rioters flooded the Capitol, ransacked offices, took selfies, and waved flags representing the obvious (like President Trump), the mundane (like imagery of the American Revolution), and the delirious (like QAnon and Pepe the Frog). It was clear at the time that the riot was an attempt to overthrow the 2020 presidential election. It was less obvious that it would come to be seen, on both sides, as a crossroads at "the very heart of our democracy." After all, what even is "the heart" of our democracy?

Reports about democracy, even years after the January 6th riots, suggest the heart of democracy is elections. "American Democracy Is Still in Danger" reads a headline in Foreign Affairs that begins by describing President Trump’s attempt to overthrow his election defeat as a “historic low point” but that “American democracy has begun to function better” because “[t]he 2022 elections were conducted successfully and extreme election deniers lost in key swing states.” A New York Times headline and subheading make the connection even more directly: “How the Worst Fears for Democracy Were Averted in 2022” reads the headline while the subheading turns directly to elections: “A precariously narrow but consequential slice of the electorate broke with its own voting history . . . .” In a short break from ranking law schools, U.S. News described “How Democracy Fought Back in 2022,” by opening with the observation that “[a]cross America last year, election deniers were defeated in the midterm elections, and President Joe Biden recently signed legislation shoring up the nation’s presidential election certification system.”


The Hill put it simply: "Voters Turned Out to Support Democracy." The Washington Post editorial board explained how the report from the House of Representatives’ January 6 committee “would (mostly) help preserve democracy.”

The Washington Post, of course, knows better than to equate democracy with elections. After all, the Post’s motto is “Democracy Dies in Darkness,” which plainly spotlights the importance of information and deliberation in a democratic process, not just votes. Indeed, there have been some stories reflecting a more robust definition of democracy, such as a syndicated commentary maintaining that “[d]emocracy means more than just holding elections.” Nevertheless, if defining democracy were a matter of, well, vote counting, the results are clear. The popular idea of democracy is majoritarian elections. And discussions of democracy, whether majoritarian or otherwise, are all over the headlines.

B. In the Academy

There are academics, too, who have argued that the concept of democracy goes no further than elections, but by and large, the scholarly debate on the subject is much more involved. It begins, of course, with the actual word democracy, consisting of the Greek roots demos and kratos meaning, respectively, “the people” and “power.” The core question for democratic theorists, then, is how people can exercise the power to coerce in a legitimate way. The remainder of this section will survey, contextualize, and compare the most prominent efforts to understand how to operationalize this idea of people power.


27. I have said that my goal with this Article is to provide more precision to debates about democracy. As some early readers of this Article noted, whether the elements I propose are “precise” depends a great deal on one’s perspective. They are not precise compared to, for example, the elements of mutual mistake in contracting that I referenced in the Introduction. While, in that comparison, these democratic factors are big buckets, not precise elements, when compared to the various theories I address in this Part, I hope they come across as sufficiently narrow and useful.

I am not presenting a comprehensive list of all democratic theories, of course. I focus here on models that are plausible given the size of most states today. For this reason, I do not fully explore ideas of direct democracy like that of classical Athens. Classic Athenian democracy is, for many, a model, and it has much to offer. It provided direct and powerful forums for participation that were famously deliberative and relied on a *demos* that was not just engaged but felt a deep political responsibility. On the other hand, the classic Athenian *demos* was so narrow that it can make one wince when describing the system as democratic. The economy was built on the labor of enslaved people, all of whom were excluded from governance along with women and anybody whose family had not been in Athens for many generations. To the extent we call this a democracy, it is not a good model for today. The models I discuss below, therefore, in addition to being prominent and significant, are adapted for larger, freer, and more inclusive populations.

1. **Minimalist Majoritarianism**

The simplest approach to democracy is majoritarianism, which simply says that—however we define the *demos*—democratic action is action that the preponderance of the *demos* prefers. One set of theorists argues that democracy is thus no more complicated than regular elections. Joseph Schumpeter’s 1942 book, *Capitalism, Socialism and Democracy*, is perhaps the leading articulation of this form of minimalist democracy. Schumpeter asserts that people have no politically meaningful individual will. For this reason, it does not make sense to think of democracy as anything more than an aggregation of individual votes. These votes, he argues, are largely meaningless on their own, but they can select leaders who then make the real decisions about governance. In other words, Schumpeter’s minimalist democracy is, in his own words, “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” It is a “competition for leadership.”
Defining democracy as a minimalist majoritarian process of selecting leaders is parsimonious,39 but to fully grasp minimalist democracy, it is important to note at least some of the ideas that it does not include and some of the conclusions to which it can lead. Minimalist democracy is only a procedural concept. It describes how democracy works as a majoritarian competition.40 Schumpeter’s minimalist democracy explicitly does not include any substantive content. That is, it tells us how to elect leaders but not what those leaders can and cannot do. For instance, in Schumpeter’s view, democracy is not a process for achieving any vision of a public good or even for resolving political issues.41 The ideas of a public good and political resolution are imbued with values, and Schumpeter’s democracy eschews any value other than that some people get to vote for leadership.42

One could imagine a democracy that is centered on majoritarian elections but also includes some substantive content. In An Economic Theory of Democracy, Anthony Downs presents a plainly majoritarian democracy but demands that the electoral process does not undermine certain values, such as roughly universal adult enfranchisement, and he imposes a prohibition on those who win elections. Downs’ vision does not permit efforts “to restrict the political activities of any citizens or other parties as long as they make no attempt to overthrow government by force.”43 This is minimalist majoritarianism with an added veneer of substantive rules that prohibit elected leaders from undermining future elections.

Others go slightly further, including rights to freedom of expression, press, and assembly, all of which arguably undergird a rigorous electoral process. This is the core of Robert Dahl’s view of democracy.44 Dahl’s clear, engaging, unpretentious, and brilliant writing on democracy made him one of the leading thinkers on the subject. And although he is less often described as a minimalist, I think that categorization is fair.45 Dahl’s democracy requires five criteria: (1) effective participation, meaning that everybody has an effective means of making their views known; (2) voting equality, meaning that every vote, and opportunities

39. I use this word in both senses: minimalism is frugal and sparing in the qualities it attaches to democracy and it is also tightly fitted to the data if we take only the roots demos and kratos as data from which to draw conclusions about democracy.
40. Id.
41. Id. at 269. As Pettit says, Schumpeterian democracy does not resolve issues, it does not even direct government how to act, it is “non-directive influence.” PETIT, supra note 10, at 22–23.
42. SCHUMPETER, supra note 7, at 269.
43. DOWNS, supra note 7, at 23–24. Notably, Downs explicitly locates his own work in Schumpeter’s minimalist camp, writing that “Schumpeter’s profound analysis of democracy forms the inspiration and foundation for our whole thesis, and our debt and gratitude to him are great indeed.” Id. at 29 n.11.
44. DAHL, supra note 7, at 8–16.
45. As does, for example, Professor Mansbridge. Jane Mansbridge, Using Power/Fighting Power: The Polity, in DEMOCRACY AND DIFFERENCE, supra note 9, at 46, 52; see also HELD, supra note 12, at 141 (confirming that Dahl was writing in the minimalist tradition that Schumpeter largely conceived).
to vote, must be equal; (3) enlightened understanding, meaning that everybody has an equal and effective opportunity to learn about issues; (4) control of the agenda, meaning that citizens have the exclusive opportunity to decide what issues are under consideration; and (5) inclusion of adults, meaning that most adults, regardless of broad characteristics like race and sex or gender, must be able to participate. These criteria create a system for facilitating majority rule, but unlike Schumpeter’s democracy, Dahl’s comes with inviolable safeguards for the electoral process.

One area where Dahl and Schumpeter most glaringly diverge is in how they define “the people”—the demos. As is evident from his five criteria, particularly the fifth, Dahl believes democracy requires that almost all adults have the equal right to vote. This is not a conclusion based on what a given democratic government might decide, it is an *a priori* requirement before Dahl will describe a government as democratic. Schumpeter disagreed. Schumpeter argued that the demos is itself a democratic question and that whatever the majority wants is acceptable. If the people decide they should exclude voters based on race, economic status, or any other characteristic, that does not undermine the democratic nature of a system. “We may disapprove” of these exclusions, Schumpeter admits, but that does not make them any less appropriate in a minimal and majoritarian democratic system. Where democracy is merely the majoritarian election of leaders without any *a priori* substantive content, there are no boundaries on substantive outputs.

Dahl’s democratic criteria are plainly deeper and more substantive than Schumpeter’s. Yet, while items like equality and the effective opportunity to understand political issues are particularly value-laden, tied to ideals that Dahl argues must exist prior to the electoral process and which the electoral process cannot change, Dahl nevertheless presents these criteria in the service of electoral decision-making. Put differently, Dahl’s criteria are much richer than Schumpeter’s, but they are still criteria that help assure fair and effective majoritarian elections. In that respect, Dahl also presents a minimalist democratic ideal.

In brief, minimalist democracy describes majority-rule governance in which elections aggregate individual votes to select the real, official, decision-makers. At its most minimal there are no substantive commitments. Democracy is merely a set of procedures for voting. Minimalist democracy can, however, be slightly thicker, including some substantive

47. Id. at 38.
48. Schumpeter, supra note 7, at 244–45.
49. Id.
50. Id. at 245.
51. In addition to being theorists, both Dahl and Schumpeter were empiricists. Dahl, supra note 7, at vii–viii; Song, supra note 34, at 43. Perhaps empiricists prefer minimal democracy because identifying a minimal system in the real world may be easier than identifying a more complex democracy, thereby making their empirical work more comprehensive.
rights that support majoritarian aggregation. What minimalist democracy nominally eschews is a commitment to any values that do not attach to the voting process. Of course, in this way, minimalist democracy has a liberal character (and arguably an exogenous commitment to liberalism—that is, a commitment to the ideal that society is, first, a collection of self-governing individuals) because it treats people as pre-political beings and the democratic process as merely a way to aggregate pre-political individual preferences.

Minimalism is appealing because it settles on elections, the most obvious aspect of popular democratic thought. But it also erases more robust ideas about democracy. Professor Abu El-Haj, for instance, reminds us that there is a richer version of democracy. “Public meetings, petitions, local and national festivities, and even juries and mobs were the normal channels through which citizens, ordinary and elite, enfranchised and disenfranchised, participated . . . .” The following models trend more in this direction.

2. **Pluralism**

Pluralism is an approach that shares some similarities with minimalist democracy but also departs significantly in how it identifies the demos. Pluralism focuses on “group politics” that emerge in between individual citizens and elected leadership. In pluralism, “[g]overnments mediate and adjudicate between [interest group] demands.”

Pluralism emerged as an attempt to empirically describe democracy in practice rather than to offer a normative model. Here again, Dahl played a formative role, though pluralism gained such widespread traction early in the twentieth century, it is harder to ascribe it to a single scholar. Indeed, it may be most accurate to tie pluralism, at least as a normative theory, back to James Madison.

In the *Federalist Papers*, Madison wrote about factions and the need to take advantage of self-interested groups to play against each other such that no single special interest would dominate politics. This is the core of pluralist democracy: the “fundamental purpose of government is to protect the freedom of factions to further their political interests while preventing any individual faction from undermining the freedom of...

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54. Id. at 173.
55. Id. at 158.
56. Id. at 159 (describing Dahl as “one of the earliest and most prominent exponents of pluralism”); see also Dahl, *supra* note 7, at viii–ix.
others.\footnote{Held, supra note 12, at 159.} We might say that it is classic liberalism applied to groups rather than individuals.

Pluralism relies on the idea that the vast diversity of individuals in a political community will coalesce into groups of interested parties, these groups will articulate various interests in society, and the democratic process is effectively the mediator, advancing only those policies that emerge from the clash of interests.\footnote{Life of Administrative Democracy, supra note 14, at 1236 (first citing Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1514 (1992); and then citing John Dewey, The Public and its Problems 73 (1927)).}

Underlying this version of democracy is the fear that individuals cannot make good decisions either as individuals or in the aggregate.\footnote{Schumpeter, supra note 7, at 264.} Thus, divining any cogent will out of individuals is impossible, which arguably makes any coercive government policy undemocratic because it is not the result of the majoritarian will. It is hard to accept a democracy in which individuals are not, at least, informing the goals of government decision-making. The minimalists would say that a cogent public will is not necessary, only that the majority voted for the decision-makers. Other theorists assert that the trick is not to interpret individual will or to let elected decision-makers act on their own will, but instead to govern in a way that would advance an \textit{objective} public good, whether or not individuals were able to articulate that good themselves.\footnote{Walters, supra note 11, at 21.} The problem with this approach was that political scientists were finding it impossible to empirically identify any such thing as a “public good” or “public interest.”\footnote{Mouffe, supra note 11, at 81–82.}

The pluralist solution to the lack of meaningful aggregate public will or identifiable objective public good was to explain a dynamic version of the public good.\footnote{Schumpeter, supra note 7, at 264.} This pluralist version of the public good is the bargain that emerges from interest-group competition.\footnote{Id. at 250.} As I noted earlier, this has obvious Madisonian roots. In \textit{Federalist No. 10}, Madison wrote that factions—interest groups, in modern parlance—would come together to represent “some common impulse of passion, or of interest.”\footnote{Schumpeter, supra note 7, at 264.} Madison lamented that factions existed at all because he believed that they were anathema to the now discarded idea of a “public good.”\footnote{Id. at 250.} But he later stressed, although in the context of separation of government powers, rather than separation of interest-group powers, that “[a]mbition must be made to counter ambition.”\footnote{The Federalist No. 51, supra note 58, at 322 (James Madison).} With specific reference to factions, Madison famously explained that in a large republic, the sheer “variety of  

60. Held, supra note 12, at 159.  
61. Life of Administrative Democracy, supra note 14, at 1236 (first citing Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1514 (1992); and then citing John Dewey, The Public and Its Problems 73 (1927)).  
62. Schumpeter, supra note 7, at 264.  
63. Id. at 250.  
64. Walters, supra note 11, at 21.  
65. Mouffe, supra note 11, at 81–82.  
66. Life of Administrative Democracy, supra note 14, at 1236.  
67. The Federalist No. 10, supra note 58, at 78 (James Madison).  
68. Id.  
69. The Federalist No. 51, supra note 58, at 322 (James Madison).
parties and interests” will “secure . . . against [any] danger” that a single-special-interest faction may pose.\textsuperscript{70}

Unlike minimalist democracy, pluralism sees the democratic playing field stretching well beyond elections because interest-group conflict and negotiation happen in myriad places. Like minimalist democracy, pluralism assumes that the role of democracy is to aggregate pre-political preferences. Pluralism aggregates first by noting that individuals who care enough will gather into interest groups,\textsuperscript{71} and then pluralism aggregates again by accepting the outcome of interest-group interactions as democratically legitimate.\textsuperscript{72}

Pluralism played a significant role in shaping New Deal institutions.\textsuperscript{73} Most notably, the National Recovery Administration facilitated representatives of private industry negotiating their own schemes of self-regulation.\textsuperscript{74} Having laid claim to such significant real-world implementation, pluralism also eventually became the subject of harsh criticism. Some of that criticism came from scholars like Theodore Lowi, who were not promoting a particular vision of democracy but instead uncovering the way that pluralism attempted to hide the reality of government coercion under the false promise of pluralist negotiation or consensus.\textsuperscript{75}

3. **Deliberative Democracy**

Other critics, like Jürgen Habermas, saw pluralism as just another form of aggregative majoritarianism representing private interest,\textsuperscript{76} and sought to offer a richer alternative in which democracy itself is political, going beyond aggregating and actually generating public will.\textsuperscript{77} This is the origin of deliberative democracy.

Deliberative democracy is the idea that communication and, of course, deliberation and discourse are at the center of decision-making

\textsuperscript{70} *The Federalist* No. 10, *supra* note 58, at 80, 83 (James Madison). Madison’s solution to the problem of factions was built on his explicit distinction between a “pure democracy” and the American constitutional “republic” for which he was arguing in the *Federalist Papers*. Id. That distinction, however, was made up, without prior roots in democratic thought. *Dahl, supra* note 7, at 17.

\textsuperscript{71} E.g., *The Federalist* No. 10, *supra* note 58, at 78 (James Madison) (“By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest . . . .”). *See generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups* (1971) (providing a classic study of interest groups).

\textsuperscript{72} *Life of Administrative Democracy, supra* note 14, at 1236.

\textsuperscript{73} Id.


\textsuperscript{76} Habermas, *supra* note 9, at 21.

\textsuperscript{77} See, e.g., *Mouffe, supra* note 11, at 81–82, 84 (explaining how Habermas and others, like Rawls, proposed a view of democracy built on generative consensus to supplant pluralism).
rather than preference aggregation as in minimal or plural democracy.\textsuperscript{78} It begins with the idea that when people communicate “better arguments . . . come into play.”\textsuperscript{79} As a result, deliberative democracy is both a theory of discursive democratic decision-making and a set of procedures that can guide deliberation.\textsuperscript{80}

To fully grasp deliberative democracy, it is important to clearly see how it departs from the other theories I have described. Where those theories assume pre-political preferences and envision democracy as an institution for aggregating those preferences, or choosing between them, deliberative democracy sees the process of conversation and deliberation as an institution for explaining, shifting, building, and transforming preferences.\textsuperscript{81} Because deliberative democracy makes democracy generative, it can facilitate consensus. In the other theories, consensus would only arise, if ever, by accident. In deliberative democracy, it can arise through dialogue.

Much of the debate within deliberative democracy is about the specific procedures that should guide public deliberations: what is a valid reason, what is a valid form of communicating that reason, and so forth.\textsuperscript{82} Although I return to this general concept of procedures for deliberation later in this Article, the nuances of specific discursive theories are less important than the approach to coercion that emerges from deliberative democratic theory.

In aggregative theories, there is coercion because there is an irreducible plurality of values and when government acts to advance one preference, it will conflict with another. Deliberative democracy does not reject this difference nor necessarily assume that deliberation will always generate consensus. It does, however, suggest that people will accept the coercive force of government because, after an effective and satisfying deliberative process, they understand that a policy is, at the very least, justifiable.\textsuperscript{83} By building a consensus on legitimacy, if not preferences, deliberative democracy makes coercion acceptable because it is reasoned and debated rather than because of the fiat of majoritarian aggregation.

In this sense, deliberative democracy returns to the idea of a “public good” in two ways. First, some theorists insisted that in the deliberative process, people only rely on arguments about the common good rather

\begin{itemize}
  \item[78.] Habermas, supra note 9, at 25–26.
  \item[79.] Id. at 24.
  \item[80.] Id. at 26.
  \item[81.] E.g., Mansbridge, supra note 45, at 47 (“Deliberation can help transform interests and reveal previously unrealized areas of agreement.”).
  \item[82.] E.g., John Rawls, The Idea of Public Reason, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 93, 96–97 (James Bohman & William Rehg eds., 1997); Habermas, supra note 9, at 25; Seyla Benhabib, Toward a Deliberative Model of Democratic Legitimacy, in DEMOCRACY AND DIFFERENCE, supra note 9, at 67, 80–81; Joshua Cohen, Procedure and Substance in Deliberative Democracy, in DEMOCRACY AND DIFFERENCE, supra note 9, at 95, 102; Iris Marion Young, Communication and the Other: Beyond Deliberative Democracy, in DEMOCRACY AND DIFFERENCE, supra note 9, at 120, 129.
  \item[83.] Walters, supra note 11, at 25–26.
\end{itemize}
than special private interests. Second, the process of deliberation can build a sort of public good that grows from mutual recognition of each person’s good-faith participation in the deliberative democratic process. In other words, the public good is not a fixed or objective reality; it is a sense of satisfaction or contentment with the process of democratic governance.

4. Republicanism

While “republican government” or “republican democracy” are common terms to describe the United States’ system of representative government, republicanism in this discussion is a theory of democracy, not merely a description of a representative system. Republicanism shares some key features of deliberative democracy but also differs in at least one significant way. Like deliberative democracy, republicanism relies on democratic processes that are collaborative and deliberative so that they can generate ideas and build consensus and satisfy people that they are not subject to unjust coercion. Republicanism is about active and engaged citizens. Unlike deliberative democracy, republicanism starts from a very precise articulation of the meaning of public good or public interest. In republican thought, the goal of democracy, the public good to which it strives, is non-domination. From its earliest articulations, “[t]he core of the Renaissance republican case was that the freedom of a political community rested upon its accountability to no authority other than that of the community itself.”

Philip Pettit is the leading proponent of modern republicanism, though K. Sabeel Rahman, particularly in the legal literature, is also a prominent thinker on the subject. Pettit advocates a broader vision of democracy as a tool to fight subjugation and domination. Some visions of personal liberty define liberty as freedom from interference. Freedom from interference means that a person is free so long as no person or entity actively restricts their behavior. This seems a natural description of the relationship between the state and the people: when the government regulates behavior, it interferes with the individuals whom it regulates. But to republican theorists, liberty runs deeper than active interference. To republicans, liberty means that we are not subject to the

84. Pettit, supra note 10, at 14–16.
85. Young, supra note 82, at 129.
86. Pettit, supra note 10, at 167.
87. Held, supra note 12, at 29.
88. See Pettit, supra note 10, at 1–2 (demonstrating that republicanism is similar to, but more specific than, deliberative democracy because it is aimed at the goal of non-domination).
89. Id. at 4–10; see also Rahman, supra note 10, at 14.
90. Held, supra note 12, at 34.
91. E.g., Pettit, supra note 10; Rahman, supra note 10.
92. Pettit, supra note 10, at 1–3.
94. Id. at 108.
arbitrary will of another. If somebody has the power to control us, even if they do not use that power, there is still domination. If the government has the authority to inspect private property but chooses not to exercise that power, the government has not actively interfered, but the property owner is still subjugated or dominated because inspection could happen at any moment. Rahman’s view is just slightly more specific, focusing particularly on economic domination.

From the concept of non-domination, a democratic theory emerges. If people have the proper level of control over the state, then the state can intervene to prevent domination. That intervention will often require some form of interference with individual decision-making, but that is not a democratic problem so long as the purpose of the intervention is to prevent domination and so long as the government is working at the behest of the demos. Put slightly differently, if somebody interferes with your freedom based on your instructions, not their own independent will, their interference would not be an encroachment on your freedom.

Pettit uses the example of an alcoholic asking their friend to hold the key to the liquor cabinet. If the friend refuses to let the alcoholic access the liquor, the friend is not dominating the alcoholic because the friend is not exercising their own will, they are exercising the will of the alcoholic. The relationship between the alcoholic and the friend roughly parallels that of the people and the state. If the people ask the state to act, if the state is an agent of the people, then the state can impose restrictions that prevent domination but is not itself dominating because it acts on the will of the people.

To assure a democratic government in this vein, Pettit defines democracy as a system that makes public control “individualized, unconditioned and efficacious.” This requires that participants equally share in control of the state, that the government works at the behest of citizens, not through the will of others, and that when the state implements a policy that does not advance an individual’s particular preference, that individual can accept the state’s action as arising from democratic control rather than “the work of an alien will.”

95. Id.
96. Id.
98. Pettit, supra note 10, at 153.
99. Id.
100. Id. at 165.
101. Id. at 57. Note that Pettit does not say that the initial actor is, in fact, an alcoholic. I add this detail myself to make the example slightly easier to explain in few words.
102. Id. at 152–53.
103. Id. at 239.
104. Id. at 153.
105. Id. at 167.
democratic process, is satisfying and reassuring. Pettit uses the shorthand of a “tough-luck test” to explain that the democratic system where people who do not get what they want feel like it was just bad luck and maybe next time they will prevail, as opposed to a system where they feel like they are not getting what they want because somebody else is in control.

Rahman elaborates on Pettit’s outline of democracy by looking more closely at the institutions that are necessary for implementing the republican ideal. These policymaking institutions must be visible and sufficiently powerful so that they can become “target[s] for mobilization—providing a forum and language through which claims can be made, and possessing the authority to respond to those claims.” In other words, like the minimalists, there is a need to define the institutions here. The minimalists define elections and what makes an election fair enough that they would describe it as democratic. The republicans define policymaking institutions, like administrative agencies and legislatures, such that they have the power both to curb domination and energize people to effectively participate in a deliberative and contestatory system. In this way, again, republicanism is similar to deliberative democracy because it sees the democratic process as politically generative based on discourse and debate, which even though it may not lead to consensus, can lead to satisfaction.

5. Other Democracies

Minimalism, pluralism, deliberation, and republicanism are all significant modern democratic ideals (often with classical origins) that command attention in any writing about democracy. Of course, they are not the only visions of democracy that deserve attention. In the remainder of this Part, I want to briefly acknowledge two other approaches: Vandana Shiva’s earth democracy and agonistic democracy, most closely associated with Chantal Mouffe.

I choose these for two distinct reasons. First, contrasting the two shines light on the important distinction between the procedural and substantive contents of different democratic theories. When we debate pure majoritarianism versus representative democracy, for instance, we tend to focus on questions of procedure. Substantive values do not describe how we do democracy. Instead, they describe the state of the world that a vision of democracy seeks to achieve. Second, agonistic

106. Id.
107. Id. at 177–78.
109. Id. at 15.
110. Id. at 23.
111. Id.
113. Id.
democracy, for good reason, is gaining more attention in the legal literature and will play a role in some of the ideas I present in the following Parts.

Earth democracy is an almost entirely substantive endeavor while agonism is predominantly procedural. This distinction helps us focus on the substantive and procedural commitments that any theory contains. Identifying these values is important because it allows us to understand what we are committing to should we prefer any particular ideal and what we are eschewing should we prefer a more proceduralist approach.

Out of the gate, Shiva is plain that her vision of earth democracy is a “movement for peace, justice, and sustainability.”114 She presents earth democracy in opposition to what she sees as two prevailing values in most democratic systems. First, she objects to the way existing democracies have removed economic issues from public consideration, arguing that to the extent states respect public participation at all, they take “economic decisions outside the reach of parliaments and citizens.”115 To the contrary, earth democracy must include “[e]conomic democracy, which involves participation of all people in [all] the decisions about the economy.”116 Shiva’s second objection is that “[r]epresentative democracy is increasingly inadequate at defending our fundamental freedoms.”117 One critique of representative democracy is that as long as it cannot regulate economic issues, it forces representatives to focus on nationalism and politics of race, ethnicity, and the like, to maintain popular support, thereby undermining effective governing.118 The solutions to these objections take three forms. The first is focused on identifying the demos. Earth democracy asks us to expand our notion of the political community beyond humans and beyond the present. We must, writes Shiva, base democracy “on the intrinsic worth of all species, all peoples, all cultures; a just and equal sharing of this earth’s vital resources; and sharing the decisions about the use of the earth’s resources.”119 The second approach of earth democracy is more procedural. Focusing on making democracy more effective for individuals, earth democracy demands that people do not just vote for leaders, but that they also have continuing influence over public decisions.120 Earth democracy is also about localism and local decision-making.121 Finally, to address the failings of representative democracy and the exclusion of economic issues from democratic debate, earth democracy offers a litany of expressly substantive principles. These principles include peace, justice,
sustainability, diversity, the right to sustenance, commons, and the "polluter pays principle."

There is much to unpack in earth democracy because the myriad substantive commitments each deserve their own exploration to fully understand what earth democracy might look like in practice. Nevertheless, it is clear this is an ideal that puts more emphasis on the substantive elements than on the few procedural points such as local decision-making and an expansion of the demos.

Agonism presents a different picture, focused on two key procedural points rooted in one overarching substantive commitment. The substantive commitment is that we live in a world of “radical indeterminacy,” meaning that there is no way to finally and certainly resolve any conflict. Put differently, because we cannot be certain of the right or wrong approach to political questions, we cannot settle on a definite public good. The concept of agonism is quickly emerging in the legal literature, with exceptional articles from scholars like Dan Walters, Glen Staszewski, and Anya Bernstein. Rahman, although he speaks more in the language of republicanism, also vigorously nods in the direction of agonism. However, political theorist Chantal Mouffe is most closely associated with the agonistic view of democracy, and she describes this substantive commitment as a recognition that democracy and liberalism are “incompatible.” Democracy promises political equality and popular sovereignty. Liberalism is a transcendental authority that promises absolute certainty on some issues, such as the inviolable existence of different human rights. “Those values are central to the liberal tradition and they are constitutive of the modern view of the world. Nevertheless, one should not make them part and parcel of the democratic tradition whose core values, equality and popular sovereignty, are different.” Without liberalism’s absolute guardrails, the rules of democracy become less obvious. Agonism is therefore an effort to find a way for liberalism and democracy to coexist without hiding the tension behind promises.

122. Id. at 1.
123. Id. at 4.
124. Id. at 8, 55.
125. Id. at 54.
126. Id. at 65.
127. Mouffe, supra note 11, at 1.
128. See generally Walters, supra note 11.
129. See generally Glen Staszewski, Obergefell and Democracy, 97 B.U. L. Rev. 31 (2017).
131. E.g., Rahman, supra note 10, at 25 (“[T]his view . . . suggests that regulatory capture be addressed by expanding the countervailing power of grassroots movements, groups, and individuals to contest.”).
132. Mouffe, supra note 11, at 5.
133. Id. at 2.
134. Id. at 1–3.
135. Id. at 2.
Two interdependent procedural points follow. First, agonistic democracy requires something like an expansion of the demos. I say “something like” because it does not match earth democracy’s call for including non-humans or future generations. Indeed, it does not precisely call for an expansion, so much as a recognition of those who do not prevail in other forms of democracy. The agonistic thinking here is that non-agonistic forms of democracy can “expel[] any legitimate opposition from the democratic public sphere” once that opposition is not part of the majority or consensual status quo. This expulsion silences valid perspectives and undermines the democratic process. Just because most people can vote does not mean we have an equitable and participatory system. As a result, democracy should create space for groups who are political minorities.

The second procedural point is that to promote recognition of those whom the democratic process otherwise silences, democracy must invite and facilitate conflicts rather than seek strategies to resolve and avoid conflict. Agonism sees democracy as “conflict regulation” rather than conflict resolution. Mouffe urges that we see “the process of contestation itself as intrinsically valuable and constitutive of democracy.” Conflict is democratic because it unsettles the status quo by forcing various interests to interact with each other and, returning to the initial substantive point, by interacting in conflict, participants are reminded that no policy has a claim to being fundamentally and finally settled. This insistence that there is no uncontestable policy resolution has the happy side effect of helping individuals see each other as co-participants in democracy, working constantly to shape the state, and therefore becoming adversaries but not enemies.

The comparison between the deeply substantive earth democracy and the largely procedural agonism helps us see that the question of democracy is generally not just a question of how we achieve something. It is first a question of what we want, who we are, and on those substantive criteria we begin to ask how. This is not a problem. To the contrary, recognizing the first questions of what we want and who we are forces us to remain vigilant in asserting our interests and needs and, ideally, remaining attentive to the interests and needs of others. And this is perhaps the

136. Id. at 81–82.
137. E.g., Walters, supra note 11, at 49.
140. Id. at 514.
142. Walters, supra note 11, at 55.
143. Id. at 47.
144. Id. at 1.
145. Id. at 13.
one idea that every democratic theory shares: each offers a way to, at a minimum, advance our interests and to deal with the interests of others. That distillation is the basis for the elements of democracy that I present in this Article.

II. Purpose, Methods

Before turning to the primary analytical contribution of this Article in the next Parts, this Part clarifies the purpose and scope of this endeavor and details my methods. The purpose of this Article is relatively modest. The goal is not to reinvent democracy nor to offer or even introduce a new theory of democracy. The purpose is to survey leading theories and to distill them into something like a “democracy for lawyers”—a useful description that breaks down the big ideas into useful elements.

To some extent, this effort is a bit like a restatement of democracy. I am searching for general principles in the diverse writing about democracy. I want to understand and interpret those principles, clarifying them into a series of specific elements that draw from and synthesize the existing theories.146 Lawyers and scholars undertaking various types of analysis that purport to rely on some democratic foundation can then use this “restatement” in their own work. In fact, I undertook this project because I found that in my own work I was frequently making claims about democracy without a satisfying framework for approaching democracy in a comprehensive way.147 Most work that defines democracy does so in order to make the case for a specific vision of democracy rather than a black letter restatement.148 I hope this Article will fill that gap.

Thinking about democracy is a bit like the common-law process. The thinking has evolved over time with tweaks at the margins and the core, but without a complete reinvention and almost always with recognition of the precedential theories. When Madison wrote about the fledgling American democracy, he intentionally connected it to thinking and writing of the ancient democrats.149 Dahl and other early pluralists described the interest-group model and explicitly framed it as flowing from these early American thinkers.150 Minimalists like Schumpeter and

147. E.g., Life of Administrative Democracy, supra note 14, at 1232–42; Death of Administrative Democracy, supra note 14, at 50–67; Environmental Governance, supra note 14, at 84–89.
148. E.g., Seidenfeld, supra note 61, at 1512; Walters, supra note 11, at 22; Mathews, supra note 34, at 636–37.
149. See, e.g., The Federalist No. 10, supra note 58, at 77 (James Madison) (“The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired . . . .”).
150. E.g., Dahl, supra note 7, at viii (“One illuminating window into Dahl’s scholarship is to view him as having been engaged in a lifelong dialogue with James Madison.”).
Downs pared down democracy because they rejected the idea of identifying a meaningful public good, which had been so important to earlier thinkers. And deliberative democrats like Habermas and Rawls added the process of deliberation to democratic thinking to enrich and soften the aggregate majoritarianism of their predecessors. Recognizing this common-law-like flow makes it easier to see that despite their differences, the various theories are in conversation and interdependent. With that in mind, it should be understandable that a distillation to and restatement of core black letter elements is possible and desirable.

In the Parts that follow, I will explain the meaning of each element and the precedent from prior thinking that leads me to elevate that particular element. Sarah Song has written that "democracy is more than a set of procedures; it is also a set of values underlying those procedures." With this distinction in mind, I will also be explicit about at least some of the substantive value commitments of each element, at least the ones that I find most appealing or most obvious. Finally, I will offer illustrations of each element to add some depth and to show that each element is practical in real democratic institutions.

I realize, of course, that very much unlike the real restatements, the writings from which I draw in this analysis are not binding law in any respect. For that reason, the elements I have extracted here are also elements that I think are evident in the U.S. Constitution. This is not to say that the Constitution requires the form of democracy I am describing. Rather, one of the reasons I have settled on these elements is because the Constitution suggests their importance. For this reason, in addition to explaining the scholarly sources from which I draw a given element, I will likewise explain how the Constitution elevates it as a particularly important component of democratic practice. It is, however, important to note that much like the story of Athenian democracy, the story of the U.S. Constitution is also one corrupted by the enslavement of human beings, the exclusion of women and people of color, and other injustices. Unlike classic Athens, however, the U.S. Constitution is necessarily indispensable because it provides the structure of U.S. government. In this way it is important both to draw on the Constitution as a resource for understanding U.S. democracy and to do so critically, without ignoring the history from which it emerges and the system it has helped create.

The elements on which I have settled, each detailed more in the following Parts, are: (1) majoritarianism; (2) individual contestation; (3) reason-giving; and (4) deliberation. I do not mean to imply that each theory of democracy embraces each element, but that each element stands out as a critical component of one or more of the dominant democratic theories and is also embedded in the Constitution. To ignore any

151. Mouffe, supra note 11, at 81–82.
152. Id. at 82–84.
153. Song, supra note 34, at 42.
element would thus be to erase an important part of the “common law democracy doctrine.”

III. Majoritarianism

A. In Summary

Majoritarianism denotes a voting process in which the largest bloc of voters on a given question determines the outcome. To many, this is often the entire meaning of democracy. To Schumpeter, majoritarianism and democracy are interchangeable, either is a competition in which the majority of voters select leaders. The Schumpeterian view represents the thinnest, most minimal view of democracy and majoritarianism.

Majoritarianism can mean more than just selecting leaders. It can provide democratic impulse, closure, and accountability. A thicker version of majoritarianism might, therefore, include layers of voting, first by the people to elect representatives, but then by the representatives that the people have elected, and then again by the people as a check on their representatives. Because people vote on a per capita basis, voting also introduces the baseline of equality into democracy. Equality was particularly important to Dahl’s view of majoritarianism, but even ardent minimalists like Downs held that all voters should be treated the same.

In a non-minimalist view of majoritarianism, voting provides a starting point—the impulse of democratic governance—when people elect representatives and leaders. Voting next provides democratic closure. In a majority-rule legislative system, voting ends an immediate policy debate and passes a law. This is policy closure. That closure may not (and should not) be truly final or unreviewable, but as a procedural matter, it is at least a temporary resolution. Among other reasons, when a legislature makes a majoritarian move to close a debate, it is not truly

155. Schumpeter, supra note 7, at 269, 272.
159. Downs, supra note 7, at 23.
160. Dahl, supra note 7, at 38.
final as a matter of democracy or majoritarianism alone because a majoritarian system should also provide the opportunity to check the behavior of representatives with periodic elections.\textsuperscript{161}

There is some flexibility in how we construe the meaning and manifestation of majoritarianism. When people vote out a representative, majoritarianism arguably offers accountability. Voters can hold representatives accountable for their actions by wielding the authority to remove them from office. This view of accountability seems to have a modern pedigree. For example, Professor Bressman argues that only after Alexander Bickel introduced his “countermajoritarian difficulty” did we begin to see majoritarian accountability as the essence of democratic legitimacy.\textsuperscript{162} The point here is that majoritarianism is a necessary element of democracy and it will typically involve voting for leaders and representatives. But there is room for how we interpret the exact purpose of majoritarianism—as merely a competition for leadership, as a source of control and accountability, or perhaps as something else. It is possible for majoritarianism to manifest in referenda, town meetings, voter initiatives, and recalls as well.\textsuperscript{163}

A significant debate in democratic theory is how to define the \textit{demos}, that is, the group that is entitled to participate in the majoritarian process.\textsuperscript{164} Some, like Dahl, argue that a system is not democratic if too few people have access to voting.\textsuperscript{165} Thus, this element of majoritarianism describes both the existence of majoritarian processes and also a consideration of whether those processes are sufficiently open and accessible.

Majoritarianism is one of the two essentially liberal elements of democracy. It is premised on the idea that each person has equal and inviolate rights to self-govern but that, in a complex and diverse society, self-government is unlikely to be consensual, making the mechanism of voting necessary to legitimize the power of the state.\textsuperscript{166} Whether or not majoritarian processes come with attendant protections for other individual rights, the process of voting itself is essentially a mechanism for implementing a view of liberalism.\textsuperscript{167}

\textbf{B. Precedent}

All the dominant theories of democracy make room for voting. The minimalists like Schumpeter and Downs,\textsuperscript{168} and the quasi-minimalists and pluralists like Dahl, of course.\textsuperscript{169} But even the more generative views

\begin{thebibliography}{99}
\item \textsuperscript{161} \textit{Id.}; \textit{Downs, supra note 7}, at 23.
\item \textsuperscript{162} Bressman, \textit{supra note 156}, at 464–65, 478 (quoting Alexander M. Bickel, \textit{The Least Dangerous Branch} (2d ed. 1986)).
\item \textsuperscript{163} E.g., Pettit, \textit{supra note 10}, at 209; Rahman, \textit{supra note 10}, at 69.
\item \textsuperscript{164} See, e.g., \textit{supra} Section I.B.1.
\item \textsuperscript{165} Dahl, \textit{supra note 7}, at 37–38.
\item \textsuperscript{166} E.g., Mansbridge, \textit{supra note 45}, at 53.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Schumpeter, \textit{supra note 7}, at 269; Downs, \textit{supra note 7}, at 23.
\item \textsuperscript{169} Dahl, \textit{supra note 7}, at 37.
\end{thebibliography}
of democracy that rely on interactions outside the voting booth recognize the essential requirement of some majoritarian processes. Pettit, for instance, explains that republican democracy requires individual systems of influences and explores electoral influence and majoritarianism as one such system.170 Rahman likewise praises electoral reforms that empower voters to shrug off domination.171 Deliberative theorists generally accept the majoritarian process and “assert that decision by majority rule becomes politically legitimate when it is the product of rational deliberation among political equals on grounds acceptable to all the participants.”172 Habermas himself, for example, is explicit that his own deliberative approach draws from the aggregative majoritarianism of liberal democratic theories.173

Outside of the philosophical thought on democracy, majoritarianism and electoral democracy find precedent in real institutions, not least of which is the U.S. Constitution. Two of the three branches of the federal government are elected.174 Although the Constitution does not specify the process for making decisions within Congress, it clearly implies a majoritarian decision-making regime within each house by describing the votes necessary for certain acts, such as the expulsion of members,175 adjournments,176 or impeachment.177 As to the President, majoritarianism is plainly at play, given that national voting is the groundwork of presidential elections, even as the Electoral College tempers that majoritarianism by filtering the popular vote through state delegates.178

C. Examples

This description of the way the Constitution uses majoritarian strategies for elections and internal decision-making is one of the most obvious examples of majoritarianism in our system. It is not the only one. In addition to the federal government, state constitutions have implemented majoritarianism in diverse ways. Professor Yeargain, for instance, has documented a history of state-level elections for all sorts of positions other than legislatures or governors.179 States have, or had,

172. C h r i s t o p h e r J. Peters, P e r s u a s i o n: A M o d e l o f M a j o r i a n t a r i a n i s m a s A d j u d i c a t i o n, 96 N w. U. L. R e v. 1, 3–4 (2001).
173. H a b e r m a s, supra note 9, at 26.
174. U.S. C O N S T. art. I, § 1 (election of representatives); id. amend. XII (election of president); id. amend. XVII (popular election of senators).
175. Id. art. I, § 5, cl. 2.
176. Id. art. I, § 5, cl. 1.
177. Id. art. I, § 3, cl. 6.
178. Id. amend. XII.
179. E.g., Quinn Yeargain, S h a d o w D i s t r i c t s, 45 C a r d o z o L. R e v. 405 (2024) [hereinafter S h a d o w D i s t r i c t s] (discussing multimember state boards elected by voting district); Quinn Yeargain, A d m i n i s t r a t i v e C a p a c i t y i n D i r e c t D e m o c r a c i e s, 57 U.C. D a v i s L. R e v. 1347, 1350–51 (2023) [hereinafter A d m i n i s t r a t i v e C a p a c i t y] (describing election of state-level regulatory officials in the late 1800s and early 1900s).
elections for agriculture commissioners, attorneys general, commissioners of education, insurance, and more.\textsuperscript{180}

Another somewhat familiar example is the New England town meeting. The town meeting is a long-standing tradition in much of New England, in which all eligible voters are invited to assemble as a whole to make decisions for their community.\textsuperscript{181} Although classic Athenian democracy is an example of such an assembly of the whole, the New England town meeting may represent one of only two modern examples.\textsuperscript{182} Town meetings do have deliberative aspects,\textsuperscript{183} but it is ultimately a majoritarian process in which participants make decisions based on majority-rule voting.\textsuperscript{184}

A perhaps less familiar example is majoritarian elections within the federal administrative state. Though many criticize the federal bureaucracy for being “undemocratic” because it is not majoritarian,\textsuperscript{185} there are examples of majoritarian elections within the federal bureaucracy.\textsuperscript{186} The most complete example is the almost 8,000 elected farmers who sit on over 2,000 farmer-committees that promulgate, implement, and adjudicate federal farm policy at the local level.\textsuperscript{187} In this system, individual farmers elect other farmers from within their local jurisdiction to sit on these committees.\textsuperscript{188} There is some argument that these are not truly majoritarian insofar as only farmers can vote and only farmers can serve.\textsuperscript{189} But there is no question that within the designated demos, majority-rule elections select official decision-makers, and certainly this fits at least the Schumpeterian minimalist version of democracy.

The majoritarian examples in this section are helpful for seeing majoritarianism in the real world, and the concept of majoritarianism more broadly is essential to get democracy moving, but democracy does

\textsuperscript{180} Shadow Districts, supra note 179, at 415–27; Administrative Capacity, supra note 179, at 1357–58.
\textsuperscript{182} Zimmerman, supra note 181, at 1.
\textsuperscript{183} See Mansbridge, supra note 181, at 662–63 (“Resolving conflicts in person has helped generations learn self-worth, largeness of spirit, responsibility, compromise, and respect for the rules of the democratic game.”).
\textsuperscript{184} See id. at 636 (describing the voting procedure for a particular town official); Zimmerman, supra note 181, at 1 (same); Environmental Governance, supra note 14, at 107–08.
\textsuperscript{185} Death of Administrative Democracy, supra note 14, at 33 n.195, 44.
\textsuperscript{186} Life of Administrative Democracy, supra note 14, at 1216–18.
\textsuperscript{187} Id. at 1216. Other federal administrative elections include Federal Home Loan Bank directors, Department of Housing and Urban Development resident councils, Department of Labor state employment statistics advisors, United States Department of Agriculture (USDA) grazing advisory boards, and USDA commodity committees. Id. at 1217.
\textsuperscript{188} Id. at 1220.
\textsuperscript{189} Id. at 1235.
not stop there. Majoritarianism is only the first element in this Article’s restatement of democracy.

IV. Individual Contestation

A. In Summary

Democracy offers non-majoritarian, individual participation and contestation that protect individuals or groups of individuals even in a collective endeavor. Individual contestation allows people to participate intensely and not only to have their votes aggregated or their consensus noted. It allows people an opportunity to upend political settlements and the status quo, and to object to coercion. Different approaches to individualism provide greater and lesser degrees of contestation. At the minimalist end, individualism is merely the opportunity to voice one’s opinion in support of effective elections. To the republican end, institutions must empower individuals to contest any domination. To others, individualism is an opportunity to participate in agenda-setting. The fundamental point is that a democracy should offer not only majoritarianism as a tool of aggregation, deliberation as a tool of consent, or reason as a tool of justification and expertise, but also should offer outlets to protect disaggregate individuals and groups who may object to the status quo. This does not mean that individual contestation promises to change the status quo or undo any coercion. It does mean that individuals must at least have the opportunity to try. Court systems and individual rights are typical components of individual contestation, as I discuss more later in this Part. Individual rights provide baseline protection of the individual even in a democratic system with other values. Courts provide a forum for defending those rights.

Individual contestation, like other elements of democracy, comes with some substantive commitments. There should be no question that the political community is just that—a community—not merely a collection of atomistic, pre-social, automatons. There should also be no question that society is made up of human beings who, as dependent as we are, as influenced as we are by each other in the collective, we are also indispensably individuals. Voting accounts for the collective. Individual contestation accounts for, well, the individual. And, as the following Parts will argue, reason-giving accounts for facts and deliberation accounts for the shared understandings of a society.

190. Staszewski, supra note 129, at 61.
191. Mansbridge, supra note 45, at 46.
192. Dahl, supra note 7, at 37.
In other words, like majoritarianism, the element of individual contestation is also rooted in a commitment to liberalism. Where majoritarianism advances a liberal ideal by assuring that each person has an equal share of influence through voting, individual contestation assures the individual voice against competing processes like aggregation, consensus, and rationalism. To be very clear, this is not to say that we should jettison any of these other processes, only that we should continue to value individuals even in a complex democracy that includes other elements. It likewise brings another measure of political equality into the democratic framework as even those who are denied votes or who are in a voting minority have equal access to forums for individual contestation.  

This runs along the same lines as Mouffe’s agonistic effort to assure that individual liberty can exist alongside what she identifies as the democratic ideals of equality and popular sovereignty. Indeed, it is the persuasiveness of agonistic thinking that has convinced me to explain this element as individual contestation rather than merely individualism or individual participation. Individualism alone might import too many specific notions of natural human rights that impose limits on the democratic process of collaboratively enunciating political ideals and values. There are, for instance, liberals who would happily ditch democracy to protect their own visions of fundamental rights. But, in Mouffe’s words, “‘human rights’ are defined and interpreted at a given moment, they are the expression of the prevailing hegemony and thereby contestable.” Thus, this individual element of democracy is not about fundamental rights, but about a process for individuals, particularly those with less practical governing power, to contest majority rule or other forms of policy resolution.

In agonistic thinking, the core of democratic process must be contestation because without abundant processes for contest, the political process will—behind platitudes about consensus, majority rule, or rational expertise—hide the reality of power, coercion, and the voices of those who do not prevail. Agonism’s focus on contestation as a way to rectify liberalism and democracy is valuable. But contrary to Mouffe’s insistence that liberalism and democracy are in tension, if we see liberalism not as a commitment to specific rights, a natural order, or an endowment from a creator, but instead see liberalism as a process, a form of political engagement, voice, and, yes, contestation, then liberalism and individual contestation fit well within a democratic framework such as this one.

195. E.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).
196. MOUFFE, supra note 11, at 2.
197. Id. at 3–4.
198. Id. at 3.
199. Id. at 4.
200. Id. at 7–8, 100.
201. Id. at 9.
B. Precedent

And in one form or another, individual contestation is part of most democratic theories.\textsuperscript{202} It is, of course, the heart of agonism, which holds that only individual contestation can really bring the individual into a democracy.\textsuperscript{203} Without such individual contestation over specific policies and programs, the democratic process will steamroll those voices and visions that do not conform to the status quo or majoritarian demands.\textsuperscript{204} Thus, individual contestation creates space for more perspectives and it helps to make democratic conflict productive rather than antagonistic, devolving into racism and nationalism.\textsuperscript{205} And to the pluralist, individual contestation is an important way to assure that the perspectives of each faction make their way into government planning.\textsuperscript{206}

Republican theory, focused as it is on non-domination, naturally leads into contestatory structures to prevent domination.\textsuperscript{207} Similar to agonistic contest, Rahman notes that a non-domination view of liberty requires institutional procedures that empower people to resolve disputes and maintain productive disputes.\textsuperscript{208} In Pettit’s words, the only way to overcome the tyranny of the majority “is to introduce a system of individualized contestation” as “[t]here ought to be openings for particular individuals and subgroups to test the laws or proposals.”\textsuperscript{209}

Deliberative theorists like Habermas have also had plenty to say in favor of individual contestation. Habermas developed his theory of co-originality, which contends that a communal, deliberative state is not in tension with the idea of the individual because the state and individual are dependent on, interactive with, and inseparable from each other.\textsuperscript{210} Thus, in the deliberative theory, even though the focus is on collective discourse, there is no denying that the individual is an essential participant.

The minimalists might be seen as having less to say in favor of individual contestation, but they do have important contributions. Those with a broader vision of majoritarianism certainly see individualism as essential to elections because individuals must have an opportunity to, at least, make their views known.\textsuperscript{211} The more extreme liberals put an emphasis on individualism, of course, but sometimes outside of the lexicon of democracy. Carl Schmitt and Fredrich Hayek, as examples, were leading proponents of individualism but also skeptics of democracy.\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{202} Scott Skinner-Thompson, \textit{Agonistic Privacy \& Equitable Democracy}, 131 \textit{Yale L.J.} \textit{F.} 454, 457 (2021).
\item \textsuperscript{203} \textit{Id.} at 13.
\item \textsuperscript{204} Skinner-Thompson, \textit{supra note} 202, at 469.
\item \textsuperscript{205} Walters, \textit{supra note} 11, at 22.
\item \textsuperscript{206} Pettit, \textit{supra note} 10, at 15.
\item \textsuperscript{207} Rahman, \textit{supra note} 10, at 96, 98.
\item \textsuperscript{208} Pettit, \textit{supra note} 10, at 213.
\item \textsuperscript{209} Jürgen Habermas, \textit{Between Facts and Norms} 128 (William Rehg trans., 1998).
\item \textsuperscript{210} Dahl, \textit{supra note} 7, at 37.
\item \textsuperscript{211} \textit{Id.} at 37.
\item \textsuperscript{212} \textit{Mouffe, supra note} 11, at 5, 9.
\end{itemize}
Interestingly, Schumpeter was explicit that in a democratic system, the individual only matters in the aggregate, but his views on capitalism are quite different. When elaborating on the capitalist system, he puts emphasis on the creative destruction that individuals and firms bring about to advance the evolutionary process of capitalism. Although we might typically think of markets as operating as a sort of aggregating mechanism, because the creative and economic power of an individual can directly change markets, we can see a shadow of agonistic contestation in Schumpeter’s thinking, albeit not explicitly in his thinking about democracy.

With respect to constitutional precedent, individual contestation is evident in, though not limited to, the Petition Clause of the First Amendment. That Clause assures “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” The Petition Clause is specifically a limitation on Congress’s authority, which is largely majoritarian authority, in favor of individual power. As Professor Blackhawk demonstrates, this liberal seed of individual participation flowered into several recognizable institutions, including private bills, lobbying, and much of the Administrative Procedure Act. Empowerment and opening of courts as a remedy to violations of law, regardless of whether the law or the violation claims majority support, is also proof of the Constitution’s call for individual participation. Finally, of course, the entire notion of the Bill of Rights is the notion of limiting majoritarian processes and limiting the field of vision of state action, in order to protect individual rights. This general notion does not necessarily or directly create opportunities for contestation—though it is certainly precedent for the concept of individualism as a part of a democratic order. When paired with the Article III judiciary, rights become practically enforceable in a contestatory, adjudicatory system.

C. Example

The judicial system, therefore, is one of the prime examples of an institutional system for contestation. The courts are open to all individuals who can demonstrate some individual harm, regardless of the individual’s role in the majoritarian process. While the judicial

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213. Schumpeter, supra note 7, at 271.
214. Id. at 81–86.
215. U.S. Const. amend I.
216. Id.
218. Id. at 1555.
220. Arguably both fundamental individual rights and a judiciary are necessary democratic institutions, but I do not consider that question in this Article.
221. McKinley, supra note 217, at 1559.
system’s primary focus is on redress for harm, that process is also an opportunity for political participation. When a court issues a judgement in favor of one party, that judgement can “serve to restore a status of equal standing within the political body.”

As noted earlier, the Petition Clause and the petitioning process creates another “avenue for political participation distinct from the vote. The process was available to even the unenfranchised and did not operate by a majoritarian decision rule.” On almost the opposite end, Richard Pildes and Elizabeth Anderson note that the filibuster is also a form of individual contestation. I say it is on almost the opposite end because petitioning is so open to anybody in society whereas the filibuster is specific to senators. Nevertheless, it is an institutional tool that allows an individual to upend a simple majority.

Professor Walters argues that the administrative state can be a source of individual contestation as well. He does not promise that every aspect of the administration currently serves this purpose, and is clear that, to a large extent, some aspects of the administrative state are too focused on closure rather than contestation. Nevertheless, the notice-and-comment rulemaking process, in which individuals can voice their opinions with little barrier, is one example of an opportunity for individuals to stand up in “an act of defiance or dissent.” Agency adjudications create another form of highly individualized and contextual decision-making.

Finally, one might look to various common-law doctrines as tools of individual contestation. As with many of my examples, these doctrines may not be necessary for a sufficiently contestatory democracy, but they are useful for providing that forum. For instance, tort protects, primarily, a notion of bodily integrity and contract a notion of free bargaining. If an individual feels that another has caused them cognizable harm under tort or contract doctrine, that individual can stand up and challenge the person who has caused the harm. Though some views of the law see this as merely a conflict resolution tool, others explicitly see the system as “an official stage upon which parties may demand an accounting from their wrongdoers and a restoration of the equal dignity that each holds before the law and their shared community.” Of course, for the common-law court to be an effective tool of contestation, the parties will want to have

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223. McKinley, supra note 217, at 1559.
224. Pildes & Anderson, supra note 194, at 2196, 2205.
225. Id.
226. Walters, supra note 11, at 58.
227. Id. at 60–63.
228. Id. at 37.
229. Id. at 60.
their arguments at the ready. Arguments require reasons, which brings us to the next element of democracy.

V. Reason-Giving

A. In Summary

Reason-giving has two aspects. The first is simply a requirement that when the government adjusts the status quo or institutes a coercive action, the decision-makers must give reasons for the action. To summarize Henry Richardson, because we live in a world of “irreducible contestability” we will always have contests over both goals and the means to achieve those goals.231 A demand for giving reasons is no more than a demand that decision-makers explain their goals and the way that a given action will help achieve those goals.232 But reason-giving is not limited to public officials.

The second aspect of reason-giving is that a democratic system must also have opportunities for the public—the demos—to express our own reasons for preferring or rejecting various goals and policy proposals. Drawing again on Richardson’s thinking, public reasoning is necessary because it is the source of goal setting.233 Like many other thinkers, Richardson rejects the idea of a fixed public good and in its place promotes a “liberal understanding,” of the public good.234 This public good forms when the public can express reasons that force a sort of collaborative self-awareness on democratic participants.235

In the case of public and governmental reasons, the demands of reason-giving are low. The Supreme Court’s rational basis standard of review is one such example of a very low demand for reason-giving.236 On the other hand, some conceptions of reason-giving can be quite demanding, requiring reasons that others will accept, or reasons that further only shared goals.237 The element of reason-giving I am advancing here is simpler, requiring only that people express true reasons, whether or not those reasons are generally acceptable to others or advance a notion of the public good. This is somewhat in line with the Supreme


233. Id. at 38.

234. Id.

235. Id.

236. E.g., FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993) (“[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”).

237. E.g., Pildes & Anderson, supra note 194, at 2193 (“[C]hoices must be justified through publicly articulable and acceptable reasons.”); Cohen, supra note 82, at 102.
Court’s decision in *Department of Commerce v. New York*[^238] in which the majority determined that the Department of Commerce had violated the law because the reasons it gave for changing a question on the U.S. Census were “pretextual.”[^239] The Court was not demanding in the level of reason it required, holding only that agencies must “offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”[^240]

In a similar vein, it is important to distinguish reason-giving as a democratic element from a different sense of *reason* as an analytical pursuit. To some, the idea of reason means logical analysis from first principles or objective goals thereby translating policymaking into a technocratic or managerial effort[^241]. In some ways, this is the opposite of the reason-giving element I am articulating in this Part. Reason-giving, for our democratic purposes, simply means that people have the opportunity to explain themselves and that government has the obligation to explain decisions that lead to coercive policy. These two approaches to reasons (*reason* versus *reason-giving*) are arguably opposites because technocratic reasons often hide the coercive nature of government decision-making under the veil of objectivity.[^242] Reason-giving exposes the nature of policy by insisting that the purpose and values are express rather than buried in technocratic jargon, statistical analysis, or other managerialist feints. Thus, reasons may be purely rational, or they may be expressions of feelings, goals, and values.[^243]

Another way to frame reason-giving in democracy is as non-arbitrariness. When there is a reason, an action is not arbitrary.[^244] The content is no different in this mirror image, but the alternative language helps tie the ideal of non-arbitrary action to broader democratic theory that considers what makes for arbitrary governance.[^245] In either language, this element elicits reasons for action, perhaps because giving reasons has value in itself when it forces the decider to think, perhaps because reasons let communities see themselves in a collective practice and not just as proximate individuals using the same contrivance for registering their preferences.

And perhaps reason-giving is also important because reasons provide the fodder for other democratic elements. Reasons contribute to majoritarianism. Certainly, a voter could prefer or reject a representative for how that representative votes on a given proposal. But an election is more informed if there are express reasons attached to a representative’s

[^238]: 139 S. Ct. 2551 (2019).
[^239]: Id. at 2574, 2576.
[^240]: Id. at 2575–76.
[^241]: E.g., Rahman, supra note 10, at 35.
[^243]: Benhabib, supra note 82, at 81 (citing Iris Young, *Impartiality and the Civic Public, in Feminism as Critique* 73 (Seyla Benhabib & Drucilla Cornell eds., 1987)).
[^244]: Richardson, supra note 231, at 36–37.
[^245]: Id.; Pettit, supra note 10, at 149.
choices, if the voter understands not just the yea or nay but the reasons for the representative’s action. Reason-giving can uncover deeper purposes of policies such that an individual can challenge the action because the reasons do not support it or because the action embodies values that do not match the expressed reasons.\footnote{246} Reason-giving also allows the decider and the public to assess the reasons and determine if there are better, newer, or alternative reasons for action. That is, reasons may be instrumental, but they can also be principles, values, and ideals that guide thinking about what society wants to achieve and reasons can thereby change social goals.\footnote{247} As noted earlier, reason-giving does not promise reason in the form of strict rationality, but it helps in that pursuit.\footnote{248} Reasons may be misleading or false, but at least in having reasons there is a possibility of discovering the misdirection.\footnote{249}

This last benefit of reason-giving begins to get at the deeper, substantive commitments of reason-giving. It expands democracy beyond a process for implementing the prefabricated demands of isolated individuals into a practice that summons emergent will from constant social interactions.\footnote{250} My word choice is important. In one view, democracy is a “process,” implying that it exists exogenously to do our bidding. In the view I am presenting here, democracy is a “practice,” implying that it is something we do, not something we use. If we only use democracy, we assume fixed preferences or fixed ends to which we implement democracy. If that view represented reality, then all we would need is majoritarianism to aggregate preexisting preferences and individual contestation to fight for those preferences. If we do democracy, then we recognize that interaction also shapes our preferences and helps define our ends. I take this as not only a desirable frame, but also a necessary one. Interactions do indeed shape our preferences; “[h]uman beings are self-conscious creatures”\footnote{251} and conscious of our social relations there is a “power of political communities to change both their values and their interests through the self-interpreting activity of democratic politics.”\footnote{252} As Mathilde Cohen has written, reasons are often instrumental, but they also advance substantive values like respect and equality.\footnote{253} In Professor Cohen’s words, “reasons certainly affect preexisting values.”\footnote{254}

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\item \footnote{246} Galperin, supra note 16, at 354.
\item \footnote{247} Richardson, supra note 231, at 109.
\item \footnote{248} Donald J. Kochan, The “Reason-Giving” Lawyer: An Ethical, Practical, and Pedagogical Perspective, 26 Geo. J. Legal Ethics 261, 264 (2013).
\item \footnote{249} Id. at 264–65.
\item \footnote{250} Richardson, supra note 231, at 111.
\item \footnote{252} Id. at 1125.
\item \footnote{253} Mathilde Cohen, Reasons for Reasons, in 20 Approaches to Legal Rationality: Logic, Epistemology, and the Unity of Science 119, 120 (Dov M. Gabbay, Patrice Canivez, Shahid Rahman & Alexandre Thiercelin eds., 2010).
\item \footnote{254} Id. at 142.
\end{itemize}
Thus, reason-giving and deliberation, the next and final element, represent substantive commitments to a dynamic and mutual process of generating values and goals not merely striving for a priori objectives.

B. Precedent

Most democratic theorists see some role for reason-giving, going back at least as far as Pericles, who urged that reason-giving is indispensable prior to government action.255 Although an extreme minimalist like Schumpeter or Downs would make no space for it, Dahl expressly argued that effective voting requires opportunities to express reasons and his concept of enlightened understanding rests on learning the reasons behind various political positions.256 Pluralists advocated for robust opportunities to provide reasons matching perspective of the various interest groups.257 Agonism requires reasons because the point of agonistic democracy is to be heard, not just to be counted, and our reasons are a large part of what we want others to hear.258 To republicans, the threat of domination is the threat of arbitrary and uncontrolled interference, and actions without reason are definitionally arbitrary.259 The republican call for reason-giving is not just part of this negative implication. “According to standard thinking, often influenced by the long republican tradition,” Pettit writes, government decision-makers must “justify their decisions in public.”260

The theory under which most discussion of reason-giving has taken place is deliberative democracy. Deliberative democratic theory places a significant emphasis on reason-giving,261 “promot[ing] a conception of reason over power in politics.”262 Joshua Cohen writes that “[t]he deliberative conception of democracy is organized around an ideal of political justification. . . . [O]n the basis of a free public reasoning among equals.”263 But it is important to further note the distinction between deliberative reasoning and the reasoning I am advancing in this Part. Cohen further asks, “Which considerations count as reasons?”264 His answer is that reasons must be “compelling to others, acknowledging those others as equals, aware that they have alternative reasonable commitments, and knowing something about the kinds of commitments that they are likely to have . . . . If a consideration does not meet these

256. Id. at 37, 85–86.
257. Walters, supra note 11, at 23.
258. Id. at 53.
259. Richardson, supra note 231, at 36–37.
261. E.g., Pildes & Anderson, supra note 194, at 2193 (“[C]hoices must be justified through publicly articulable and acceptable reasons.”); Cohen, supra note 82, at 102; Habermas, supra note 9, at 23.
262. Young, supra note 82, at 122.
263. Cohen, supra note 82, at 99.
264. Id. at 100.
tests, that will suffice for rejecting it as a reason.” Rawls’s famous “veil of ignorance” is one such reason-giving restriction, which supposes that if people reason under such a veil, not knowing their own position in society, then their reasons are just. In short, deliberative theorists, although their exact restrictions differ, call for only specific sorts of reasons, for impartial and generally acceptable reasons. Pettit calls this a “deliberative constraint.” Agonists likewise object to limited visions of reason-giving. Mouffe, for example, calls them “profoundly inadequate.” She sees these constraints on reasons as washing out power and disagreement, thereby limiting dissenting voices of the least powerful who may not speak in the acceptable and impartial terms of those in power. Put differently, these criteria for valid reasons suggests, in Iris Young’s words, that the deliberative theorists “value speaking, but they less often discuss listening.”

Like that of the political theory, the constitutional precedent for reason-giving is scattered but ubiquitous. The Fourth Amendment, for example, demands “reasonable” behaviors such as searches and seizures that are based on articulate and convincing reason. The Due Process clauses assure that any law will “bear some reasonable relationship to the pursuit of a public purpose,” which is an implicit requirement that the government actor offer a reason. The strict scrutiny standard of judicial review, which connects to a number of constitutional provisions, is effectively a test of reason-giving in which a court asks whether a legislature has a sufficient and explicit—compelling—interest to justify a law. Even the rational basis standard is a standard that judges reasons, asking whether the reason for a law is related to a legitimate government interest. The Public Use Clause of the Fifth Amendment requires that

265. Id.
268. Mouffe, supra note 11, at 95.
269. Id. at 98–100.
270. Young, supra note 82, at 130.
272. Mashaw, supra note 271, at 43.
273. See, e.g., Johnson v. California, 543 U.S. 499, 505–06 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’ . . . ‘[A]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” (third alteration in original) (emphasis added) (citation omitted) (first quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); and then quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989))).
when the government takes private property it can only do so for a public use, implying that the government must give a reason for using eminent domain, only taking property when it can provide a public reason for that taking. Finally, most obvious, and therefore, perhaps least noteworthy, the First Amendment’s protection of speech and press is protection of public reason-giving.

C. Example

The fact that the Constitution has some demands for reason-giving is a good argument to include reason-giving as a key element of democracy. However, the Constitution’s demands do not necessarily tell us the sort of institutional structures that advance reason-giving. Of course, where the Constitution demands, for example, that the government give reasons prior to a search of private property, in our legal system the natural place to enforce that demand is the court system. Many scholars have written about reason-giving in court, and Mathilde Cohen’s work is particularly on point. Cohen notes that both claimants and judges are bound to give reasons embedding reason-giving in courts. But she notes that the complexity of reason-giving is perhaps more important than its mere existence. Sometimes too many reasons hurt, and sometimes too few hurt. Sometimes reasons are meant to advance democratic discourse but other times judges may offer reasons to protect their own reputations. This may not be something to celebrate, but it does help demonstrate that demanding requirements for reason-giving, even if preferable, is not realistic, whereas the broad notion of reason-giving I am advancing here better reflects reason-giving in practice.

Courts are not, of course, the only forums with embedded reason-giving requirements. Reason-giving is also a central component of administration. The demands for administrative reason-giving arise from constitutional and statutory sources. The Fifth Amendment’s Due
Process Clause demands that when administrative agencies make decisions that deprive an individual of life, liberty, or property, those agencies must provide reasons for their actions. While the constitutional baseline applies in only limited cases, the Administrative Procedure Act demands that agencies give reasons for virtually any agency inaction or action. The Act directs courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An action is arbitrary if it is without reason and courts will rely only on the reasons that agencies actually give when announcing their decisions. Like judicial reason-giving, while administrative reason-giving is a very prevalent example of this constitutional element in practice, it is not without criticisms. Walters notes, for example, that courts have tended to limit the types of reasons agencies can provide. This alone conflicts with the roomy nature of reason-giving that I am offering. In addition, Walters’ critique is an agonistic one, arguing that courts should permit agencies to give political reasons, not just rationalist reasons, for their actions in an effort to admit that decisions are not often, if ever, the result of formalistic reasoning to an indisputable conclusion. Sometimes the “right choice” is unclear. In these frequent cases, political, even partisan, reasons are more transparent and allow more open debate about the values at play.

Finally, we are flush with institutions of reason-giving outside of the government. The press, and particularly the opinion page, is a forum for public reason-giving. The rise and ubiquity of social media has likewise made the cost of giving public reasons very low even if it has made the impact of each act of reason-giving less powerful.

284. E.g., Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972) (concluding that an agency must give notice of its claims, that is, reasons for its actions, and that an adjudicatory decision-maker must give reasons for its findings); Mathews v. Eldridge, 424 U.S. 319, 346 (1976) (concluding that giving reasons for action is a safeguard against mistake and existing procedures were fair because the agency gave reasons).

285. Administrative Procedure Act, Pub. L. No. 79-404, § 101, 60 Stat. 237, 244–45 (1946) (codified as amended at 5 U.S.C. § 706(2)(A) (2018)). Lisa Bressman makes a persuasive argument that the demand for reason-giving is more constitutional than most scholars acknowledge and that while the Administrative Procedure Act does indeed prohibit arbitrary action, there are constitutional provisions, beyond Due Process, that likewise prove that reason-giving is a constitutional principle. Bressman, supra note 156, at 462–63.


287. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 2551, 2573 (2019) (citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)).


289. Walters, supra note 11, at 61.

290. Id.
VI. DELIBERATION

A. In Summary

Deliberation and reason-giving plainly have a lot in common. In fact, deliberation follows on reason-giving in two ways. First, deliberation is the applied consequence of receiving reasons. A decision-maker gives reasons and other decision-makers, including the political community, consider those reasons, wrestle with them, compare them to reality, consequences, values, and alternative reasons. Deliberation is the place where politics looks ugly but is nevertheless productive and unavoidable. Deliberation is where we find “angry protests, unrestrained verbal attacks on opponents, and ways of trying to combat the entrenched powers that exercise domination.” But from the ugly mess comes a somewhat clear “picture of democratic will-formation.” Deliberation begins with proposals and proceeds by: discussing those proposals; reaching informal agreement (which is usually not consensus on the big picture but may involve agreement on what not to pursue); and finally, official decision, typically legislative or administrative action. Then deliberation iterates.

The second way in which deliberation follows reason-giving is more of a substantive commitment to equality and a “network” of respect. Deliberation furthers the community self-recognition that begins with reason-giving. Deliberation could be atomistic individuals yelling out their own pre-political preferences, but even if we accept that stylized liberal model, the very act of yelling to another, rather than yelling into a void, creates (or proves) a community. An individual can deliberate, but only with information and values that emerge from the “operation of social institutions.” Thus, in democracy, deliberation is always a group endeavor and so the lemniscate of deliberation proves the community, gives some shape to the community, gives the individual the power of voice, reshapes the community, and the deliberation continues.

This “[d]eliberation can help transform interests and reveal previously unrealized areas of agreement.” Thus, while the self-recognition, community building, and generative aspects of deliberation are clearly

291. Richardson, supra note 231, at 143.
292. Id.
293. Id. at 180.
294. Id. at 165–67.
295. Habermas, supra note 9, at 25.
296. See Amy Gutmann & Dennis Thompson, Democracy and Disagreement 43 (1996) (noting that deliberation creates respect and recognition); Pildes & Anderson, supra note 194, at 2197 (explaining how institutions are a necessary part of deliberation because they help people see each other and then to recognize they are part of a collective endeavor).
297. Kysar, supra note 242, at 117.
298. Id.
299. Mansbridge, supra note 45, at 47.
substantive values, there is also the instrumental benefit of each because these values can also lead to agreement.

Although deliberation has several benefits, to put it simply, deliberation is negotiation, discussion, debate, and reflection, all of which can only happen in groups. The purpose of deliberation is political generation, that is, to create something new rather than merely aggregate individual votes or to shrink in the face of the most powerful contestation. While other elements add critical pieces to democracy, deliberation serves to shape and structure a community that is made up of so many preexisting values. It forces us to confront the existence of disagreement.\footnote{300} It can help us change minds and meanings.\footnote{301} It is, in short, “mutual justification among equals.”\footnote{302}

**B. Precedent**

The most obvious precedential theory that supports deliberation as an element of democracy is deliberative democracy. Habermas wrote that “discourses are meant to allow one to discuss value orientations and interpretations of needs and wants, and then to change these in an insightful way.”\footnote{303} This change could help build a consensual view of the common good,\footnote{304} or it could be a forum for disagreement that helps us recognize adversaries.\footnote{305} The consensual purpose of deliberation draws from deliberative democratic theory, while deliberation as a forum for contestation ties the deliberative element to agonism.

Republicans critique the narrowness of deliberative theory’s vision of deliberation.\footnote{306} Nevertheless, republicanism sees a role for deliberation in generating norms that facilitate public control over the levers of coercion.\footnote{307} To the republican, deliberation is not a “foundational commitment.”\footnote{308} It is merely one among a variety of tools to develop norms.\footnote{309} And unlike deliberative democratic theory, republican theory does not require that participants are expressly aware they are participating in a deliberative endeavor.\footnote{310} This republican approach to deliberation, paired with the agonistic demand for accessible contestation, is more in line with the element I propose here, in which democratic institutions must simply provide opportunities for collective discourse.

It should come as little surprise that minimalists do not see deliberation as a necessary element of democracy. Pluralists, however, underscore

\begin{footnotes}
\footnote{300. Chantal Mouffe, *Agnostics: Thinking the World Politically* 7 (2013).}
\footnote{301. Pildes & Anderson, *supra* note 194, at 2202.}
\footnote{302. Song, *supra* note 34, at 45.}
\footnote{303. Habermas, *supra* note 9, at 23 (emphasis omitted).}
\footnote{304. Walters, *supra* note 11, at 25.}
\footnote{305. Mouffe, *supra* note 300, at 138.}
\footnote{306. Young, *supra* note 82, at 130; Pettit, *supra* note 10, at 190.}
\footnote{307. Pettit, *supra* note 10, at 267.}
\footnote{308. Id.}
\footnote{309. Id. at 268.}
\footnote{310. Id.}
\end{footnotes}
the process of interest-group negotiation prior to government resolution.\textsuperscript{311} To that extent, the deliberative process is a process for such interest-group discourse to shape public goals. And Dahl, somewhere between the pluralist and minimalist in this respect, is clear that deliberation, scrutiny, and reflection are important aspects of the democratic process insofar as they shape opinions prior to voting.\textsuperscript{312}

Deliberation’s constitutional precedent does not begin in the First Amendment, but that is where it is most evident. The First Amendment prohibits Congress from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”\textsuperscript{313} Speech, press, and assembly are forms of deliberation and articulation. The grand jury requirement of the Fifth Amendment gives a forum for deliberating on facts and arguments that might support a criminal conviction.\textsuperscript{314}

C. Example

Continuing with the Constitution as a resource, bicameralism and presentment do not explicitly require deliberation, but as barriers to swift majoritarian conduct, the requirement that different officials, representing different constituencies, shall pause to consider any law is a strong push towards deliberation.\textsuperscript{315}

“There is,” according to the Supreme Court, an “unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”\textsuperscript{316} Even though one could argue that Congress is anything but deliberative, the nature of deliberation here is relatively thin, and many of the Framers, including Madison, saw the nature of representative rather than direct democracy as advancing deliberative ideals.\textsuperscript{317}

Conclusions

The literature on democratic theory is vast and conflicting. On the other hand, the popular understanding of democracy as little more than periodic elections is too shallow to offer much guidance. As a result, “[d]emocracy is a word that has come to mean very different things to different people.”\textsuperscript{318} Indeed, “[t]here are, and will likely always be, disagreements over what it means to be a democratic society, and democracy

\begin{itemize}
  \item \textsuperscript{311} \textit{Life of Administrative Democracy, supra} note 14, at 1236.
  \item \textsuperscript{312} \textit{Dahl, supra} note 7, at 38.
  \item \textsuperscript{313} \textit{U.S. CONST. amend I}.
  \item \textsuperscript{314} \textit{Id. amend V}.
  \item \textsuperscript{315} \textit{Death of Administrative Democracy, supra} note 14, at 53.
  \item \textsuperscript{316} \textit{INS v. Chadha}, 462 U.S. 919, 959 (1983).
  \item \textsuperscript{318} Ober, \textit{supra} note 28, at 3.
\end{itemize}
will always be a work in progress.” This is a little surprising since “[d]emocracy has been discussed off and on for about twenty-five hundred years.” You would think this is “enough time to provide a tidy set of ideas about democracy on which everyone, or nearly everyone, could agree. For better or worse, that is not the case.” Nevertheless, we should ask, “[j]ust what do we mean by democracy?”

That is what I have attempted to ask in this Article. Indeed, I think we can identify a “tidy set of ideas about [Western] democracy on which everyone, or nearly everyone, . . . agree[s].” True, there is plenty of disagreement at the margins, but as this Article has argued, if we look to the leading democratic theories, a collection of underlying elements emerges.

Majoritarianism, individual contestation, reason-giving, and deliberation are ideals or processes present in almost every major democratic theory. Just as the Restatements of Law take on the vast, complex, and often conflicting common law and distill some central elements, if we slightly abstract each of these democratic ideals, avoiding some of the particularities that any single theory might impose, we can see a meaningful and useful democracy take shape: (1) majoritarianism captures the minimalist, election-centric aspects of democracy; (2) individual contestation promises that people have opportunities to challenge the status quo and superficially settled policy in institutional venues like the court system; (3) reason-giving demands that decision-makers explain the purpose of their actions and that the people have the chance, as members of the public, to explain their own positions; and (4) deliberation assures that collective negotiation, dialogue, and consideration precede policymaking.

A. A Democratic Metaphor

Each of these elements, on its own, is quite thin—in some cases, only a shadow of the deeply theorized and vigorously articulated ideals that appear in each of the democratic theories from which I have drawn. However, in combination, they present a rich democratic structure. A comparison comes to mind: bread. Flour, yeast, and salt are mostly inedible on their own. Water is edible, but not particularly interesting. When flour, yeast, salt, and water are combined, with a bit of effort, they can make bread that is not only palatable but delicious and interesting. Each element of democracy may not be revolting, but each might be at least slightly disagreeable. Put together, with a little work, they make something outstanding, valuable, and nourishing.

321. Id. at 2–3.
322. Id. at 2.
323. Id. at 2–3.
Majoritarianism and individual contestation recognize the liberal ideas of unique and self-determining beings seeking to achieve and maximize their own preferences. Majoritarianism does so in the aggregate and contestation does so on the individual level. Reason-giving and deliberation each recognize the essentially collective nature of society, in which people develop values and preferences through their connections to others. Thus, reason-giving and deliberation are generative, creating and shifting perspectives by assuring that people explain themselves and have the opportunity to do so in an accessible institution.

The elements also have some intuitive appeal. It is likely that if any component existed on its own, or if any were missing, we may still see a democratic system, but not a satisfying one. A majoritarian system of voting without individual contestation would frustrate anybody who objected to government action but was without even the notion of recourse. A system of vast opportunities for contestation, without the initial impulse of voting, would be both inefficient and aimless if decision-makers had authority to make decisions and were accountable through, for example, petitioning and lawsuit, but had no impulse to guide their initial actions. A system with the benefits of majoritarianism, individual participation, and detailed reasons, but without a forum for debating the reasons would be stifling. Each orientation would cut an awkward, if not impossible, chasm.

In addition to thinking about how we combine elements, it is also important to think about sequencing. A lawyer who was general counsel for a federal agency and was responsible for designing that agency’s rulemaking process from scratch commented on the four elements I offer in this Article. He noted that the words were unfamiliar but the concepts fit his experience. He recounted that when designing the new rulemaking process, he and his staff were attentive to how things were working in the real world. When something went wrong in real life, whether they discovered it in a newspaper article, scientific journal, or elsewhere, that was the basis for starting a regulatory action. We might think of this as something like majoritarianism, given that the agency would react to real-world issues that could attract the attention of voters. However, this lawyer was very clear that the word “majoritarianism” was never part of the agency’s vocabulary nor explicitly part of their thinking. Next, an individual or team would sit down and write a regulation. This is a form of deliberation although, again, this is not how he and his team would have described


325. Today, with the role of the White House Office of Management and Budget’s Office of Information and Regulatory Affairs, there is more direct presidential oversight of agency rulemaking, which arguably increases the majoritarian input near the end of the rulemaking process. Information and Regulatory Affairs, WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/ [https://perma.cc/MAT8-NSP6] (last visited Feb. 25, 2024).
The third step was for the agency to write the preamble to their proposed regulation. The purpose of the preamble was to explain why and how the agency was addressing the issue and the intended public benefit of their approach. Thus, he called this step “explanation.” It looks like what I have called reason-giving. Fourth, the public has an opportunity to weigh in and offer their comments on the proposal. This is “public participation” to many commentators and agencies, but it is also a form of individual contestation. Next, the rule drafters will analyze public comments and then decide whether to amend the rule in response. This is what I have called deliberation but what he would call “decision-making.”

The sequence of that agency rulemaking process was important to the agency and the democratic credibility came not only from the presence of each element, but from the order in which the agency undertook them. This is therefore an area for further consideration when bringing all four elements together.

### B. A Synthetic Constitutional Example

The Fifth Amendment’s Takings and Compensation clauses bring together the strands of majoritarian, individual, deliberative, and reasoned decision-making within the Constitution, and shine some light on each as a democratic element. Thus, to conclude this Article, I want to offer this as a brief example to demonstrate that the elements of democracy are practical, not just on their own, but in combination.

The Takings Clause is a majoritarian tool, allowing the state to acquire property for a public use, that is, for the good of the majority. The Compensation Clause is an individual contestation device, assuring that when the majoritarian public use does affect the taking of an individual’s property, the state must recognize and respect the individual from whom the property is taken by paying them from public funds. Moreover, because both clauses provide standards—the state may take property only for “public use” and must offer “just” compensation—they also create a basis for judicial review as a contestatory institution.

Facially, each clause manifests majoritarianism and individual participation. At a deeper level, each clause also gives life to reason-giving.
and deliberation. The public use requirement means the state must give a reason, explaining how the public benefits, before the state can take property. Establishing just compensation means deliberating over what a condemnation will cost and also whether compensating the owner for that cost is commensurate with the public benefit.\(^3\)

I offer this only as a brief example, and I offer only one example, because I do not want to give the impression that we have a huge trove of ideal examples from which to draw as we aim for a better system. We can implement structures of this multidimensional democracy and we can see how the elements can work together. But there is vast room for improvement.

C. A Parting Thought

Given that some are writing obituaries for American democracy and rightly agonizing over the rise of populist tyranny,\(^3\) it is understandable if readers balk at claims that democracy is not just viable but critical. As I hope this Article demonstrates, there are reasons not to give up just yet. In particular, where tyranny is on the rise, it is often populist tyranny over-reliant on mere majoritarianism, not the antidote of the multidimensional democracy that I describe.\(^3\) More importantly, to paraphrase Churchill, to the extent democracy has failed, it may be the worst form of government, except all the others.\(^3\) In other words, what is the alternative? And if we had an alternative, who would be responsible for choosing it? It is not clear that corporate leaders, journalists, academics, or any other particular group has any special right to make that choice. To the contrary, it strikes me that some combination of majoritarianism, individual contestation, reason-giving, and deliberation would be the right, perhaps only, way to reject or reenergize democracy.

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