

# Essay

## Democratic Disobedience

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## INTRODUCTION

Political protesters sometimes break the law. Moreover, disobedience may sometimes be a part of political protest, as protesters elaborate their claims that laws or policies are wicked or foolish or lack authority.<sup>1</sup> In such cases, disobedience is not guided by greed or self-dealing but by principle, and it is therefore not criminal in any ordinary sense but becomes, instead, *political disobedience*.<sup>2</sup>

Even when the laws or policies at which a protest takes aim are indeed bad or wrong, political disobedience may be imprudent or even counterproductive: Disobedience must always contend with the possibility that it will be met with overwhelming repression or trigger a popular backlash against the very ends it seeks to promote. But when the underlying political order that has produced the objectionable laws or policies is legitimate, disobedience triggers concerns of political principle as well. It seems, in such cases, that political disobedience risks becoming itself a form of oppression, in which protesters attempt improperly to impose their personal political preferences upon others. Nor is this concern answered (or even addressed) by emphasizing the distinction between political disobedience and ordinary crime: Oppression need not involve greed or self-dealing, and even the benevolent may overstep their authority. The worry about oppression, moreover, is particularly salient when the political system in which disobedience occurs, and that underlies the laws and policies that disobedient protest seeks to unseat, is democratic. In such cases, the oppression that political disobedience threatens to impose takes on a familiar countermajoritarian form. Political disobedience in a democracy carries a taint of autocracy.

In spite of these concerns, many believe that political disobedience can sometimes be justified and, indeed, that it plays an important role in politics

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1. Political disobedience need not break the same laws that it protests against (for example, demonstrations that trespass or block roads in protest of foreign policy). Political disobedience, as Rawls observed, may be indirect as well as direct. See JOHN RAWLS, A THEORY OF JUSTICE 364-65 (1971).

2. Here it is more common to speak of *civil* disobedience. I prefer to say *political* because this usage emphasizes connections to political theory that I seek to elaborate. Moreover, terminology has grown up around the more common usage that fits more naturally with the traditional approach to disobedience that I set aside than with the new approach I hope to develop. An example is the distinction between civil disobedience proper—roughly, disobedience guided by political principles and addressed to the public generally—and conscientious refusal—roughly, disobedience guided by more broadly ethical ideals and answering to the protester's own integrity. See, e.g., ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 104 (1975); RAWLS, *supra* note 1, at 363-71. Introducing a new term therefore avoids unhelpful associations that the more familiar language invites.

more broadly.<sup>3</sup> In particular, political disobedience has been connected to libertarian and egalitarian ideas about the limits of political authority, in the service of a theory of *liberal* disobedience—liberal because the ideas about limited government to which the theory refers lie at the heart of the liberal tradition in political theory characterized by Mill and Rawls.<sup>4</sup> Importantly, political disobedience, on this liberal account, may properly be directed against even democratic laws and policies, because liberalism imposes limits on the authority even of democratic governments. Political disobedience, on this liberal account, expressly addresses “the nature and limits of majority rule,”<sup>5</sup> and those who practice liberal disobedience “claim[] a qualification or exception of some kind” to majority rule.<sup>6</sup> These limits and qualifications on majority rule have to do with fundamental rights—to certain basic liberties and to equal treatment—that liberalism familiarly regards as trumps over democratic majorities.<sup>7</sup> Governments, including democratic governments, that violate fundamental rights overstep their authority, and when the violations are grave enough, those whose rights are violated or others who make common cause with them may justly resist, including by disobeying the law.

Moreover, the historical cases of disobedience around which the traditional liberal view arose—the particular practices that this view sought to explain and justify—actually did assert fundamental rights against overreaching majorities. The most prominent of these historical examples, the disobedience of the American civil rights movement, sought to secure equal treatment and protect basic liberties of black Americans against white majorities that aimed to deny those rights. Other cases from the same era, such as the disobedience by Jehovah’s Witnesses of democratic laws requiring primary and secondary school students to salute the American flag, had a similar basic structure.<sup>8</sup>

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3. Thus Ronald Dworkin, writing in 1985, could confidently claim “we can say something now we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community.” RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985). I suspect that one might actually have been able to say much the same thing earlier—if not in 1955, then certainly in 1940. *See, e.g.*, WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 239-43 (1963) (describing the “sit-down” strikes of 1936-1937).

4. *See generally* JOHN STUART MILL, *ON LIBERTY* (Alan Ryan ed., W.W. Norton & Co. 1997) (1859); RAWLS, *supra* note 1.

5. RAWLS, *supra* note 1, at 363.

6. DWORKIN, *supra* note 3, at 110.

7. *See generally* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984). Notice here that I am using “fundamental rights” as a term of art to include not just the basic freedoms—of speech, conscience, and so forth—most immediately associated with liberal rights in ordinary political discourse, but also more abstract entitlements to equal concern and respect. When I speak of “fundamental rights” going forward, I have both classes of entitlements in mind.

8. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630-31 (1943) (“The sole conflict [in this case] is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same

Of course, liberal disobedience can have a democratic component also, insofar as protesters hope, by their example, to persuade others that a law does in fact violate fundamental rights. Especially when democratic values are entrenched in a political order, rights that limit democratic authority may be most effectively secured, in practice, by persuading the majority that these limits are just. Successful liberal disobedience will therefore often have wide persuasive appeal, as is once again illustrated by the civil rights protests in the American South, which undoubtedly succeeded partly by persuading the white majority of the evil of American apartheid.<sup>9</sup> But even in such cases, in which liberal disobedience seeks self-consciously to win democratic approval, this is an instrumental decision only. The justification of liberal disobedience does not depend on democratic approval, and protesters may continue to disobey, perhaps now with the aim of coercing a change of law or policy, if the majority remains unpersuaded. Certainly the civil rights movement's challenge to Jim Crow did not depend on the opinions of white Southerners.

The connection to rights not only underwrites political disobedience on the liberal view but naturally takes on a regulative role as well—it determines the metes and bounds of justified liberal disobedience. This regulative role appears on the face of the most prominent accounts of liberal disobedience. It appears affirmatively in Rawls's observation that “there is a presumption in favor of restricting civil disobedience to serious infringements of . . . the principle of equal liberty, and to blatant violations of . . . the principle of fair equality of opportunity.”<sup>10</sup> And it appears negatively in Dworkin's concern that when civil disobedience becomes unmoored from basic rights and takes aim at laws or policies that are thought merely

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time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.”).

9. The leaders of the protests knew this well and actively sought to persuade the very majority whose laws they defied. Thus Martin Luther King, Jr. observed, in perhaps the most famous speech of the civil rights era,

The marvelous new militancy which has engulfed the Negro community must not lead us to a distrust of all white people, for many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny and they have come to realize that their freedom is inextricably bound to our freedom. This offense we share mounted to storm the battlements of injustice must be carried forth by a biracial army. We cannot walk alone.

Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217, 218 (James Melvin Washington ed., 1986).

Some of the civil rights movement's greatest triumphs were pieces of democratic legislation rather than declarations of the limits (constitutional or otherwise) of democratic political authority. See Civil Rights Act of 1968, Pub. L. No. 90-284, 1968 U.S.C.A.N. (82 Stat. 73) 89 (codified as amended in scattered sections of 18, 25, and 42 U.S.C.); Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (2000); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6.

10. RAWLS, *supra* note 1, at 372; see also *id.* at 366 (noting that civil disobedience confronts “especially the infringement of the fundamental equal liberties”).

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imprudent or foolish, its justification becomes fragile indeed.<sup>11</sup>

Not all political disobedience may plausibly be cast, therefore, as following the liberal model and protecting fundamental rights to liberty and equality. And actual cases of political disobedience that fall outside of the liberal model do exist. The civil rights movement—and the rights revolution more generally—represented the heyday of liberal disobedience. In the subsequent years, the most prominent cases of political disobedience have increasingly not emphasized liberal rights to equal treatment or to basic liberties. This trend away from liberal disobedience figured in the protests against the Vietnam War. It also appeared in protests against nuclear weapons, especially in Europe—including the cases in the 1980s that Dworkin had expressly in mind when he worried about the justification of civil disobedience that is based on prudence rather than rights. Finally (although here I am only speculating), the trend is perhaps reaching maturity in the most prominent cases of political disobedience in the United States and Europe today, which arise in connection with protests against globalization.

These protests are increasingly difficult to cast as liberal efforts to protect fundamental rights against overreaching governments. Although the Vietnam War may have been unwise and even illegal, the decision to wage a war to rid a foreign nation of a hostile and repressive regime plausibly falls within the scope of a democratic government's political authority. Although the aggressive deployment of nuclear missiles, including American missiles, in Europe may have been reckless, the decision to deploy them in order to deter attack by hostile neighbors probably falls within the scope of a democratic government's political authority. And although policies that support multinational corporate enterprises and remove national barriers to trade may be unappealing, they certainly fall within the scope of a democratic government's political authority. Political disobedience in protest of these policies therefore becomes increasingly difficult to justify by reference to liberal ideas about the limits of democracy, and efforts to explain or defend such disobedience must proceed outside the liberal model.

I speculate later that such cases—which cannot be fit into the liberal model—represent the future of political disobedience. But however that may be, the examples that I have given emphasize that disobedient protest that pursues ends besides the vindication of liberal rights is becoming the dominant form of political disobedience, at least in developed, democratic states. The political culture of these states therefore presents a challenge today much like the one that confronted the lawyers and philosophers who

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11. See DWORKIN, *supra* note 3, at 112. Dworkin was considering political disobedience directed against the stationing of American nuclear missiles in Europe in the 1980s. This case is interesting in its own right, and I return to it later.

constructed the liberal theory of political disobedience four decades ago. An important form of political engagement, which is experienced as legitimate by those who participate in it, cannot be understood through the prevailing theoretical accounts of legal and political authority.

To meet the challenge, a new theory of political disobedience must once again be developed. This theory will not justify all the disobedient practices that confront it, just as the liberal theory did not justify every case of disobedience that it faced—the opinions and even self-conceptions of the political actors the theory addresses may, after all, be mistaken.<sup>12</sup> But if the theory is to succeed at interpreting the lived experience of contemporary political disobedience, then it must enable a sympathetic approach to the forms of political disobedience that confront politics today, sympathetic in the sense of translating the dissatisfactions that generate this disobedience into a theoretically articulate language that connects the impulse toward disobedience to pressure points or possibly even ruptures in the underlying justification of the political authority that is being disobeyed.

I seek in these pages to set out a new account of political disobedience that underwrites a sympathetic reconstruction of the prominent contemporary cases of disobedient protest and, moreover, justifies some of them. This theory of disobedience is very different from the traditional liberal view; it in some respects takes an opposite approach. In particular, the view that I propose departs from the liberal project of justifying political disobedience from without democracy, by reference to inherent limits on political authority, including even the authority of democratic governments—an idea that renders liberal political disobedience, among other things, *democracy-limiting* disobedience. My proposal, by contrast, attempts to justify political disobedience from within democratic theory, emphasizing the support that political disobedience can provide for the broader political process by correcting democratic deficits in law and policy that inevitably threaten every democracy. The argument aims to construct a precise account of these deficits and of the contribution that political disobedience can play in overcoming them. Instead of being a theory of democracy-limiting disobedience, this is a theory of *democracy-enhancing* disobedience or, more simply, *democratic* disobedience. It aims to render plausible the counterintuitive claim that disobeying the laws of a democratic state can serve democracy. Indeed, the argument casts democratic disobedience as an unavoidable, integral part of a well-functioning democratic process.

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12. Thus it is an open question, for example, whether the liberal theory justified the violently disobedient protest against American racism practiced by the Weather Underground. Indeed, some former members of the Weather Underground have come to doubt that their actions were justified and to suspect, instead, that “when you feel you have right on your side, you can do some horrific things.” THE WEATHER UNDERGROUND (The Free History Project 2002) (remarks of Brian Flanagan).

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I develop the theory of democratic disobedience in several stages. Whereas the liberal treatment of political disobedience sets out from a thin and derivative conception of democratic authority—and displays much greater sophistication about democracy’s limits than about democracy itself—the theory of democratic disobedience arises out of a much thicker understanding of democracy as a freestanding source of political authority. The argument therefore begins by taking up the freestanding conception of democracy and contrasting it with the derivative conception associated with liberal political disobedience. This conception explains democratic political authority in terms of the ways in which participants in democratic politics come to identify with, and indeed take authorship of, collective decisions, even when they have been outvoted. I elaborate the idea of individual authorship of collective decisions in conjunction with the related idea of a democratic sovereign will. I make no effort to develop a final or complete account of democratic sovereignty or to resolve intramural disputes in democratic political theory. Instead, with this stage-setting purpose in mind, I concentrate on those aspects of democratic ideas concerning authorship and sovereignty out of which the theory of democratic disobedience arises.

I emphasize in particular that democracy can sustain the sense of authorship and underwrite the sovereign will on which its political legitimacy depends only if the democratic process departs from the simple preference aggregation associated with unreconstructed majority rule and instead insists on various forms of political engagement among citizens. This observation introduces the second stage of the argument, which proposes that the engagement-enforcing mechanisms at the heart of democratic sovereignty are necessarily imperfect, in the sense that they inevitably misfire on occasion. Here the argument draws on an analogy between the sovereign will and an individual will to explain why public policy sometimes departs from the sovereign will, and the sense of individual authorship of collective decisions sometimes fails, in even the most finely wrought and well-run democratic systems. The argument’s ambition is to show that these occasional failures do not reflect idiosyncratic inadequacies in particular democracies but rather are inevitable and intrinsic concomitants of the very mechanisms that make democratic sovereignty possible, *tout court*. The analogy to the individual will is drafted in the service of this ambition. Democratic political authority therefore has built into the conditions of its possibility the inevitability of occasional democratic deficits, in which the political process no longer sustains individual authorship of the collective policies it produces.

The argument that democratic political authority suffers, by its own standards, inevitable deficits opens the door to political disobedience. But it does not yet make out an affirmative, much less a democratic, case for political disobedience, because it does not say how illegal protests can serve

democratic values. The third stage of the argument begins to make this case by drawing an analogy between political disobedience and another allegedly undemocratic political practice, judicial review.<sup>13</sup> Although the most prominent account of judicial review, like the dominant approach to political disobedience, stresses that courts enforce the limits of democracy by protecting fundamental rights,<sup>14</sup> an alternative theory presents judicial review as enhancing democracy by correcting defects in the democratic process, including when no rights are at stake.<sup>15</sup> I exploit the analogy to judicial review and propose that political disobedience can similarly enhance democracy by correcting the democratic deficits identified in the earlier argument and that sometimes no other form of protest can serve democracy equally well. This proposal opens up an affirmative space for political disobedience in democratic theory—a space for democratic disobedience.

The argument's final stage completes the analogy to democratic judicial review and outlines the theory of democratic disobedience. Just as proponents of the democratic account of judicial review have elaborated doctrinal structures through which courts might enhance the democratic process, so I propose a basic set of governing principles that might structure democratic disobedience to serve its democracy-enhancing function. I develop these principles by reference to the historical and contemporary examples—protests against the Vietnam War, nuclear weapons, and globalization—that I introduced earlier. Just as liberal ideas about fundamental rights structure the practice of liberal disobedience, so these principles set out the metes and bounds of democratic disobedience.

The historical references also display the costs of neglecting the theory

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13. The democratic trouble with judicial review is articulated, for example, in Alexander Bickel's account of the "counter-majoritarian difficulty." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

14. Rawls, for example, observes that

certainly we are not required to acquiesce in the denial [by a democratic majority] of our own and others' basic liberties, since this requirement could not have been within the meaning of the duty of justice in the original position, nor consistent with the understanding of the rights of the majority in the constitutional convention.

RAWLS, *supra* note 1, at 355. He adds that "[a] constitution that restricts majority rule by the various traditional devices [including a bill of rights enforced by courts] is thought to lead to a more just body of legislation." *Id.* at 229.

Dworkin's approach to judicial review also grows out of a more general theory of rights, which insists that "[t]he existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will." RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (1977); *see also id.* at 82-90, 131-49. *See generally* Dworkin, *supra* note 7, at 153 (elaborating the idea of "rights as trumps").

15. *See* BICKEL, *supra* note 13; Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). This approach to judicial review is further developed in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), of which more later, *see infra* notes 81-83 and accompanying text.

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of democratic disobedience, because they reveal the distortions that arise when disobedient protests that properly fall under the democratic model are prosecuted on liberal terms. Against this backdrop, a brief Conclusion proposes that the practical importance of democratic disobedience will grow in the coming years. Certainly the most prominent contemporary political disobedience—associated with protests against globalization—is best understood along democratic rather than liberal lines. Finally, the Conclusion speculates that politics is changing in ways that increasingly enable authoritarian elites to subvert democracy without resorting to repression of the sort that violates fundamental rights. Insofar as this diagnosis is accurate and a species of soft authoritarianism is arising, the democratic roots of the antiglobalization protests are not mere curiosities but instead represent the future of political disobedience.

## I. DEMOCRATIC POLITICAL AUTHORITY

The problem of political disobedience arises in light of the authority of law in democratic states, and the theory of democratic disobedience must therefore be grounded in an account of democratic political authority—that is, of the ways in which the decisions of a democratic majority legitimately govern dissenters who would prefer to pursue an alternative course of action but have been outvoted. I take up two accounts of democratic political authority, which I associate, respectively, with liberal and republican political thought. The liberal view is perhaps more popular nowadays—it is also implicit in the liberal defense of political disobedience—but the republican view provides a more plausible reconstruction of political practice. I address the liberal view only briefly, and only to emphasize the gaps between that theory and actual democratic politics. I develop the republican view in greater detail to serve as a foundation for my account of democratic disobedience.

### A. *The Liberal View (or Democracy as Reason)*

The liberal view approaches democracy as a special application of more general principles of justice. These principles, and the political authority of the democratic decisions that they underwrite, may be appreciated by reasoning abstractly about justice and democracy, quite apart from any affective consequences of actually participating in democratic politics, so that the liberal view might also be called democracy as reason. The liberal account of democracy has been developed along two quite different lines: on the one hand by casting democracy as the political branch of a more general ideal of equality, and on the other hand by connecting democracy to ideals concerning public reason and the demand that power be justified to

those against whom it is exercised. Neither articulation of the liberal view is adequate to the lived experience of democratic politics (although the second is more nearly adequate than the first). In particular, neither liberal approach to democracy credits the wide range of disagreements to which the authority of democratic practice extends.

The first liberal approach—the idea that democracy is the political application of liberal equality—is hinted at in Rawls’s early work, as when he says that “[p]erhaps the most obvious political inequality is the violation of the precept one person one vote.”<sup>16</sup> But it is most fully and self-consciously elaborated by Dworkin, who develops an account of democracy expressly in response to the question, “How would a community based on [the liberal principle of] equal concern choose its representative officials?”<sup>17</sup>

Dworkin’s answer turns out to be surprisingly complicated, although the details of his argument do not matter here. It is enough to note that the most natural and intuitive articulation of the idea that democracy is equality applied to politics—according to which democracy secures an equal distribution of political power—becomes ensnared in complexities and conceptual traps from which it cannot escape.<sup>18</sup> These obstacles lead Dworkin to seek another formulation of the idea that democracy is political equality, which abandons an emphasis on democratic procedures in favor of a broadly substantive conception that identifies democracy as the form of government “most likely to produce the substantive decisions and results

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16. RAWLS, *supra* note 1, at 231. Rawls’s views are of course subtler than this simple remark reveals. He acknowledges, for example, that the difference principle applies in this area to justify inequalities that benefit the worst off, so that political inequality is justified as long as it is “to the benefit of those with the lesser liberty.” *Id.* at 232.

17. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 184 (2000).

18. Dworkin identifies these conceptual problems, which plague both the idea that democracy is about the distribution of political *power* and the idea that it renders this distribution *equal*. With respect to power, Dworkin distinguishes between impact and influence—roughly, between the difference a person can make “just on his own, by voting for or choosing one decision rather than another,” and the difference he can make “not just on his own but also by leading or inducing others to believe or vote or choose as he does.” *Id.* at 191. With respect to equality, he distinguishes between horizontal and vertical dimensions—which compare “the power of different private citizens or groups of citizens” and “the power of private citizens with individual officials,” respectively. *Id.*

Dworkin observes that a democratic theory of equal power must insist on a vertical as well as a horizontal component, because authoritarian states that completely disempower ordinary citizens satisfy horizontal equality of power but clearly are not democratic. *See id.* Next, he observes that vertical equality of power must be understood in terms of influence rather than impact, because vertical equality of impact cannot possibly obtain in states that distinguish between public officials and private citizens, even though many such states obviously are democratic. *Id.* at 192. And finally, he observes that equality of influence is itself a dubious ideal, because it can be achieved only by suppressing forms of political engagement—for example, persuasive speech on matters of political principle—that are manifestly valuable, and indeed essential, to both liberal equality and democratic politics. *Id.* at 194-98. Together, these observations deny that democracy can combine conceptions of equality and power in an appealing way, and they therefore undermine the suggestion that democracy involves equal political power.

that treat all members of the community with equal concern.”<sup>19</sup> The democratic process, according to the liberal view, has no independent political value but merely serves the end of “improv[ing] the accuracy” of political decisions by making them more consistent with the demands of liberal equality.<sup>20</sup>

The liberal suggestion that democracy is a special application of substantive values of equal concern and respect must back away from democracy’s procedural elements if it is to get off the ground. But this places democratic decisionmaking, in the intuitive sense associated with elections and majority rule, at the mercy of these substantive values, so that voting must give way to equality’s demands whenever the two conflict. This counterintuitive possibility—that democracy might constrain voting—is not always a liability for the liberal theory. As I mentioned earlier, it is a celebrated feature of liberalism that judicial review (sometimes, of course, by unelected judges) and also political disobedience are justified insofar as they enforce the fundamental rights of the minority against the tyranny of the majority. But it is much less appreciated just how substantially this liberal approach encroaches (even in less compelling contexts) on the majoritarian and procedural elements that dominate everyday democratic understandings. When this feature of the liberal view is emphasized, the liberal ideal of political equality ceases to present a satisfying account of democracy.

The extent of the liberal encroachment on ordinary democratic practice is made plain in Dworkin’s work. Dworkin proposes that democracy should be constructed to improve the accuracy of decisions about “the distribution of resources and opportunities into private ownership, about the use of collective power and resources in public programs and foreign policy, about saving and conservation, and about the other topics of public principle and policy that confront a modern government,”<sup>21</sup> and he expressly requires the democratic process to defer to substantive values in all these areas. Indeed, Dworkin would limit majoritarian decision to what he calls choice-sensitive issues, that is, issues “whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community.”<sup>22</sup> As his proposal concerning substantive accuracy indicates, not many issues (and certainly not many politically vital issues) are choice sensitive.<sup>23</sup> Nor are Dworkin’s views idiosyncratic in this respect

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19. *Id.* at 186. Dworkin calls the formal conception of democracy “detached” and the substantive conception that he adopts “dependent.” *Id.*

20. *Id.* at 204.

21. *Id.*

22. *Id.*

23. Thus Dworkin observes that “[t]hough it might seem odd,” he believes that it is “sensible” even “to speak of a decision . . . to give aid to the [Nicaraguan] Contras as either accurate or inaccurate.” *Id.* His liberal conception of democracy requires that this decision be made accurately, regardless of citizens’ actual preferences or the outcomes of a majoritarian process. *Id.*

among philosophical liberals. Rawls's theory of justice similarly restricts the democratic process by imposing substantive requirements on policies concerning not just basic liberties but the distributions of all primary goods, including income and wealth, powers and opportunities, and even the social bases of self-respect.<sup>24</sup> The idea that democracy arises when liberal ideals of equality are applied to politics turns out not to generate a practice of democracy, in the ordinary sense, at all.

The second liberal approach connects democracy to liberal ideals concerning public reason and in particular to the idea that political power is never its own justification but must always be legitimated through arguments that are, in principle, acceptable to all citizens. This approach appears in Rawls's later work, as when he casts democracy as an attempt to "meet [the] condition" that political power must be justified in terms that all citizens "might endorse as consistent with their freedom and equality."<sup>25</sup> But the connection between public justification and democracy is most clearly developed by Bruce Ackerman, who expressly seeks to "reconcile majoritarianism with the principles of liberal dialogue,"<sup>26</sup> that is, with the liberal demand for political legitimation on mutually acceptable terms.

Ackerman's argument is also intricate, although only its main lines interest me here, and its details may again be set aside. The argument begins from a theorem in public choice established by Kenneth May, which identifies four formal properties of collective decision procedures that are, together, logically equivalent to majority rule.<sup>27</sup> Ackerman defends the

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As an example of a choice-sensitive issue, Dworkin imagines the decision "whether to use available public funds to build a new sports center or a new road system," although even here he suggests that choice-insensitive issues like distributive justice may "merge in that decision." *Id.*

24. See RAWLS, *supra* note 1, at 62.

25. JOHN RAWLS, POLITICAL LIBERALISM 218 (1993). Rawls did not entirely abandon his earlier suggestion that democracy arises when substantive equality is applied to politics, and he continued to propose that democracy gives all citizens "an equal share in the coercive political power that citizens exercise over one another by voting and in other ways." *Id.* at 217-18.

26. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 277 (1980).

27. See Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 *ECONOMETRICA* 680 (1952). The conditions, as articulated by Ackerman, are (1) universal domain—that the decision rule specifies some collective choice for all possible sets of individual preferences, (2) anonymity—that the decision rule requires the same degree of support for enactment of a collective choice regardless of the identities of the individuals who support the choice, (3) outcome indifference—that the decision rule makes the degree of support necessary for an option to be chosen collectively the same for all alternatives, and (4) positive responsiveness—that the decision rule allows each individual to break a tie among the others by joining one side and carrying the collective choice with her. See ACKERMAN, *supra* note 26, at 278-83.

In fact, the set of properties for which Ackerman provides a liberal defense differs in one of its four elements from the set that May proved are equivalent to democracy: Ackerman's argument replaces "positive responsiveness" with a slightly weaker condition that he calls "minimal decisiveness." Thus Ackerman's argument, as he is well aware, does not quite converge exclusively on majority rule. Instead, it provides a liberal defense for a slightly broader class of decision procedures, which includes, besides majority rule, a lottery in which each alternative is weighted according to the proportion of the citizenry that supports it. See *id.* at 285-89. This complication is irrelevant for my purposes here.

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legitimacy of each of these properties by reference to the liberal ideal of mutual public justification. Because the formal properties are jointly *equivalent* to majority rule, an evaluation of these properties is *precisely* an evaluation of democracy. Accordingly, Ackerman's argument that these properties express the liberal commitment to public reason and mutual justification amounts to a liberal explanation of the authority of democratic decisionmaking.

This approach fares better than the first liberal argument in addressing democracy's procedural element, although it still does not succeed well enough to capture the authority of democratic politics as it is actually experienced. The difficulty lies not in the account's execution but in its antecedents, that is, in the conditions that Ackerman must impose on the individual preferences to which May's theorem applies in order for his liberal reconstruction of May's four conditions to succeed. Ackerman's argument repeatedly requires that these individual preferences be compatible with liberal ideas about equal concern and respect. For example, his liberal reconstruction of the anonymity condition in May's theorem—which requires that decision rules establish a constant threshold for approving a collective measure regardless of which citizens support the measure—applies only insofar as no citizens are “would-be tyrants.”<sup>28</sup> The liberal commitment to mutual justification complicates the question of counting the preferences of tyrants in a way that the anonymity condition applied generally would reject. Similarly, Ackerman's liberal reconstruction of the condition he calls outcome indifference—which requires that decision rules make it equally difficult for all measures to be collectively adopted—applies only within the set of preferences that accept basic liberal commitments to freedom and equality. As Ackerman says, liberalism insists that citizens have “eliminated all exploitative proposals from [their] agenda” before they begin the process of democratic decisionmaking.<sup>29</sup> Outcome indifference applied generally would again reject this requirement. Ackerman himself appreciates, and indeed touts, these limits. He says that “[i]t is not the act of voting but the act of dialogue that legitimates the use of power in a liberal state” and adds, to be absolutely clear, that majority rule “is only appropriate for collective choices between options of *equivalent* liberal legitimacy.”<sup>30</sup>

Ackerman's liberal justification of democratic authority therefore applies only when the range of democratic politics is constrained according to antecedent liberal principles. The constraints are undoubtedly less restrictive than the constraints imposed by Dworkin's substantive account of democracy—disputes about inheritance and redistribution, for example,

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28. ACKERMAN, *supra* note 26, at 279.

29. *Id.* at 280.

30. *Id.* at 297.

which were excluded from democracy by Dworkin, are expressly included in democratic politics under Ackerman's approach.<sup>31</sup> But even if the scope of liberal democracy is broader on Ackerman's view than on Dworkin's, it nevertheless remains narrower than the scope of actual democratic practice. Ackerman continues to insist that views that are known to be illiberal remain absolutely excluded from political debate before democracy begins to operate at all. Actual democratic processes, by contrast, take in many plainly illiberal views, such as those that express class interests or sectarian religious ideology. The idea that democracy is the institutional expression of liberal ideals of public justification therefore once again turns out not to generate a practice of democracy, in the ordinary sense, at all.

The liberal view of democracy, in both its articulations, denies that democracy in its common procedural sense can legitimately resolve deep disagreements about political principles or even justice, and it therefore denies democracy the central place that it occupies in the lived experience of politics and political authority.<sup>32</sup> Instead, the liberal view converts the democratic process into a residual category, to be employed only in the narrow range of cases in which liberal principles of justice produce indeterminate results. Moreover, although this tension between liberalism and democracy is underappreciated outside political philosophy, it is accepted, and indeed advertised, by proponents of the liberal view. Both Dworkin and Ackerman expressly identify the limits that their views place on democratic politics.<sup>33</sup> Rawls puts the point more strikingly still when he says that "we submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system."<sup>34</sup> Democracy's power to produce authoritative resolutions of deep political disagreements remains a mystery, to be sure, but the liberal view provides no answer. Indeed, the liberal view does not so much explain our democratic intuitions as explain them away. Although these observations may not settle the question against the liberal view, they

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31. *See id.* at 294.

32. The contemporary political thinker who gives this experience of democracy its most prominent role is Jeremy Waldron. *See generally* JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) [hereinafter WALDRON, *DISAGREEMENT*]. Waldron connects democracy to what he calls the circumstances of politics—that is, to a "felt need . . . for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be," WALDRON, *DISAGREEMENT*, *supra*, at 102—and criticizes traditional liberalism for supposing a fanciful agreement about justice and basic rights, *see id.* at 1-2. Waldron should therefore be skeptical of liberal justifications for political disobedience. And although he does not emphasize the issue, he is immensely skeptical of liberal justifications for judicial review, liberal disobedience's close cousin. *See id.* at 285-94.

33. *See supra* notes 21, 30 and accompanying text.

34. RAWLS, *supra* note 1, at 355. Here it is worth noting that the later Rawls may well have been more of a democrat, insofar as he came to emphasize the need for freestanding political ideals and institutions capable of adjudicating reasonable disagreement among competing comprehensive moral doctrines. *See* RAWLS, *supra* note 25.

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surely motivate the alternative approach to democracy that generates the account of democratic disobedience at which I am aiming.

B. *The Republican View (or Democracy as Will)*

The republican view of democracy reverses the basic structure of the liberal view. Where the liberal view holds that democratic political authority depends on antecedent and more fundamental political principles, the republican view proposes that democracy is a freestanding political value that contributes to political authority on its own bottom. Where the liberal view constrains democratic processes in the ordinary sense, the republican view stresses the procedural aspects of democracy. Where the liberal view concludes that democracy ultimately sounds in equality, the republican view concludes that it ultimately sounds in liberty, and in particular in the connection between individual and collective self-governance. Finally, where the liberal view explains democratic authority on the basis of abstract principles that may be appreciated quite apart from actual political practice, the republican view proposes to explain democratic authority in terms of the affective consequences of engagement with the democratic political process—that is, in terms of the influence that democratic politics aspires to have on the political attitudes of the persons who participate in it. The republican view might therefore be called not democracy as reason but rather democracy as will.

None of these contrasts should be overblown, of course. The republican view of democracy does not seek to eliminate from political thought the ideals of equality that underlie the liberal view or to deny a connection between liberal ideals and political legitimacy. (Indeed, proponents of the republican view may, and commonly do, accept that liberal principles may constrain the democratic process, including by insisting on the inviolability of certain fundamental rights.) But the contrast between the liberal and republican views nevertheless remains real and practically important. Most broadly, the republican view—because it treats democracy as a freestanding political value—opens up the possibility that democracy may conflict with, and indeed outweigh, liberal political ideals.<sup>35</sup> And more importantly for present purposes, the republican view opens up the possibility that political disobedience may be democratically justified even when it cannot be cast as protecting basic rights.

The republican view of democracy sets out from the idea that persons are free only insofar as they are governed by laws that they have given

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35. See, e.g., Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1538 (1997) (book review) (“Approaches that attempt to maximize other kinds of equality of ideas or of persons are either implausible or inconsistent with the principle of collective self-governance [that is, democracy].”).

themselves. The challenge of freedom is therefore particularly stark when persons must live together with others, because the need to regulate the conduct of all constrains the conduct of each. As Rousseau emphasized, preserving freedom in the face of politics therefore requires finding a political mechanism through which each person “uniting with all, nevertheless obeys only himself and remains as free as before.”<sup>36</sup> The republican view casts democracy as an answer to this challenge—it insists, with Robert Post, that “[t]he essential problematic of democracy . . . lies in the reconciliation of individual and collective autonomy.”<sup>37</sup> The republican view of democracy elaborates this insight and gives it a practical form in the characteristic language of democratic politics. The republican view proposes that the democratic process, properly constructed and managed, transforms citizens from isolated individuals into members of a democratic sovereign, with which they identify and whose will they take as their own even when they have been outvoted. It proposes, again adopting Post’s language, that the participants in a well-functioning democratic process remain individually free because they take *authorship* of the collective choices that the process generates.<sup>38</sup>

It is, to be sure, no easy task to articulate a successful account of how the democratic political process enables a sovereign will to form or how it encourages individuals to take authorship of the collective decisions this will expresses. Many attempts at elaborating a republican theory of democracy have ended in confusion or outright failure. Rousseau’s own effort at democratic theory, and in particular his proposal that a well-constructed republican politics causes individual private wills to be completely subsumed in a unified general will, is famously obscure and unconvincing.<sup>39</sup>

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36. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 53 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762).

37. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 7 (1995). Here I am of course grafting Post’s remark onto my own morphology of democratic theory.

38. See Robert C. Post, *Democracy and Equality*, 1 *LAW CULTURE & HUMAN*. (forthcoming June 2005) (manuscript at 4, on file with author) (“Self-government is about the authorship of decisions, not about the making of decisions.”); see also Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *NOMOS XXXV: DEMOCRATIC COMMUNITY* 163, 170 (John W. Chapman & Ian Shapiro eds., 1993) (arguing that democracy makes collective self-government possible by “social processes anterior to majoritarian decision making that somehow connect the democratic system as a whole to the autonomous will of the entire citizenry”). In both essays Post is following Hans Kelsen, who observed that “[a] subject is politically free insofar as his individual will is in harmony with the ‘collective’ (or ‘general’) will expressed in the social order. Such harmony of the ‘collective’ and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates.” HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 285 (Anders Wedberg trans., 1945).

39. Rousseau insisted, for example, that “[t]he citizen consents to all the laws, even to those passed against his will, and even to those that punish him when he dares to violate one of them.” ROUSSEAU, *supra* note 36, at 110. Contemplating a circumstance in which his private will conflicted with the general will, Rousseau concluded that “[i]f my private will had prevailed, I

But in spite of these abiding theoretical difficulties, the lived experience of the democratic process as a legitimating force in politics suggests that the republican view is onto something. To begin with, democratic politics produces a citizenry that is dramatically more, and more intimately, engaged with collective decisionmaking than it would be under alternative political arrangements. The mass political parties that accompany democracy draw legions of citizens into active politics. Democratic deliberation encourages political engagement among citizens. And the formal structure of elections integrates ordinary citizens into the apparatus of government: "Voter," after all, is a public office. Moreover, the effects of the engagement may be felt introspectively by democratic citizens. Although the freestanding authority of democratic politics is difficult to discern directly, because it is difficult to know whether one obeys a law because it is authoritative or because it is enforced, the indirect power of democratic sovereignty may be experienced by dissenters in democratic states. It is expressed in the feeling that they cannot avoid personal responsibility for their governments' policies through dissent alone but only by taking more drastic steps to dissociate themselves from the democratic sovereign, such as by renouncing their citizenship.<sup>40</sup> Finally, the practical place of democracy as a freestanding source of political legitimacy is widely accepted. For example, the United Nations Universal Declaration of Human Rights does not just guarantee individual liberties and equal treatment before the law but also includes a right to democratic self-government.<sup>41</sup> Democratic political authority, including in particular the connection between democratic politics and a widespread sense of authorship of collective decisions, is a phenomenon in search of a theory, and it is set in conditions that provide fertile ground for theoretical growth.

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would have done something other than what I wanted. It is then that I would not have been free." *Id.* at 111.

40. It is an open question whether measures short of renouncing citizenship can relieve a democratic citizen of personal responsibility for her government's policies and, in particular, whether engaging in disobedient protest against these policies is sufficient. Although I do not take up the question in earnest, I suspect that disobedient protest is not by itself sufficient and that the reason has to do with a distinction between the authority of particular laws and of an underlying constitutional order. Ordinary political disobedience denies the former but accepts the latter, and this acceptance is sufficient to create individual responsibility even for the laws whose particular authority is denied. A protester who renounces her citizenship, by contrast, rejects even the authority of the constitutional order, and this can undo her individual responsibility for government policies enacted within that order.

41. As the Declaration states,

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Universal Declaration of Human Rights art. 21, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

The idiosyncratic failures of one or another articulation of republican theories of democracy therefore should not sow insecurity about the republican enterprise more generally.

Moreover, the subject at hand, democratic disobedience, happily does not require developing a complete, fully articulate elaboration of the republican view of democracy. The question of sufficient conditions for democratic sovereignty—conditions that guarantee or require that citizens take authorship of collective decisions—may safely be set aside for the limited purposes of the present argument. Instead it is enough to set out some necessary conditions of democratic sovereignty—conditions without which the democratic process cannot possibly accommodate collective self-government to individual liberty. I emphasize, in particular, that in order for democracy to reconcile individual and collective autonomy—in order for a democratic sovereign to come into being—the democratic process must be more than simply a mechanism for aggregating the instantaneous preferences of voters. And I argue that even as they render democratic political authority possible, the intensity and complexity of the democratic processes that the republican view requires introduce into democratic politics the pathologies that democratic disobedience seeks to correct.

Although the republican approach to democracy rejects the idea that democratic authority must be an articulation of some substantive political value and insists instead that democracy is procedural in a fundamental way, the procedure at issue cannot be simple majority rule. This is familiarly emphasized by the deliberative movement in democratic political theory, whose main lines may be traced back to Rousseau's insistence that the general will must be more than just the aggregate of individual preferences, which he called, dismissively, the will of all.<sup>42</sup> These traditions insist that the sovereign will—the will of “the people,” as it is sometimes called—is not simply the instantaneous adding up of the immediate preferences of the citizenry taken severally. As Alexander Bickel pointedly put it, “The people are something else than a majority registered on election day . . . .”<sup>43</sup>

The democratic sovereign cannot possibly arise out of such a simple majoritarianism, at least not if democratic government is to make good on its promise to reconcile individual and collective freedom by ensuring that even those who lose a vote take authorship of the collective decision. Simply adding up instantaneous preferences cannot possibly achieve this result for those whose preferences lose out. This is particularly vivid in cases in which majorities pursue prejudicial or oppressive—that is,

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42. See ROUSSEAU, *supra* note 36, at 61 (“There is often a great difference between the will of all and the general will. The latter considers only the common interest; the former considers private interest, and is only a sum of private wills.”).

43. BICKEL, *supra* note 2, at 17.

illiberal—ends,<sup>44</sup> but the same objection to identifying democracy with simple majority rule applies much more broadly, and indeed quite generally. No simply aggregative procedure can possibly induce losers to take ownership of collective decisions in a diverse and complex society. Certainly the most familiar forms of aggregation—lotteries,<sup>45</sup> for example, or markets<sup>46</sup>—do not sustain anything like the sense of authorship on which republican democratic authority depends.<sup>47</sup>

Nor can the practice of voting, taken on its own, cure these shortcomings. As Post points out, a political process in which collective decisions were made by continual direct referenda but in which the thicker forms of democratic engagement—public deliberation, political parties, a free press—were prohibited could never underwrite a democratic sovereign and would, to the contrary, generate alienation from rather than authorship of collective decisions.<sup>48</sup> A person may rationally retain minority preferences even in the face of the knowledge that most persons' preferences depart from hers, and the simple adding up of the majority's preferences cannot possibly engage her in a manner that gives her reason to accept, let alone authorize, the decision of the greater number. Moreover, this will be especially true insofar as politics implicates, as it inevitably does, not just brute preferences, to which only the modality of satisfaction and frustration applies, but also beliefs and ideals, which may be answered, denied, reasoned with, and so on. The rise of a democratic sovereign, whose decisions command the allegiance even of dissenters, therefore requires more than just fair adding up of fixed and inviolate preferences; it requires a political process that includes engagements that break through, that penetrate into, the preferences to be aggregated.

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44. Post focuses on these cases and the objection they raise against simple aggregative majoritarianism. See POST, *supra* note 37, at 6-7.

45. Athenian society, which allocated public office by lottery, was neither complex nor diverse.

46. It is simply implausible to think that persons who are outbid in a market take ownership of the equilibria that they sought to avoid. This is not, of course, to deny that markets have moral content. They may figure instrumentally in the liberal theory of equality. See DWORKIN, *supra* note 14, at 65-119; Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291 (2003). And the individual contractual relations that markets involve may underwrite intrinsically valuable forms of community. See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

47. Moreover, the needed sense of authorship cannot be sustained by reintroducing the liberal approach to democracy through the back door at this stage in the argument, to explain the formation of the democratic sovereign in terms of the fairness of the democratic decision procedure. The difficulties that embarrass the liberal theories' efforts to explain democracy in terms of broader principles of fairness would also trouble efforts to return fairness to the argument at this late stage. The lived experience of democratic sovereign authority extends even to cases in which the demands of fairness are at most imperfectly satisfied because, for example, access to the mechanisms of democratic politics—the press, the political party, and even the slate of candidates—is highly unequal. Finally, other features of democracy, such as widespread participatory engagement in politics, figure more prominently than fairness in the experience of sovereignty.

48. Post, *supra* note 35, at 1523-24.

Republican theorists of democracy have elaborated this need in a variety of ways and at several levels of abstraction. They have identified the opportunities for political engagement on which democratic sovereignty depends and explained how these forms of engagement induce persons to take authorship even of collective decisions that have gone against them: some by identifying the general conditions under which collective self-government is conceptually possible,<sup>49</sup> others by characterizing the general forms of political discourse on which widespread acceptance of democratic decisions depends,<sup>50</sup> and still others by identifying the specific institutions and practices through which particular democracies have historically generated the political engagement that democratic sovereignty requires and the specific historical moments at which particular democratic sovereigns have appeared.<sup>51</sup>

I do not propose, in these pages, to adjudicate among these accounts or to add my own distinctive approach to the list.<sup>52</sup> The theory of democratic

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49. This was of course Rousseau's project. *See* ROUSSEAU, *supra* note 36. More recently, Jed Rubenfeld has sought to complicate the conceptual structure of self-government and to connect democracy to constitutionalism by arguing that democratic self-government in purely the present moment is impossible and that, instead, democracy "requires an inscriptive politics, through which a people struggles to memorialize, interpret, and hold itself to its own foundational commitments over time." JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 163 (2001).

50. The most philosophically prominent form of democratic political discourse is deliberation. *See generally* ACKERMAN, *supra* note 26; BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); 1-2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., Beacon Press 1984, 1987) (1981). It is an open question (and one that particularly plagues Habermas's and Ackerman's accounts) whether idealized rather than actual deliberation can underwrite republican rather than just liberal democratic politics.

51. These questions are taken up, for example, by Bruce Ackerman, who may be understood to be fleshing out a republican theory of American democracy by elaborating a conception of the forms of political engagement that sustain American democratic sovereignty and identifying examples of this political practice in the historical record. *See* 1-2 BRUCE ACKERMAN, *WE THE PEOPLE* (1991, 1998).

52. My own account of democratic political engagement and the foundations of democratic sovereignty would likely emphasize the (to my mind) underappreciated role that political parties play in sustaining democratic authority. In particular, it would emphasize the ways in which political parties penetrate individual citizens' political preferences even before what is ordinarily thought of as democratic politics—that is, competition among parties—has begun. Thus political parties, at least in well-functioning democracies, do not pursue raw power (that is, the direct capacity to implement policy) but instead seek the intermediate end of political office, narrowly understood. Political offices, being creatures of the wider political system in which they appear, can be obtained only by conforming to the procedures that this system employs for allocating them. Revolutionaries may implement policy when they overthrow a government, but they cannot become senators.

This feature of political parties—that they seek office rather than power directly—causes party members to recast their political ambitions in forms that implicitly accept the authority of the wider political system, including even the authority of competing parties when they win elections. Thus, although it might be thought that political parties are important primarily because they connect parliamentarians to the masses (serving to keep ruling elites informed of the wishes of the people), political parties' greater contribution to politics may be rather to connect the masses to the parliament, in the sense of channeling political ambitions into forms that implicitly recognize government authority. This is probably especially true in democracies, because although

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disobedience does not require any distinctive view of democratic engagement. Although it is important to forestall distracting worries that no such theory is possible, it is enough, for this purpose, to gesture (in a catholic mode) at the range of theories of democratic engagement that others have developed. This is especially true because actual democratic politics, wherever it arises, uniformly involves more than unadorned majoritarianism, so that actual democracies in fact do generate the experience of democratic sovereignty, and secure political authority, in precisely the ways that the republican theory recommends. This is perhaps most obvious in the emphasis that all actual democracies place on promoting public political discourse and deliberation: through constitutional protections for speech, the institutional entrenchment of an independent press, and organized election practices that include established political parties and formal campaigns.<sup>53</sup>

I do not belabor these important but familiar points here. Instead, I briefly illustrate a less commonly remarked way in which actual democracies serve to create democratic sovereigns. In particular, actual democracies, besides promoting political engagement by protecting discourse and deliberation directly, also encourage political engagement indirectly, by rejecting simple majoritarianism in favor of aggregative mechanisms that require the forms of political engagement on which democratic sovereignty, according to the republican theory, depends. I take up these practices for two reasons. First, bringing them out of the shadows will help generate confidence in the republican theory of democracy by displaying a connection between this theory and the actual practice of democracy that would perhaps otherwise go unnoticed. And second, these complex aggregative mechanisms, even as they are essential to the republican case for democratic authority, also figure prominently in the argument for democratic disobedience to come.

Rejecting simple majoritarianism in favor of engagement-encouraging methods of aggregation is a necessary part of the very idea of representative

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parties can exist under many political regimes, they are most broadly appealing in democracies. The best historical account of the role of political parties in a democratic state appears in RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969). An underappreciated early account is MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* (photo. reprint 1967) (Smith T. Van Buren et al. eds., New York, Hurd & Houghton 1867).

The story of political parties presents an illuminating contrast to the argument to come, because democratic disobedience is dissociated from office in a way in which parties are not, and indeed arises precisely when party ideals no longer penetrate ordinary persons' political ambitions.

53. Measuring democracy in a rigorous and formal way is a complex and controversial task. But the basic elements of democratic politics—electoral competition and electoral participation—are unquestionably connected to all of these practices. For a recent empirical effort at measuring democracy across space and time, see Tatu Vanhanen, *A New Dataset for Measuring Democracy, 1810-1998*, 37 *J. PEACE RES.* 251 (2000).

democracy and appears on the face of every such government. Insofar as elected officials are (as they inevitably must in some measure be) true representatives rather than mere delegates—entitled to vote their consciences rather than simply tracking the preferences of their constituents—governments cannot possibly achieve democratic legitimacy on the model of simple majoritarianism. After all, no matter how much free play democratic representatives enjoy, the democratic sovereign must be the whole people and never just the government.<sup>54</sup> Accordingly, even if simple majoritarianism could sustain democratic authority, simply adding up the preferences of representatives could not (because it would count the wrong preferences). Representative democracy implicitly abandons the simple majoritarian view of democratic authority: It functions, as Bickel observed, “not merely as a sharer of power, but as a generator of consent.”<sup>55</sup> Representative democracy, in other words, is the conclusion of an argument that simple majoritarianism cannot sustain democratic authority and that the democratic sovereign is best conjured into being by the complex processes that representative government necessarily involves. Moreover, actual representative democracies depart from simple majoritarianism in ways that promote precisely the forms of political engagement that the republican theory of democratic sovereignty emphasizes.

Democracies may depart from simple majoritarianism and require engagement, at two levels—involving elected representatives, on the one hand, and the voting population, on the other—and democratic political systems differ with respect to which of these forms of engagement they promote. The United States, for example, departs from majority rule and encourages political engagement at both levels. The separation of powers,

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54. In the Anglo-American tradition, popular sovereignty is typically styled an American departure from the English idea that the sovereign was the Crown-in-Parliament. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432-66 (1987). It is commonly thought that England retained parliamentary sovereignty, see, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (photo. reprint 1996) (8th ed. 1926), but it has recently been suggested that England abandoned parliamentary sovereignty in favor of popular sovereignty, at least for parts of its more recent constitutional history, see Rivka Weill, *We the British People*, 2004 PUB. L. 380.

Continental European attitudes toward popular sovereignty are more complicated and various still. For a brief summary, see KENNETH DYSON, THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND INSTITUTION 113-15 (1980). This complexity is reflected even within national traditions. The German Constitution (the *Grundgesetz*, or Basic Law), for example, expressly declares that “all state authority emanates from the people,” GRUNDGESETZ [GG] [Constitution] art. 20(2) (F.R.G.) (“Alle Staatsgewalt geht vom Volke aus.”), but also makes certain basic principles—concerning federalism, the dignity of persons, and democracy—unamendable, see *id.* art. 79(3) (entrenching values contained in articles 1 and 20). Presumably these principles are entrenched on the basis of authority that resides outside the people.

55. BICKEL, *supra* note 2, at 15. Bickel was commenting approvingly on Edmund Burke, who famously championed the right of elected representatives to vote their consciences and connected this practice to the authority of representative government. See Edmund Burke, Speech on Fox’s India Bill (Dec. 1, 1783), in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE: INDIA: MADRAS AND BENGAL, 1774-1785, at 378 (Paul Langford et al. eds., 1981).

together with rules of bicameralism and presentment, encourages deliberation and compromise—that is, political engagement—among elected officials. And first-past-the-post elections in single-member districts cause elected officials to represent even those constituents who have not voted for them and therefore encourage representatives to run on compromise platforms that engage all popular points of view.<sup>56</sup>

Germany, by contrast, promotes political engagement principally at the representative level, not at the popular level. German elections employ proportional representation, so that even relatively unpopular political parties elect some representatives to parliament. Because no party typically commands a parliamentary majority, even the representatives of relatively small parties figure prominently in coalition governments. Democracy, in such systems, is an ongoing negotiation among political parties with separate constituencies, carried out through the representatives each party elects. In this way, the government as a whole can represent the people as a whole, even when each political party plays exclusively to its base. The ongoing political engagement among citizens on which democratic authority depends occurs vicariously, through the citizens' several representatives.<sup>57</sup>

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56. First-past-the-post elections, as the political science literature has made familiar, encourage candidates to court the median voter. See DENNIS C. MUELLER, PUBLIC CHOICE 98-105 (1979); see also JAMES M. ENELOW & MELVIN J. HINICH, THE SPATIAL THEORY OF VOTING: AN INTRODUCTION 12-13 (1984). What is less familiar is that in such elections, under which elected officials represent all voters and not just their supporters, a population chooses its elected officials together rather than separately.

57. Indeed, the German *Grundgesetz* expressly declares the Federal Republic of Germany a representative democracy, in which sovereignty is exercised through specific legislative organs (“durch besondere Organe der Gesetzgebung”) rather than by the people directly. GG art. 20(2). (The same article of the *Grundgesetz* also creates a right to political disobedience. See *id.* art. 20(4).) This language has been interpreted to render direct democracy constitutionally suspect. See Horst Dreier, *Demokratie*, in 2 GRUNDGESETZ KOMMENTAR 20, 31 (Horst Dreier ed., 1998) (connecting the “broad-ranging exclusion of direct-democratic elements” from German politics to article 20(2) of the *Grundgesetz*). In this way, the German political system not only encourages political engagements that occur at the representative level but, with few exceptions, actively privileges indirect engagement through elected officials over direct engagement among the people themselves. Moreover, the German hostility to direct democracy has been expressly connected to the idea that sovereign political engagements are best achieved, and democratic authority best sustained, when political engagements arise among elected representatives rather than unmediatedly among the people—a view explainable by German experience in the Third Reich. This was the point, for example, of Theodor Heuss’s remark in the constitutional assembly that drafted the *Grundgesetz* that direct democracy merely presents a “bonus [or welcome reward] for every demagogue.” *Id.* at 32.

This claim should not be overstated. Thus, the several German states are permitted to adopt forms of direct democracy. See Friedrich E. Schnapp, *Der Bund und die Länder*, in 2 GRUNDGESETZ-KOMMENTAR 1, 8-9 (Ingo von Münch & Philip Kunig eds., 2001). And the German electoral system—with the express aim of connecting representatives to voters—follows a complicated mechanism that ensures that even as the aggregate numbers of parliamentary seats each party holds are fixed through proportional representation, half of the individual seats are held by representatives who have won specific geographic districts. See Bundeswahlgesetz [BWG] [Federal Election Law] July 23, 1993, BGBl I at 1594, §§ 4-6. Finally, the *Grundgesetz* expressly

Finally, Britain adopts the mirror image of the German approach and departs from majority rule by encouraging political engagement primarily at the popular level. First-past-the-post elections in single-member districts dampen the legislative impact of minor parties and virtually ensure single-party government, and the parliamentary union of the executive and legislative branches and the absence of American-style judicial review dramatically reduce the need for deliberation and compromise—engagement—at the representative level. But members of Parliament, because they are elected in first-past-the-post voting in single-member districts, once again represent all their constituents (and not just their supporters), and this way of voting continues to promote engagement at the popular level. Admittedly, these are highly stylized characterizations. But they are enough to bring home that actual democracies all aggregate preferences through mechanisms that invoke political engagement, and not just simple majoritarianism, in the service of creating a democratic sovereign will.<sup>58</sup>

Much more would have to be added before these remarks could present a complete, fully articulate account of democratic politics—they are gestures toward a democratic theory, rather than the theory itself. But the main elements are in place. First, democracy has a broader scope than liberal theories credit; a republican approach is necessary. Second, this approach to democratic political authority emphasizes that the democratic process underwrites the development of a democratic sovereign and that individual citizens come, through participating in the democratic process, to take authorship of the sovereign's collective decisions, including even those that they opposed. And third, the democratic process can function in this way only if it is more than simple majority rule but instead involves, in one way or another, an intensive engagement among the participants. This

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contemplates that changes in the borders of the German states be proposed by parliamentary legislation and confirmed by popular referenda. See GG art. 29(2).

58. The stylized characterizations in the main text have emphasized the role that departing from simple majority rule and complicating the democratic process play in constructing the democratic sovereign, specifically by promoting individual authorship of collective decisions. A more complete account would also emphasize a second role that another set of departures from simple majority rule play in creating a democratic sovereign, this time by increasing the sovereign's capacity to reach stable equilibria in its policy choices. A long literature, initiated by the Marquis de Condorcet, see MARQUIS DE CONDORCET, *An Essay on the Application of Probability Theory to Plurality Decision-Making*, in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 131 (Iain McLean & Fiona Hewitt eds. & trans., 1994), and brought to maturity by Kenneth Arrow, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Yale Univ. Press 2d ed. 1963) (1951), explains that simple majority rule can produce pathological cycles in collective decisions. Departures from simple majority rule that are built into the institutional structure of all representative governments—involving committee systems, allocations of decisionmaking jurisdiction, and constraints on amending proposed decisions—can cure, or at least dampen, these pathologies. See Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979).

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engagement is fostered by political practices and institutions such as free speech, political parties, and an independent press. But it also depends—at least in representative, and therefore also in all actual, democracies—on more involved and complex mechanisms of preference aggregation, which encourage political engagement among the populace in choosing representatives or among representatives in forming policy or both. These ideas are not complete, as I have said, but they are enough to set up, and eventually also to address, the problem of democratic disobedience.

## II. DEMOCRATIC DEFICITS

If the liberal view could be sustained, democracy would be best understood as a technology of liberal justice, and democratic political authority might suffer no greater imperfections than any other mechanism for doing justice. Moreover, if simple majority rule could underwrite the rise of a democratic sovereign, then even the republican view of democracy would involve no necessary gaps in democratic authority beyond those associated with the usual practical limitations on social or political engineering. In either of these cases, democracy could be perfectly realized, at least in principle, and the practical obstacles to perfect democracy would be simply the practical obstacles that frustrate the perfect implementation of any moral or political ideal.

But the situation is very different if, as I have proposed, democratic political authority arises along republican rather than liberal lines and, moreover, requires rejecting simple majority rule in favor of more complex political processes. This is because the very political arrangements necessary, on this view, for underwriting democratic sovereignty—the political arrangements that sustain citizens' sense of authorship of collective decisions that they opposed—also inevitably cause collective choices sometimes to depart from what would be democratically authoritative. In particular, the institutions and practices of representative government, even as they are necessary for democratic sovereignty and authority, inevitably also raise obstacles to the effectiveness of the democratic sovereign will. The mechanisms of deliberation and compromise through which representative democracies encourage the engagements among citizens that democratic sovereignty demands give collective choices a sticky or, changing metaphors, an inertial quality.<sup>59</sup> Even as this inertia is in general necessary for democratic sovereignty, it can also entrench collective decisions that cannot (or cannot any longer) sustain the support of the sovereign. The very practices on which democratic sovereignty depends

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59. I am borrowing the inertial metaphor from Guido Calabresi, who emphasizes legislative inertia in an account of the democratic authority of courts to which I return presently. See CALABRESI, *supra* note 15, at 91-119.

therefore sometimes open up deficits in democratic legitimacy.<sup>60</sup>

There are at least two reasons for which the practices necessary for constructing a democratic sovereign also open up deficits in democratic legitimacy. First, and more banally, democratic deficits can arise because the very same procedures needed to generate a sovereign will are open to manipulation and abuse by special interests. These procedures encourage political engagement by requiring deliberation and compromise among both citizens and elected officials. At the popular level, a candidate cannot get elected out of a single-member district unless she can persuade a broad coalition of voters, with initially very different preferences, to join together in support of her campaign. And at the representative level, a legislator cannot enact a bill into law unless she can persuade a broad coalition of officials, perhaps from multiple institutions of government (which may be controlled by different political parties), to join together in support of her proposal. Such deliberation and compromise is, I have argued, necessary for democratic sovereignty. But persons who have no interest in deliberation or compromise—who refuse to engage others politically—can use the same inertial institutions and processes that generally foster coalition building and political engagement to block proposals around which the sovereign will could coalesce under slightly different factual circumstances or institutional arrangements.

This is a familiar form of distortion in democratic politics, at both the popular and representative levels. At the popular level, a well-organized faction of citizens that requires candidates to see some issue its way as a condition of its support can, if the balance of allegiances among the remaining citizenry renders the faction's support essential to electoral success, control policy on this issue and in effect remove it from democratic deliberation.<sup>61</sup> And at the representative level, a determined faction that gains control of a chamber in the legislature or even of a key legislative committee can similarly impose its preferences without regard to the preferences of others, in a way that once again removes issues from

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60. These inertial deficits are not the only deficits that actual democracies face. Entrenched inequalities, including even economic inequalities, can also generate democratic deficits by excluding parts of a population from the forms of political engagement on which the democratic sense of authorship depends. Such inequality-based deficits are practically important, to be sure, and my argument invites (and certainly does not preclude) that inequality might serve as a democratic ground for political disobedience.

But cases involving inequality are not as interesting for present purposes as the inertial deficits that the main argument describes. For one thing, inequality-based democratic deficits do not highlight the inevitability of democratic imperfections and hence of democratic opportunities for political disobedience. Moreover, arguments from inequality do not quite stand apart from liberal political ideals in the manner that I am trying to emphasize. (I briefly take up the connection between liberal and democratic ideals of equality in my discussion of John Hart Ely *infra* note 80.)

61. American examples of this phenomenon include teachers' unions' opposition to education reforms on the left and the NRA's opposition to gun control on the right.

democratic deliberation.<sup>62</sup> It is simply impossible to construct and administer inertial institutions and practices that discriminate perfectly between engagement-promoting and engagement-blocking—between democratic and antidemocratic—uses of inertia. This is just a special case of a much more general feature of rule-bound practices in their conception and administration: Because making and interpreting rules is costly, they are always both over- and underinclusive.

Democratic deficits that arise when special interests capture and subvert the democratic process are practically important, to be sure. They also especially plague republican theories of democracy, which raise the democratic process itself into a condition of democratic authority in a way and with an intensity that liberal theories do not. But such “as-applied” democratic deficits remain connected to defects in the implementation of republican democracy. And although this connection arises at a very deep level in the republican theory, as-applied democratic deficits are not yet intrinsic to the theoretical conception of democratic sovereignty that the republican view presents. By contrast, the second source of inevitable democratic deficits *is* intrinsic to the republican view’s theoretical conception of democratic sovereignty. Even though the argument to come does not turn on this distinction between as-applied and intrinsic democratic deficits, the intrinsic feature of the second class of democratic deficits is nevertheless worth noting in advance, because it opens a window into the workings of the republican view.

The second, and intrinsic, source of democratic deficits in republican democracy is much less familiar than the first and so requires a more elaborate explanation. This explanation is perhaps best developed through an analogy, although necessarily only a very rough analogy, between the sovereign will and an individual will.<sup>63</sup> This analogy clarifies the idea of a democratic deficit by associating it with much more familiar and intuitive cases of deficits in individual rationality. Moreover, the analogy continues to serve the argument going forward, by making it possible to explain the

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62. Southern Democrats, who dominated the powerful House Rules Committee, managed for many years to prevent civil rights legislation from reaching the House floor for a vote. See Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1227-28 (1995). They also managed, under the Democratic Party’s two-thirds rule, to prevent pro-civil-rights candidates from securing the Democratic presidential nomination. See RICHARD L. RUBIN, PARTY DYNAMICS: THE DEMOCRATIC COALITION AND THE POLITICS OF CHANGE 111-22 (1976).

63. This analogy is of course familiar—it is an example of the analogy between the state and the soul that has persisted in political thought at least since Plato’s *Republic*. See PLATO, *Republic*, in THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS 575, at \*603a (Edith Hamilton & Huntington Cairns eds. & Hugh Tredennick et al. trans., 1961).

The remarks about intentions that follow should be read in the spirit of this analogy—that is, as suggestions made in the service of an argument in law and politics rather than as freestanding and rigorous ideas in the philosophy of action or practical reason. Although subsequent footnotes refer to more technical philosophical discussions, these citations are offered by way of acknowledging general intellectual debts rather than as incorporating specific ideas by reference.

democracy-enhancing role of political disobedience by reference to the ways in which individual rationality benefits from familiar kinds of shocks to the individual will.

An individual person's will operates through her intentions. These intentions organize the person's practical affairs, elevating some reasons to prominence and eliminating others from consideration, so that when a person forms intentions in favor of one course of action—when she makes, as one might say, a plan<sup>64</sup>—this renders her insensitive to reasons that favor incompatible courses of action even though they apply to her and might, but for the intentions, move her. For example, a person faced with the choice whether to eat supper in or out might decide to eat out, which is to say that she forms an intention in favor of eating out. Although saving money continues to be a reason for her to eat at home, the intention eliminates this reason from her practical deliberations going forward. The value for her of saving money has not changed, nor have the facts about the relative costs of the two meals, but once she has formed her intention to eat out and the associated plan is in place, she sets these features of her circumstances aside and no longer responds to them in the context at hand.

Intentions therefore carry a kind of authority for the individual who adopts them, specifically in virtue of their capacity to exclude otherwise relevant reasons from a person's practical deliberations and, moreover, to support a kind of "nonreconsideration" of her course of conduct.<sup>65</sup> Intentions function in this way because of the expense, in time and effort, of attending to reasons in an unorganized form, and the authority that intentions carry turns on these costs. Individual intentions are for this reason necessarily authoritative at least to some degree, because the costs of failing to plan are never nil. Indeed, it seems plausible that unless intentions carry some measure of authority, rational or autonomous agency is impossible for persons *tout court*—that without authoritative intentions, the individual will would be incapable of latching onto any course of action or enjoying the benefits of planning but would instead attend to new or indeed

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64. These remarks about individual intention borrow in a *very* rough way from Michael Bratman's planning conception of intention. See generally MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON (1987).

65. See *id.* at 60; see also MICHAEL E. BRATMAN, *Introduction: Planning Agents in a Social World*, in *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 1, 4 (1999). Here I am using language loosely where Bratman, who distinguishes among several varieties of nonreconsideration, fixes much more precise meanings.

The remark characterizing the authority of intentions in terms of their power to exclude reasons from practical deliberation borrows, once again very roughly, from Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 57 (1986). The relationship between Bratman's account of intentions and Raz's view of practical reason is complicated, and Raz would likely not endorse my characterizations. For a brief treatment of the relationship to Raz's view, see BRATMAN, *supra* note 64, at 180 n.11. For a summary of some of the general issues, see Edward F. McClennen & Scott Shapiro, *Rule-Guided Behaviour*, in 3 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 363 (Peter Newman ed., 1998).

merely renewed reasons in an endlessly revisionary mode.<sup>66</sup> Intentions, understood along these lines, figure as necessary elements of (bounded) rationality.<sup>67</sup>

But at the same time, the costs of revisiting reasons in practical deliberations are not infinite, and the authority of intentions is not absolute. If the excluded reasons grow in importance or weight or if new reasons against the intended course of action arise, so that the person's intention comes to depart from what she has most reason to do, this puts pressure on her to revisit the deliberation that led her to form the intention. Indeed, such pressure may sometimes arise even without any change in the underlying reasons, because something thrusts the excluded reasons back into her deliberative field of vision. (Returning to the earlier example, the diner may discover that the restaurant is more expensive than she anticipated, or even if it is not more expensive, the obvious luxury of the dining room may return her attention to costs she had earlier set aside.) When this pressure grows strong enough, a person may change her mind, that is, abandon her earlier intention in favor of a new one and shift her plan. To be sure, the authority that intentions must carry in order for a person to be rational at all limits the sensitivity to such revisionary pressures that she may display, and in particular entails that the mere fact that an intention was somehow less than optimal when formed does not undermine it from the start. But although individual intentions necessarily display a kind of inertia, this inertia is bounded, so that a person may always change them—either in an orderly way and according to cultivated habits or by being jolted out of them, as happens to us familiarly when we are shocked out of complacency—and come to attend to reasons that she had previously excluded.<sup>68</sup> Although practical rationality requires that intentions display some inertia, rationality is ill served when this inertia becomes too great and certainly when it is insurmountable.

Now return to the other half of the analogy, to the case of the sovereign will—always remembering, of course, that the argument is proceeding by analogy only, and by a loose analogy at that. When a democratic sovereign decides on a collective choice (the rough analogy to an individual person forming an intention in favor of an action), the collective decision excludes certain considerations from the sovereign's ongoing deliberations. One might say, expressly adopting the language of practical politics, that these considerations are removed from the political agenda. This is literally true at the representative level, where political deliberations have a relatively

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66. This point again owes much to Bratman. See MICHAEL E. BRATMAN, *Planning and Temptation*, in *FACES OF INTENTION*, *supra* note 65, at 35, 36; BRATMAN, *supra* note 64, at 60-75.

67. For a similar point, see BRATMAN, *supra* note 65, at 4.

68. A more detailed account of the various ways of reconsidering intentions appears in BRATMAN, *supra* note 64, at 60-62.

formal structure and where the excluded considerations at issue will simply not appear on the official order of business. And it is figuratively true at the popular level, where the mainstream press, large political parties, and competitive candidates for public office will downplay or even ignore the excluded considerations, thereby removing them from the domain of democratic deliberation and political engagement. These phenomena are, once again, entirely familiar. In the context of American democracy, for example, prison practices that abandon rehabilitation in favor of segregation and retributive criminal punishment have more or less excluded considerations concerning prisoners' rights and prison reform from democratic politics. Certainly no competitive candidate in the most recent election cycle campaigned on the issue.<sup>69</sup> Indeed, it is difficult to imagine a plausible path along which considerations in favor of prison reform could, under current conditions, be brought to the fore of the American political agenda.

Moreover, just as the exclusionary force of individual intentions is necessary for the practical rationality of persons, so the exclusionary force of collective decisions is necessary for the possibility of democratic sovereignty and authority. Once a democratic sovereign has made a collective choice, this decision necessarily becomes difficult to reverse. Indeed, the exclusionary force of decisions by a democratic sovereign is generally much stronger than the exclusionary force of individual intentions, in effect because the democratic sovereign contains more internal barriers to reconsideration than even the most pathologically mulish individual.<sup>70</sup> The exclusionary force of individual intentions answers to the costs of revisiting decisions and, in the extreme case, the conditions for being able to form intentions at all (which are really conditions of practical rationality). But the exclusionary force of democratic decisions answers to the much more demanding conditions for amalgamating the many individual wills of many citizens into a unified democratic sovereign, all of

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69. The 2004 Democratic Party platform advocated "upholding international standards for the treatment of prisoners, wherever they may be held," 2004 DEMOCRATIC NAT'L CONVENTION COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 7 (2004), available at <http://www.democrats.org/pdfs/2004platform.pdf>, but this seems to have been directed more at conditions at Abu Ghraib and Guantánamo Bay than at domestic prison conditions broadly understood. Both parties did include platform planks in favor of post-prison support for the newly released. Thus the Democrats "support[ed] . . . smart efforts to reintegrate former prisoners into our communities as productive citizens," *id.* at 18; the Republicans supported "faith-based" job training, transitional housing, and mentoring for nonviolent offenders released from prison, PLATFORM COMM., REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 73 (2004), available at <http://www.gop.com/media/2004platform.pdf>. Neither plank addresses prison conditions directly, and neither party emphasized even these attenuated concerns about prisoners in its campaigns.

70. The two cases almost certainly cannot be measured on the same scale, and the comparison between them likely lacks any rigorous meaning. But the sense of the comparison is intuitive enough.

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whose members take authorship of each of its decisions.<sup>71</sup> The extent of this exclusionary force is measured by the inertial mass, as it were, of the institutional departures from simple majority rule that must be built into democratic politics in order for a sovereign will to arise—including, as I have emphasized, the practices and institutions of representative democracy. Considerations that bear on collective choices are simply not politically effective unless they can be passed through these practices and institutions.

Finally, just as the balance of underlying reasons that apply to an individual person may, and certainly may come to, oppose one of her intentions, so the balance of underlying preferences of the citizens who together make up a democratic sovereign may, or may come to, oppose a collective policy on some matter or other. This will exert revisionary pressure on the collective policy. But just as individual intentions exert exclusionary force against such revisions, so the inertia that is necessarily built into the democratic political process often prevents a sovereign from reengaging with an issue and revising its collective decision, even though a sovereign reengagement would produce a change in policy.

In some cases, such as when a policy is the product of recent collective choice and the citizenry's political energy concerning the policy has been exhausted, this poses no difficulties for democratic authority. (This is the collective analogue to the case in which the costs of reconsideration justify retaining individual intentions even when they are not quite optimal.) But in other cases, gaps between a government's policies and citizens' preferences may undermine democratic authority. This is especially true insofar as government policy departs dramatically from citizens' preferences or is procedurally removed from the democratic sovereign. A policy may, for example, have evolved out of very different policies by slow but collectively transformative stages and without a new sovereign engagement, or it may be removed from an old sovereign engagement by changed circumstances or even (if the policy is old enough) a changed citizenry. (This is the collective analogue to the case in which individual intentions have become complacent.) A citizen may reasonably conclude, in such cases, that the policies in question do not reflect the will of any sovereign to which she belongs, in which case her individual sense of authorship of the collective decision will run out. The combination of distance from any past sovereign engagement and resistance to a new sovereign engagement, although an inevitable part of democracy on the republican view, has in such a case produced a *democratic deficit*.

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71. One might say, although only at the risk of stretching an already strained analogy too far, that the entropy, or unruliness, of the many persons who must be organized into a sovereign is much greater than the entropy of the many reasons or impulses that must be organized into an individual will.

This idea—that there might arise a characteristically democratic deficit in political authority—is strikingly absent from liberal theories of democracy. Indeed, the liberal approach is if anything actively hostile to the idea, because liberal theories of democracy locate the center of gravity of democratic authority in democracy's connection to liberal principles of justice and therefore take a narrow view of the purely procedural element in democracy. (Recall Dworkin's consigning purely procedural democracy to choice-sensitive issues, that is, to issues "whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community,"<sup>72</sup> and Ackerman's remark that the democratic process "is only appropriate for collective choices between options of *equivalent* liberal legitimacy."<sup>73</sup>) And having taken this narrow view of procedural democracy's subject matter, liberal theories naturally take a thin view of its processes. In particular, they reject the republican idea of a democratic sovereign will and hence also the republican account of the inertial institutions and practices needed to underwrite the democratic sovereign and instead restrict the democratic process, more or less, to simple majority rule. But giving the procedural elements of democracy this narrow jurisdiction and thin form deprives legal and political philosophy of the materials out of which distinctively democratic, as opposed to just generically liberal, objections to governmental authority might be constructed. If voting governs only minor matters and proceeds by simple majority rule, then it is hard to imagine—save in straightforward cases of force or fraud—what democratic complaint might be leveled against this process.

The republican theory of democracy, and in particular its idea of a democratic deficit, has therefore created space for a characteristically democratic challenge to government authority that the liberal view cannot recognize. This innovation opens up a new avenue in the theory of political disobedience. Political disobedience might, in appropriate circumstances, be justified as a counterweight to the inertial institutions and practices that anchor democratic authority but that inevitably misfire on occasion and produce democratic deficits. Perhaps political disobedience might, if appropriately employed, serve to correct these deficits and in this way enhance democracy. An account of political disobedience that made good on these claims would reintroduce political disobedience, which I began (following common usage) by casting as a threat to democracy, to the interior of democratic theory. It would be an account of democratic disobedience.

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72. DWORKIN, *supra* note 17, at 204.

73. ACKERMAN, *supra* note 26, at 297.

## III. JUDICIAL REVIEW

Before turning to elaborate a theory of democratic disobedience, it is helpful to cement what has been said so far and to foreshadow what is to come by drawing an analogy between political disobedience and another political practice commonly thought to be at odds with democracy: judicial review. Although the two phenomena arise in very different settings—contrast the elite decorum of judges with the populist rabble-rousing of protesters—they display striking similarities. The similarities are so great, in fact, that the theory of judicial review provides a template for the theory of political disobedience. This is a familiar feature of liberal accounts of the two practices. Nevertheless, reprising the familiar analogy in liberal theory paves the way for an unfamiliar analogy between distinctively democratic accounts of judicial review and democratic disobedience. Moreover, the problem of judicial review once again illustrates an important difference between liberal and republican theories of democracy and some advantages of the republican approach.

Like political disobedience, judicial review involves a group of people who seemingly enjoy no democratic legitimacy—certainly no democratic legitimacy to impose their preferences on citizens generally—but who nevertheless thwart the policies of democratic branches of government. In the one case, self-appointed protesters disobey democratically enacted laws; in the other, unelected and unaccountable judges strike them down. Indeed, the tension between judicial review and democracy is even greater than that between political disobedience and democracy. Judicial review, after all, invalidates democratic laws, whereas political disobedience merely defies them. These concerns about judicial review are familiar, of course: They are captured in the well-known charge that judicial review suffers a countermajoritarian difficulty.<sup>74</sup>

The liberal defense against charges that judicial review is antidemocratic mirrors the traditional liberal defense of political disobedience. The liberal argument proposes that judicial review—like political disobedience—enforces the limits of democratic authority against overreaching by the democratic branches of government. Judicial review is therefore the handmaiden of the liberal theory of democracy. It prevents the political branches of government from imposing illiberal policies—specifically, from violating fundamental rights to equal treatment and to individual liberties—in ways that they have no legitimate authority to do. As Dworkin says, on this theory the practice of judicial review “assumes that the majority has no right to act unjustly, to abuse the power it holds by

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74. The phrase was introduced to prominence by Bickel. *See* BICKEL, *supra* note 13, at 16. The idea is no doubt much older.

servicing its own interests at the expense of a minority's rights."<sup>75</sup> This is the same idea that underwrites liberal defenses of political disobedience,<sup>76</sup> as Dworkin, once again, explicitly points out:

[J]udicial review rests on a qualification to the principle of majority rule—the qualification that the majority can be forced to be just, against its will—to which [political disobedience] might also appeal in order to explain why [its] challenge to majority rule is different from outright rejection of it.<sup>77</sup>

The liberal defense of judicial review therefore shares the attractions of the liberal theory of political disobedience. The political authority of even democratic majorities surely is in some measure limited in the ways that the liberal argument identifies: Democratic majorities may not encroach on the basic liberties of minorities (or indeed their own basic liberties), nor may they abrogate basic ideals of equal concern and respect. And judicial review can indeed serve as an important corrective against majority overreaching. But the liberal defense of judicial review also shares the defects of the liberal account of political disobedience and the liberal theory of democracy that it invokes. In particular, the liberal account of judicial review countenances immensely broad-ranging justifications for judicial intervention in public policy, much broader than can be squared with the pretheoretical intuitions of democratic citizens. This is just the flip side of the short rein that, as I observed earlier, the liberal view gives ordinary democratic politics<sup>78</sup>—where the authority of the majoritarian branches is restricted, courts step in to fill the void.

Thus the liberal theory in principle justifies judicial review of all matters that invoke liberal ideals of equality and liberty.<sup>79</sup> Moreover, the liberal theory of judicial review adds a new gloss to this familiar defect. The terms on which the liberal theory justifies judicial review place courts in a competitive rather than a cooperative relationship with the more straightforwardly democratic branches of government. If a subject is suited

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75. DWORKIN, *supra* note 3, at 111. Here Dworkin is again presenting the liberal party line. The root of the liberal position lies in the idea, as Rawls says, that the "principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good," or, put more simply, that "the concept of the right is prior to that of the good." RAWLS, *supra* note 1, at 31.

76. See *supra* notes 5-7 and accompanying text.

77. DWORKIN, *supra* note 3, at 111.

78. See *supra* notes 21-24, 28-34 and accompanying text.

79. On the more extravagant reasoning of the liberal view, these include all questions about "the distribution of resources and opportunities into private ownership, about the use of collective power and resources in public programs and foreign policy, about saving and conservation, and about the other topics of public principle and policy that confront a modern government." DWORKIN, *supra* note 17, at 204. Only the rare questions that are purely choice sensitive—recall Dworkin's example about the choice whether to build sports grounds or roads, see *id.*—are protected from judicial interference.

to judicial resolution on the liberal view, then it must involve fundamental rights, in which case it is beyond the authority of democratic politics. This is reflected in the fact that judicial review, on the liberal model, is characteristically *constitutional* review, which produces decisions that cannot be altered by the legislature. The liberal approach therefore not only expands the scope of judicial review, it also increases the aggressiveness that courts display vis-à-vis the other branches of government.

These shortcomings in the orthodox liberal view have led lawyers to seek an alternative, democratic defense of judicial review, which takes as its starting point some of the ideas that I have presented as characteristic of the republican view of democracy, even if it does not expressly adopt the full republican view in a self-conscious or theoretically articulate way.<sup>80</sup> In

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80. A third theory of judicial review, associated with John Hart Ely, casts the liberal account in democratic terms and deserves mention in the margin, not least because the prominence of Ely's theory makes it important to distinguish his approach from the democratic account presented in the main text.

Ely argued, against the traditional liberal account, that judicial review should be driven not "by a desire on the part of the Court to vindicate particular substantive values it [has] determined [are] important or fundamental" but rather by a desire "to ensure that the political process . . . [is] open to those of all viewpoints on something approaching an equal basis." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980). Ely proposed, in other words, that judicial review should protect persons against being cut off, in one way or another, from the democracy itself. He hoped in this way to overcome the counter-majoritarian difficulty and render judicial review consistent with democracy and indeed affirmatively pro-democratic. Ely's approach to judicial review and the approach presented in the main text therefore appear similar. But this appearance masks three differences, which cast Ely's view as basically liberal and the view in the main text as basically republican.

First, in spite of Ely's procedural recharacterizations of the rights that judicial review protects, he retains the basic commitments of liberal approaches to democracy and judicial review. Thus Ely, most notably through his focus on voting rights and equal protection, emphasizes the wrongfulness of political practices that attack *persons*, either by excluding them from the democratic process entirely or by subjecting them to other forms of prejudice. In this way Ely captures the concerns for substantive equality and public justification that lie at the core of liberal arguments for limiting democratic politics, including by subjecting it to judicial review. But Ely devotes little attention to the possibility that *positions* might be excluded from the democratic process (regardless of which persons adopt them) and that such exclusions are also flaws in democracy. Indeed, he seems skeptical of the proposal that judicial review might properly open up the democratic process to positions that are being excluded, as when he concludes that "we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures." *Id.* at 67. Ely therefore neglects the concerns about legislative inertia that lie at the core of the democratic theory of judicial review.

Second, Ely takes democracy to be perfectable, at least in principle. As William Eskridge observes, once the Warren Court and the Johnson Administration had "dismantled formal apartheid, purged the South of prejudice-dominated trials, and opened up the political process to minority voices and votes . . . , it was not clear [from Ely's point of view] what more a referee Court should do." William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1285 (2005). In other words, Ely neglects the idea that democratic deficits are inherent in the very possibility of democratic sovereignty, so that judicial review must constantly (if deftly) intervene to enhance the democratic authority of the political process. This idea lies at the very core of the republican conception of democracy and the democratic account of judicial review that are developed in the main text.

Finally, these two differences between Ely's view and the view in the main text come together in a third difference, namely that Ely's approach emphasizes constitutional judicial

particular, this alternative theory of judicial review observes that, “because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and that *some* of these laws not only could not be reenacted but also do not fit . . . [within] our whole legal landscape.”<sup>81</sup> It observes, in other words, that because of the inertia inherent in democratic politics, the law in the statute books may, and indeed on some occasions inevitably does, suffer democratic deficits of the very sorts that the republican account of democratic sovereignty articulates. And it observes that judicial review can help address these democratic deficits, not by irreversibly striking down such laws and replacing them with judicially divined alternatives, which would repeat the failures of the liberal view, but rather by triggering the democratic engagement that the status quo lacks—by intervening in the political process in ways that “induce the legislature to reconsider statutes that are out of date, out of phase, or ill adapted to the legal topography.”<sup>82</sup> Proponents of the democratic theory of judicial review have identified a series of techniques that courts might use to trigger legislative reconsideration of democratically dubious statutes—for example, by narrowly construing statutes that are in derogation of the common law, invalidating stale statutes on grounds of desuetude, or finding overbroad statutes void for vagueness.<sup>83</sup> In contrast to the outright constitutional invalidations associated with the liberal theory of judicial review, these techniques invite legislatures to reconsider the statutes in question and indeed to affirm the statutes’ democratic bona fides by reenacting them.

This democratic approach to judicial review therefore avoids the hegemonic claims that cast doubt on the liberal view. Its standard for triggering judicial review—that a law is somehow out of place in the

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review whereas the approach reported here emphasizes the place of judicial review in ordinary, ongoing democratic politics.

81. CALABRESI, *supra* note 15, at 2.

82. *Id.* at 18. I adopt Calabresi’s formulation of the theory because it most clearly articulates the independence of the democratic account of judicial review from liberal ideals about rights and the limits of democracy. Other elaborations of this broadly Bickelian idea also exist. Robert Burt, for example, argues in a historical context that courts should avoid the role of final arbiter of political conflicts but should instead facilitate the resolution of such conflicts within the more overtly democratic branches of government. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

It is worth noting that this theory of judicial review is not necessarily an American invention. The British development, between 1832 and 1911, of a “referendal” theory of the House of Lords’s veto over Commons legislation fits the democratic account of judicial review almost perfectly. See Weill, *supra* note 54, at 380. According to this theory, the Lords would strike down constitutional legislation that they believed lacked a mandate from the people but would allow the legislation to go forward if it was reenacted in the Commons following an election that affirmed that the people supported it. See *id.* at 384. The referendal theory therefore cast the Lords’ veto power not as a means of limiting democracy in the service of antecedent ideals (whether liberal or otherwise) but as a means of completing democracy by ensuring that Commons legislation reflected the will of the popular sovereign rather than just of a dominant political party.

83. These techniques and others are collected and elaborated in CALABRESI, *supra* note 15, at 149-62.

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broader democratic political and legal landscape—need not, and indeed typically does not, carry any implication that courts should encroach farther and farther into that landscape. Moreover, its account of the consequences of judicial review—that there should be a back-and-forth between the courts and the legislature all in the service of democratic engagement—avoids the implication that courts should take over entirely any area of law that they touch. Finally, the democratic theory places judicial review inside rather than outside the democratic political process and casts it as completing rather than limiting democracy.

There is an obvious analogy between the democratic account of judicial review and a democratic theory of political disobedience. It provides the mirror image of the more familiar analogy between liberal accounts of judicial review and political disobedience. According to the analogy, democratic disobedience, like judicial review, might serve to overcome the democratic deficits that inevitably attend the inertial institutions on which democratic sovereignty generally depends. Again drawing out the analogy, democratic disobedience might correct deficits in democratic authority along very much the same lines followed by judicial review—by overcoming political inertia and triggering a democratic reengagement with issues that the status quo has kept off the political agenda. The analogy to judicial review therefore suggests an outline for a theory of democratic disobedience, which might reprise (in a new context) the development of the democratic theory of judicial review. First, the theory of democratic disobedience must explain why the existence of a democratic deficit justifies an illegal practice such as democratic disobedience and, relatedly, how democratic political disobedience might correct or cure democratic deficits. Second, the theory must articulate the doctrinal structure of democratic disobedience in greater technical detail: It must identify the rules that should govern democratic disobedience and connect these rules to the actual practice of democratic disobedience.

#### IV. DEMOCRATIC DISOBEDIENCE

It can happen in a democracy that a public policy lacks democratic authority for current citizens. This may occur because the policy was never approved by the democratic sovereign at all but instead arose in some other way, as through a slow and unattended transformation of an initially very different policy. Alternatively, even if the policy was produced by a democratically authoritative sovereign engagement, the distance between this engagement and the present political situation—measured in terms of citizen preferences, institutional continuity, time, or whatever other variables contribute to individual authorship of collective decisions and so span the space of republican democratic authority—may be so great that the

conditions of sovereign authority no longer apply in connection with the policy at hand. Moreover, it can happen that such policies not only lack democratic authority but also would not win democratic approval if the sovereign reengaged them.

A citizen who faces such a situation may wish to reintroduce into the political agenda preferences and ideals that have been excluded by the collective decision whose ongoing democratic authority and current democratic appeal she doubts. (The citizen probably has these preferences and affirms these ideals herself, although this is not necessary, and she may pursue a renewed sovereign engagement in spite of being content with the status quo, simply for the sake of democratic values.) But in such cases, the inertial practices and institutions that usually promote democratic sovereignty inevitably come to impede it instead—they create democratic deficits. The citizen therefore has good democratic reasons to resist these inertial institutions—to overcome the democratic deficits.

Of course, the political processes of democratic states generally (and perhaps necessarily) recognize officially sanctioned mechanisms for collective course changing and revision—including, if the argument of the previous Part is correct, the processes of judicial review.<sup>84</sup> A citizen who perceives a democratic deficit may promote sovereign reengagement with an issue through these orderly political processes, that is, by means that conform to the law. But these approved mechanisms for triggering sovereign reengagements is not always adequate to correct the democratic deficits that arise from time to time. Indeed, it is impossible for a democratic system to anticipate all the democratic deficits it generates and

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84. Judicial review is of course not the only political practice that countenances seemingly counter-majoritarian conduct in the name of republican democracy. Another familiar example of such a practice is freedom of speech or, more precisely, the extension of freedom of speech to include some speech that supports or promotes illegal activity. Insofar as speakers encourage the violation of laws that have been enacted by democratic institutions, they face (although admittedly at one remove) the same counter-majoritarian difficulty that confronts both more direct civil disobedience and judicial review. Freedom of speech that protects such speakers, as Bickel remarks, therefore “makes room for . . . a measure of necessary in-system civil disobedience.” BICKEL, *supra* note 2, at 69.

The extension of freedom of speech to speech that promotes illegality may of course be defended in indirect terms and without according such speech any intrinsic value, by arguing that regulations prohibiting the speech would inevitably sweep too broadly, chilling radical but law-abiding political speech that does have intrinsic value. (This is just a special case of Harry Kalven’s worry that “if we acknowledge the risk of disorder that such speech carries as the rationale for some censorship, it will be difficult to keep the law from reading that risk into all serious dissident criticism.” HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 120-21 (Jamie Kalven ed., 1988)). The argument here, without rejecting this indirect approach, proposes an alternative account according to which even speech that promotes illegality can have more immediate political value, expressed in terms of the republican theory of democracy. The individual sense of authorship of collective decisions on which democratic political authority depends requires that persons remain engaged with the democratic process even after it has decided some matter against them. Such engagement simply cannot be sustained unless those who oppose collective decisions may speak out against them, including in ways that in some measure encourage illegal resistance.

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to develop officially sanctioned routes of protest that perfectly counterbalance all its inertial institutions.

The earlier analogy to the individual will illuminates this point. A moment's introspection reveals that the exclusionary force of our intentions is not and indeed could not possibly be always perfectly counterbalanced by the revisionary mechanisms that we cultivate. No matter how carefully we calibrate our intentions' exclusionary force, and no matter how sensitively we pursue revisionary habits, the nonreconsideration on which our practical rationality depends on occasion so entrenches our intentions that we will benefit from being forced to reconsider them by means that go beyond the reconsiderative methods to which we have antecedently committed ourselves. We simply cannot help but become complacent, and we will then benefit from being shocked out of our complacency by unanticipated, and initially unwelcome, means.

Moreover, these inevitable imbalances between inertial forces and cultivated revisionary mechanisms are only more pronounced in the case of the sovereign will than in the case of the individual will. The practices necessary for sustaining the widespread sense of individual authorship of collective decisions necessary for democratic sovereignty involve much more inertia than the exclusionary properties of intentions on which individual practical rationality depends. Accordingly, the legally sanctioned means of protest that a political system incorporates are inevitably less capable of correcting the full range of democratic deficits that arise in that system than the revisionary habits of persons are of correcting the defects in rationality that arise from time to time in individual wills. The benefit to the democratic sovereign of the unanticipated and unwelcome shocks associated with disobedient protests tend, therefore, to exceed the benefit to the individual will of being shocked out of its complacency. None of this denies that democratic systems should invite rather than discourage legal protest, just as individual persons should be flexible rather than rigid. But the mechanisms needed to generate a democratically authoritative sovereign inevitably (and even more markedly than in the case of individual intentions) also create democratic deficits whose cures no democratic system can incorporate.

In such cases, involving democratic deficits that cannot be cured by legal means, the entire institutional infrastructure of a democracy—including the inertial practices that generally underwrite democratic sovereignty and that are without effective counterbalance from officially recognized avenues of protest—imposes a policy that citizens do not experience as authoritative and, moreover, conspires to block a sovereign reengagement with the policy. In such cases, the democracy can no longer sustain its citizens' sense of authorship of the collective choices that carry the democratic deficits, and the republican justification for inertial

resistance against collectively reengaging the choices falls away. A citizen facing a democratic deficit in such cases therefore has *no democratic reason* why she should accept the policies in question or indeed why she should limit herself to official or approved mechanisms for generating a sovereign reengagement with them. There may, of course, be other reasons against employing unconventional means even in such cases, and these may sound in ideals that lie inside as well as outside the complex of democratic principle: Disobedience may damage fragile democratic engagements elsewhere in the political sphere, or persons may have developed expectations based on a policy despite its lack of democratic foundations. But these reasons, critically, do not reassert the democratic authority of the policy under pressure. And insofar as political methods that transgress the limits of ordinarily legitimate politics may succeed in triggering a democratic reengagement with the issue, there are good democratic reasons for employing such methods.<sup>85</sup>

The argument has therefore generated a category of distinctively democratic disobedience. Moreover, the argument has remained true to its initial observation that political disobedience is legally and philosophically interesting only when it arises in basically legitimate and especially in democratic states. Thus the argument has cast democratic disobedience as more than just a case of asserting democratic values against autocratic or authoritarian—and hence illegitimate—regimes. (Disobedience in these cases may of course also be justified, but that conclusion is uninteresting, because it is built into the characterization of the regimes as illegitimate.) Instead, democratic disobedience is justified even in democratic states, when it is directed against democratic laws. Indeed, the argument has shown democratic disobedience to be an unavoidable, even integral, part of a well-functioning democratic process. Democratic disobedience, on the

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85. Like liberal disobedience, *see supra* note 1, democratic disobedience may be indirect as well as direct—that is, it may violate laws besides the ones at which it ultimately takes aim, and which do not themselves lack democratic legitimacy. Most commonly, protesters who object to some grand policy or other violate laws against trespassing.

This poses no significant or distinctive problems for the theory of democratic disobedience, which need be no more formalist or rigid than the liberal theory on this count. Thus it is natural to distinguish between the laws that are *disobeyed* and the laws that are *defied*, and to say that protesters may disobey one law (against trespass) in defiance of another (concerning a war). This distinction should not, of course, be asked to bear too much weight, and there are limits to the extent of indirection that the theory of democratic, and for that matter liberal, disobedience can allow: In contrast to the case of trespass, it seems strained to say that a protester who robs an unrelated victim to fund her protests does not also defy the criminal laws that she disobeys. The intuitive difference between the two cases is clear enough and involves the narrative connections among the illegal acts, the laws that they disobey, and the laws that they defy. One might say, speaking roughly, that the trespass does not attack the legal regime that it violates whereas the robbery does.

Note, finally, that this treatment of indirect disobedience introduces a disanalogy between political disobedience and judicial review, where a practice of striking down one law because of a defect in another would seem not only unjustifiable but quite bizarre. I would like to thank Owen Fiss for pointing this disanalogy out to me.

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view developed here, *enhances* democracy.

Moreover, as the inertial mass of democratic politics grows, the democratic deficits that the politics can be expected to generate grow as well, and the need for disobedient shocks to improve democracy tend also to grow. (Certainly this holds true at the individual level of the analogy, where persons whose intentions display greater exclusionary force—who are stubborn—are more likely to benefit, in the sense of becoming more practically rational, from unwelcome shocks to their intentions than those whose intentions display less exclusionary force.) All else equal, then, the case for democratic disobedience is stronger in democracies, like the American one, whose political institutions make changing the law comparatively difficult than in democracies, like the British one, whose institutions make it comparatively easy.<sup>86</sup>

This observation suggests, incidentally, that the case for political disobedience is stronger in democracies that recognize liberal judicial review than in those that do not. This suggestion is counterintuitive on the liberal model, which proposes that both judicial review and political disobedience serve rights and therefore suggests that they should work together rather than in opposition. But it becomes natural once the possibility of democratic disobedience is taken into account. Liberal judicial review, because it removes the issues that it decides from ordinary politics, introduces enormous inertial burdens into a democratic system. Protesters who seek a sovereign reconsideration of an outcome imposed by judicial review—perhaps because they reject the liberal premises of the reviewing court's decision entirely or perhaps simply because they believe that the court applied liberal ideals incorrectly—may be unable effectively to secure this reconsideration except through political disobedience.<sup>87</sup>

These observations—insofar as they open up a new space for justified disobedience—represent an innovation in the theory of political disobedience. But they have little practical importance as yet. This is because they say nothing, or only very little, about the forms and limits of democratic disobedience, that is, about regulative principles that should

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86. *See supra* notes 56-58 and accompanying text.

87. This does not necessarily justify the disobedience, all things considered. Liberalism may be true, after all, and the reviewing court may have applied liberal principles correctly to the issue at hand. Democratic values may perhaps be properly outweighed in such a case, but one should not deny (as liberal approaches to democracy tend to do) that they are being outweighed.

The Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), to remove the basic question of abortion from the democratic process triggers this relation between judicial review and political disobedience in its full complexity. The model of judicial review employed was undoubtedly liberal rather than democratic. (The decision held that a woman's right to decide whether to terminate her pregnancy is "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153.) The decision may be opposed either by rejecting liberalism or by rejecting that liberal ideals play out as the Supreme Court supposed. Some of *Roe's* opponents have resorted to disobedient protests in an effort to return the question of abortion to the democratic agenda. And the Court's decision may well be all-things-considered justified.

govern the diagnosis of democratic deficits and the application of democratic disobedience as a cure. These topics invite analogs to the elaborate doctrines that have been proposed to regulate the practice of democratic judicial review. In the remaining pages I begin to develop a similar (although necessarily looser) set of governing principles for democratic disobedience. It will sometimes be helpful to refer to historical examples in order to fix ideas, and I therefore return, occasionally, to the cases with which the argument began: the movement against the Vietnam War, the campaign against nuclear weapons, and finally (although here my remarks will be necessarily more speculative) the ongoing protests against globalization.

It is important, as a threshold condition, to develop regulative principles that cabin the protests that the theory of democratic disobedience countenances: A theory of political disobedience should not be an invitation to general lawlessness. This limiting function assumes particular importance for the theory of democratic disobedience, because an excess of disobedient protest threatens—by colonizing the entire sphere of political activity and squeezing out legal forms of political engagement—to undermine the very practices of democratic sovereignty that the theory of democratic disobedience is constructed to serve. But the need to limit the scope of political disobedience also figures in liberal theory. And the limits that the theory of democratic disobedience imposes closely track, in their structure and purpose, the limits on political disobedience that this theory has made familiar.

Thus where the liberal theory proposes that only violations of rights and not just harms to interests can justify liberal disobedience, the democratic theory asserts that only democratic deficits and not mere political defeats can justify democratic disobedience. Because the republican theory of democracy specifically rejects simple majoritarianism in favor of inertial practices that, it claims, promote the political engagements on which democratic sovereignty depends, the mere fact that a majority of the citizenry prefers a change away from the status quo does not by itself establish that a democratic deficit exists. Instead, the diagnosis of a democratic deficit requires not just a countermajoritarian outcome, but a failure of democratic engagement in the process that produced this outcome. Moreover, just as the liberal theory proposes that only “serious” or “blatant” violations of fundamental rights can justify liberal disobedience,<sup>88</sup> so it is natural for the democratic theory to say that only substantial democratic deficits can justify democratic disobedience. The characteristic case for democratic disobedience therefore arises when the inertial institutions of democratic politics combine to keep a policy option

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88. RAWLS, *supra* note 1, at 372.

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that commands significant support among the citizenry off the political agenda entirely—when no major political party adopts the policy, the mainstream press ignores it, and this state of affairs does not respond to the legal forms of protest. Diagnosing such cases is of course an imprecise business, but the same is true of identifying the serious violations of fundamental rights on which liberal disobedience depends, and the historical cases that I discuss below demonstrate that the democratic diagnosis can persuasively be made. Finally, the constraints that the democratic theory imposes on democratic disobedience—particularly the democratic hostility to disobedient efforts to secure a particular outcome rather than to promote the democratic process, which I turn to shortly—make democratic justifications for disobedience less tempting than liberal justifications to those who seek to disguise autocratic lawlessness under cover of legitimate political disobedience. For all these reasons, the possibility of local disagreement about whether particular acts of political disobedience may be democratically justified should not lead to skepticism about the category of democratic disobedience writ large.

The regulative questions that I have raised are not, however, settled by simply identifying cases of justified democratic disobedience. It remains to elaborate how such disobedience should be prosecuted—that is, to identify the aims, methods, and forms of organization that campaigns of democratic disobedience should adopt. Here democratic disobedience departs dramatically from its liberal cousin, and where the earlier discussion of the grounds of democratic disobedience used liberal disobedience as a template, this discussion will use it as a foil. The characteristic features of the two kinds of political disobedience are strikingly opposed to each other in three interrelated ways. Together, these differences establish the outlines of a distinctive practice of democratic disobedience.

First, democratic and liberal disobedience differ in the nature of the ends that they seek to bring about (perhaps more precisely, in the ends that they are justified in bringing about). Liberal disobedience seeks to impose a particular policy, or perhaps one out of a set of policies, that is consistent with basic liberal ideals of liberty and equality. (As the earlier discussion of the limited scope the liberal conception of democracy accords majoritarian politics emphasized, this set of policies is often quite narrow.)<sup>89</sup> This makes it natural for liberal disobedience to employ means that *constrict* the space of political options, perhaps even to a single policy. Accordingly, the case for liberal disobedience typically makes reference to an alternative policy that improves on the status quo and may even depend on articulating and indeed promoting such a policy. It is often a good argument against liberal disobedience that it proposes no viable improvement to the policy it

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89. See *supra* notes 21-24, 28-34 and accompanying text.

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protests.

Democratic disobedience, by contrast, seeks to initiate a process of sovereign reengagement with an issue concerning which the political system, at the moment, stands in democratic deficit. Democratic disobedience seeks to overcome not a particular policy but the inertial institutions that prevent a democratic sovereign from taking up an issue by excluding considerations essential to the issue from the popular or legislative agenda. This makes it natural for democratic disobedience to employ means that *expand* the space of political options and, therefore, destabilize political debate. Indeed, it is natural (and perhaps preferable) for democratic disobedience to proceed without any positive agenda for replacing a protested policy, and unnatural (and perhaps mistaken) for democratic disobedience to insist on a specific policy outcome. Thus although antiglobalization protesters are sometimes criticized for lacking a positive policy agenda,<sup>90</sup> insofar as their protests are examples of democratic disobedience this is perhaps a salutary thing.

Second, and relatedly, democratic and liberal disobedience differ markedly in their methods, particularly in respect of the place that coercion may occupy in each practice. Liberal disobedience may seek to coerce a government to abandon the policies or practices it protests against. If a government encroaches on fundamental rights or violates equal concern and respect, then (no matter what its democratic credentials) it oversteps any legitimate authority that it could possibly enjoy, and it may properly be forced to withdraw the offending policy. Of course, coercion may not always be the most effective or prudent means for prosecuting a campaign of liberal disobedience. Especially insofar as majority rule has captured a society's political imagination, it may be a good strategy for even liberal protesters to try to persuade others of the justice of their cause. As Dworkin observes, the civil rights protesters' claim that the white majority could not legitimately subject the black minority to Jim Crow was aided by the fact that the majority was, or at least became, unwilling to impose this caste

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90. The antiglobalization movement sometimes seems to protest indiscriminately against the status quo. For example, the group that organized the Seattle demonstrations of November 1999 objected to "[w]ar, low wages, deforestation, gentrification, gridlocked cities, genetic engineering, the rich getting richer, cuts in social services, increasing poverty, meaningless jobs, global warming, more prisons, and sweatshops." Roger Burbach, *North America*, in *ANTI-CAPITALISM: A GUIDE TO THE MOVEMENT* 159, 160 (Emma Bircham & John Charlton eds., 2d ed. 2001) (internal quotation marks omitted). Supporters of the movement refuse to see this as a weakness. See, e.g., JONATHAN NEALE, *YOU ARE G8, WE ARE 6 BILLION: THE TRUTH BEHIND THE GENOA PROTESTS* 105 (2002) ("Everyone who looks at anti-capitalism [antiglobalization] is struck by how many issues we campaign about. From outside the movement, this can seem like a weakness. From inside, we can see that all these issues have their causes in the same system."). The theory of democratic disobedience suggests that they may be right. In particular, it organizes these substantively diverse causes around the procedural theme of democratic deficit and in this way recasts what appears to be a scattered and unbounded list of complaints in a more unified and humbler light.

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regime in the face of open, organized, and articulate resistance.<sup>91</sup> The civil rights protests therefore “forced [the majority] to consider arguments that might change its mind even when it seem[ed] initially unwilling to do so.”<sup>92</sup> Liberal disobedience in that case adopted methods that triggered a democratic revision of policy in the civil rights legislation of the 1960s. But this is an instrumental use of persuasion only: An inability to persuade others and a retreat to coercion may make liberal disobedience fail, but it does not make it wrong. The justification for liberal disobedience therefore cannot dissolve simply because the majority remains set in its ways. If American whites had responded to the sit-ins by declaring their open support for Jim Crow, liberal protesters would have continued to disobey that hateful regime and would have sought to force its end, and they would have been right to do so.

The relationship between democratic disobedience and coercion is very different and a good deal more complicated. Democratic disobedience seeks to restore sovereign authority in areas in which it is lacking due to democratic deficits, and it is therefore predicated on an express recognition that the democratic sovereign may impose its will concerning the policy in question. The justification for democratic disobedience against a policy therefore expires if the disobedience successfully triggers a political reengagement with the policy it protests against, including one in which the sovereign reaffirms this policy. Democratic disobedience therefore may never coerce a society into abandoning the policies it protests against but must eventually persuade the society to do so.

This is not the entire story, however, because the theory of democratic disobedience distinguishes between the *fact* of a sovereign reengagement and the *outcome* of that reengagement. Even though democratic disobedience may never coerce an outcome—to do so would violate the democratic principles on which it rests—nothing in the republican theory of democracy forbids democratic disobedience from employing coercion to secure the fact of a sovereign reengagement. Democratic disobedience must of course bear in mind that its ultimate aim is to open up a space for persuasive political argument, and this generally counts against employing coercive methods to trigger even the fact of a sovereign reengagement: Secret coercion, for example, is generally ill suited to opening up politics to new voices, and even open coercion typically runs an unusually high risk of triggering hostilities that only close off democratic politics.<sup>93</sup> But these are

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91. See DWORKIN, *supra* note 3, at 109-10.

92. *Id.* at 111.

93. I set aside the distinctive questions that arise when not just coercion but violence is employed as a means, but a brief remark is appropriate here. Protesters have proposed to use violence to serve some of the ends that the theory of democratic disobedience articulates—that is, to communicate performatively a political agenda to a society that insistently ignores other, more moderate forms of expression and in this way to trigger a collective reengagement with that

in the end only contingent connections, and although democratic disobedience must accept that once the sovereign takes up a matter citizens must promote policies by persuasion rather than by force, the democratic disobedience that demands the sovereign's attention need not itself be persuasive. In short, although democratic disobedience may not force a sovereign to *change course*, it may (try to) force the sovereign to *reconsider*.<sup>94</sup>

Third, democratic and liberal disobedience differ in the institutional structures that best suit the protest movements that employ them. In liberal disobedience, there is a tight fit between the complaint that justifies the disobedience and the substantive ends the disobedience seeks to promote; moreover, these substantive ends remain stable over time. Thus, to return to an earlier example, the liberal opposition to Jim Crow was justified by the same egalitarian sensibility that also motivated the protesters to seek racial equality, and this sensibility was correctly understood to be authoritative regardless of political fashion. This makes it natural for campaigns of liberal disobedience to be prosecuted by stable organizations with fixed constituencies and specific policy positions—for example, the Southern Christian Leadership Conference in the civil rights movement.<sup>95</sup> On the one hand, successful liberal disobedience must do more than merely generate attention (either for itself or for its issues); it must secure a particular outcome. This typically takes time—as the civil rights movement took time to succeed<sup>96</sup>—and a stable and institutionally entrenched organization is

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agenda. See, e.g., JOEL P. RHODES, *THE VOICE OF VIOLENCE: PERFORMATIVE VIOLENCE AS PROTEST IN THE VIETNAM ERA* (2001). The republican theory of democracy does not categorically reject this attitude toward violence, although the risk that protest will undermine rather than promote democratic engagement is obviously much greater when the protest is violent than when it is merely disobedient.

Violence also raises a host of moral questions that are independent of the problems of political authority that I am addressing here, because violence brutalizes its victims in ways in which even coercion simpliciter does not. This is illustrated, in a rough and intuitive way, by the difference between taxation, which is merely coercive, and armed robbery, which is violent. (Notice that this distinction survives even when the taxes are regressive and unjust and the armed robbery—perhaps committed by Robin Hood—is progressive and just.)

94. This distinction is easily missed, as when Dworkin observes that even if what he calls policy-based civil disobedience—disobedience that attacks a policy for being merely unwise rather than unjust and that therefore cannot easily be fit into the liberal theory—may sometimes be justified, it cannot comfortably claim to be justified in employing coercive means. See DWORKIN, *supra* note 3, at 111-12. Here Dworkin assumes, mistakenly, that the justification (and not just the cause) for policy-based disobedience must be the imprudence of the policy under protest. He neglects the possibility that the justification for such disobedience may have nothing to do with a policy's imprudence but may sound, instead, in democratic deficits that surround the policy, and that this may happen even in a well-functioning democratic state. (The liberal theory of democracy that Dworkin espouses obscures this possibility.) The example of policy-based disobedience that Dworkin considers—the European protests against American nuclear missiles in the 1980s—nicely illustrates the distinction. See *id.* at 111-13.

95. See generally ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* (1987).

96. See, e.g., PATTERSON, *supra* note 8, at 19-31 (identifying the origins of the civil rights movement in the 1940s).

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most likely to support a long campaign. On the other hand, there are no significant costs for liberal disobedience to being captured by a partisan constituency. If the principles that inform liberal disobedience are right, then even the most extreme partisanship in their favor is appropriate.

In democratic disobedience, by contrast, there is generally no corresponding fit between the justification for an act of disobedience, which is necessarily procedural and depends on the lack of sovereign engagement with the policy being protested, and the motive for the act, which typically involves a substantive desire that the policy be changed. This can also be illustrated through an earlier example: The justification for disobedient resistance to the Vietnam War turned on the democratic deficits created by the political establishment's refusal to place the war on the political agenda and the government's dishonesty about its conduct and course,<sup>97</sup> but the motive of many of the protesters was not just to engage the issue but to secure an outcome, namely to end the war. This makes it natural for campaigns of democratic disobedience to be prosecuted by short-lived alliances among shifting constituencies that unite around an essentially negative, destabilizing effort—as occurred in the loose and changing coalition of antiwar organizations that channeled opposition to the American involvement in Vietnam.<sup>98</sup> On the one hand, democratic disobedience succeeds when a sovereign engages an issue (whatever the substantive outcome of the engagement), and disobedience can trigger a

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97. As Justice William Douglas observed, normal political action against the war was futile because the same political establishment controlled both the Democratic and Republican Parties. See WILLIAM O. DOUGLAS, POINTS OF REBELLION 57-58 (1969). Indeed, it is one of the banalities of the period that the disobedient confrontation over Vietnam was “largely propelled by the widespread perception that the political system was unresponsive.” Charles Chatfield, *Vietnam War Opposition*, in PROTEST, POWER, AND CHANGE: AN ENCYCLOPEDIA OF NONVIOLENT ACTION FROM ACT-UP TO WOMEN'S SUFFRAGE 547, 549 (Roger S. Powers et al. eds., 1997).

The democratic deficit concerning the war, moreover, could be identified on the ground. In March 1967, sixty-five percent of the respondents to a Gallup poll said that they did not believe the Johnson Administration was telling the American people all that they should know about the war. 3 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971, at 2058 (1972). In May of that year, forty-eight percent said that they did not have a clear idea of what the war was about. *Id.* at 2068.

98. A description of this coalition appears in Chatfield, *supra* note 97. Note also that within months after the 1968 election cycle, in which the antiwar position finally penetrated into mainstream political parties, the antiwar coalition broke apart. In particular, Students for a Democratic Society (SDS), which had coordinated many of the nationwide antiwar activities, was effectively dissolved when the much more radical Weather Underground took over its leadership in 1969. See JEREMY VARON, BRINGING THE WAR HOME: THE WEATHER UNDERGROUND, THE RED ARMY FACTION, AND REVOLUTIONARY VIOLENCE IN THE SIXTIES AND SEVENTIES 50 (2004). The Weather Underground was dissatisfied with nonviolent political disobedience and sought instead to promote a “violent and illegal” struggle against the government. *Id.* at 51. Its tactics proved anti- rather than pro-democratic, because they “threatened to shut down political reflection, render the message of the movement incomprehensible to those outside it and many within it, and make protesters even more vulnerable to attacks by the state.” *Id.* at 102. Moreover, the antidemocratic character of the Weather Underground's political disobedience was recognized at the time, because most of the antiwar movement, including even the Black Panthers, denounced its tactics. See *id.* at 81, 83-84.

political reengagement relatively quickly—the protests against the Vietnam War did not so much gather slowly as (more or less) explode onto the scene.<sup>99</sup> On the other hand, the partisan capture of a democratic disobedience movement by forces that insist on securing a substantive outcome risks undermining the justification for the movement and rendering it undemocratic.<sup>100</sup>

The three differences between liberal and democratic disobedience—involving ends, means, and organizational structures—together organize the practice of democratic disobedience into a coherent, and perhaps even familiar, pattern. Democratic disobedience, when it is justified, pursues processes rather than outcomes, employs coercion only in destabilizing ways, and serves momentary coalitions rather than entrenched constituencies. Moreover, the differences emphasize the distance that separates the two species of political disobedience, which mirrors the distance between the liberal and republican theories of democracy out of which the forms of disobedience arise.

Finally, these differences between the two types of disobedience make it costly to confuse them. It is costly, in particular, to overlook the possibility of democratic disobedience—as commonly happens when liberal disobedience is thought (both in philosophical and legal theory and in political practice) to be the only justifiable form of disobedience. Two costs of neglecting democratic disobedience are particularly worth identifying, and each may be illustrated by a historical example.

First, such neglect stops some justified political disobedience from arising, specifically in cases in which fundamental rights are not at stake and the case for disobedience depends on democratic considerations. Potential protesters are discouraged by the mistaken criticisms of others, by their own mistaken sense that they lack authority to disobey, and by the limits that both forces impose upon the political imagination. This possibility is not just speculative, and the tangible effects of neglecting the theory of democratic disobedience may be illuminated by history. The British Campaign for Nuclear Disarmament (CND) provides a vivid

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99. The popular movement against the Vietnam War developed “during the twenty months between the start of 1964 and the end of the summer of 1965.” DAVID W. LEVY, *THE DEBATE OVER VIETNAM* 125 (2d ed. 1995).

100. This is illustrated by the decline of SDS after it was captured by the Weather Underground. The 1984-1985 British coal miners’ strike provides another vivid illustration. The strike was called by Arthur Scargill, then head of the National Union of Mineworkers (NUM), in protest of Margaret Thatcher’s policy of privatizing the British coal industry and closing many of the industry’s pits. “Scargill thought that, although the government had just won a famous election victory, it could still be defeated by direct action.” Andrew Neil, *Introduction* to PETER WILSHER ET AL., *STRIKE: THATCHER, SCARGILL AND THE MINERS*, at ix, ix-x (1985). Scargill’s narrow insistence on securing an outcome rather than promoting a democratic process—he refused to put the strike to a vote even within the union, see WILSHER ET AL., *supra*, at 78-79—cost the strike political legitimacy and contributed to disqualifying Scargill, the NUM, and their political allies from democratic success for nearly a decade.

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example, particularly through the contrast between its response to the initial British nuclear deterrent in the early 1960s and to NATO's deployment of additional nuclear missiles on British soil in the early 1980s.

In the early 1960s, CND leaders mistakenly rejected political disobedience. They believed (probably correctly) that no liberal case for disobedience against the British nuclear deterrent could be made and therefore rejected disobedient protest altogether, reasoning that "a campaign of civil disobedience designed to force what was still, regrettably, a minority view in the government was neither democratic nor truly nonviolent."<sup>101</sup> But in reaching this conclusion, the CND leadership neglected the possibility that political disobedience might be justified on democratic grounds. In particular, "[t]he debate about [postwar nuclear weapons policy] . . . never reached the general public,"<sup>102</sup> and, as Bertrand Russell observed, "[t]he major organs of publicity [felt] themselves part of the Establishment and [were] very reluctant to take a course which the Establishment [would] frown on."<sup>103</sup> British nuclear policy, in other words, suffered a significant democratic deficit, and although political disobedience might have helped overcome this deficit by making a "certain kind of publicity"<sup>104</sup> possible, the CND leadership failed to appreciate this possibility.

In the 1980s, by contrast, CND reached the opposite conclusion. "Impelled by the belief that decision-making on nuclear weapons [was] conducted in an undemocratic manner,"<sup>105</sup> CND endorsed political disobedience, including nonviolent direct action, against the NATO missiles.<sup>106</sup> Although CND's campaign of political disobedience did not in

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101. James Hinton, *Campaign for Nuclear Disarmament*, in PROTEST, POWER, AND CHANGE, *supra* note 97, at 62, 63.

102. David S. Meyer, *Nuclear Weapons Opposition*, in PROTEST, POWER, AND CHANGE, *supra* note 97, at 377, 379.

103. Bertrand Russell, *Civil Disobedience and the Threat of Nuclear Warfare*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 153, 157 (Hugo Adam Bedau ed., 1969).

104. *Id.* A disobedient protest did in the end occur, led by Russell and a breakaway "Committee of 100." See Brad Bennett, *Committee of 100 (Great Britain)*, in PROTEST, POWER, AND CHANGE, *supra* note 97, at 109. But this protest lacked the broad base needed to trigger a sovereign reengagement with the question of nuclear deterrence, and it never quite realized its own democratic potential. In particular, the protesters never came to appreciate the republican view of democratic sovereignty or of democratic deficits. Russell never developed an articulate theory of democratic disobedience, and instead of focusing generally on deficiencies in the democratic process in Britain broadly understood, the Committee of 100 emphasized the substantive importance of disarmament and the government's bad faith—in Russell's words, its "grossly and murderously misleading" account of nuclear weapons. Russell, *supra* note 103, at 157.

105. PAUL BYRNE, THE CAMPAIGN FOR NUCLEAR DISARMAMENT 132 (1988).

106. CND developed quite sophisticated intuitions about democratic disobedience, such as the distinction between forcing the fact of a sovereign reengagement with an issue and imposing a particular outcome. The CND leadership seemed to recognize that "[t]here is a fine line between civil disobedience and taking the law into your own hands, and the line depends on trying to be visible with a protest, rather than being effective in blocking the implementation of a policy."

the end prevent the missiles from being deployed, it did help to overcome the democratic deficit surrounding the decision to deploy them. The Labour Party adopted CND's policy of unilateral nuclear disarmament in the 1983 national election, and although Labour lost badly, its position secured a democratic engagement with the issue.<sup>107</sup> In particular, the peace movement convinced the Conservative government of "the need to publicise and defend" its policies, "in marked contrast to the situation in the fifties and sixties, when the government did not feel it necessary to publicly refute [CND's] arguments."<sup>108</sup> By following intuitions connected to the theory of democratic disobedience, CND achieved a form of success in the 1980s that had eluded it in the 1960s. A theoretically articulate account of democratic disobedience can only make these intuitions more reliable and further improve the democratic performance of political disobedience.

Second, neglecting the possibility of democratic disobedience causes some disobedient protest that is really democratic to be recast as liberal protest and so implemented and evaluated on liberal rather than democratic terms. In light of the deep structural differences between the two types of protest, disobedience that becomes subject to this confusion is both conducted and regulated in inappropriate ways. A historical example, once again involving the protests against the Vietnam War, illustrates the theoretical point. Resistance to the draft was, of course, a prominent feature of protests against that war, and the question naturally arose under what circumstances refusing induction into the United States military might be justified. The answers proposed were overwhelmingly liberal on both sides: The protesters tried to justify draft resistance on the grounds that the war itself was unjust and immoral,<sup>109</sup> and the government recognized a limited right of conscientious refusal, which applied only to cases that could be cast in terms of liberal ideals of individual moral integrity.<sup>110</sup>

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THOMAS R. ROCHON, MOBILIZING FOR PEACE: THE ANTINUCLEAR MOVEMENTS IN WESTERN EUROPE 182 (1988).

107. See BYRNE, *supra* note 105, at 193-96.

108. *Id.* at 172. "Without having a direct effect on policy, then, the peace movement . . . nonetheless had an enormous effect on politics." ROCHON, *supra* note 106, at 208.

109. Inductees also challenged the *legality* of the draft by arguing that the Vietnam War was unconstitutional because Article I, Section 8 of the Constitution rests the power to declare war in Congress. This challenge might be interpreted as articulating a thin version of the democratic objection to the war, in which the formal constitutional text was asked to bear the burden of an argument that in fact sounded in various and richly textured failures in a range of American institutions, including political parties, the press, and universities. Between the spring of 1967 and the end of the 1968 Term, the Supreme Court refused ten times to grant review of such challenges. Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 108 n.279 (1998).

110. See 50 U.S.C. app. § 456(j) (2000) (creating an exemption from military service for persons who, "by reason of religious training and belief," oppose all forms of participation in war). The Supreme Court gave the statute an expansively liberal interpretation, holding (in the shadow of the First and Fifth Amendments) that a person who professed no allegiance to any organized religion could nevertheless be exempted under the statute, as long as his belief held a

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This was an understandable approach, both because the Vietnam War protests drew their inspiration from the properly liberal disobedience of the civil rights movement<sup>111</sup> and because there is indeed a liberal, integrity-based right of conscientious refusal.<sup>112</sup> But the liberal approach to resisting the draft could not accommodate the idea that justified disobedience of the draft laws, extending well beyond the narrow metes and bounds of conscientious refusal, did not require that the war was immoral. Instead, the draft might properly have been resisted on the grounds of a democratic deficit in American policy, insofar as war was pursued without an adequate sovereign engagement on the issue. This deficit deprived all citizens of authorship of the collective policy and, hence, of a democratic reason to accept or obey the policy. No inductee who opposed the war (whatever the grounds of his opposition) could reasonably be expected to bear the enormous personal costs of a draft whose democratic authority did not reach him. Moreover, insofar as resisting the draft was an effective way of triggering a new sovereign engagement with the war policy, it was justified democratic disobedience. History suggests that opposition to the draft, including draft resistance, had just this democratic effect—it contributed to ending the Vietnam War less by demonstrating the war's or the draft's substantive immorality or illegality and more by the procedural route of triggering a democratic reengagement with these policies in which citizens, without necessarily rejecting the war on moral grounds, concluded that they were unwilling to bear its costs.<sup>113</sup> The erosion and eventual abolition of student deferments from the draft created a constituency of educated, middle-class citizens whose stake in the war and draft grew to exceed their taste for it.<sup>114</sup> These ideas and processes are emphasized and explained by

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place in his life parallel to the one filled by God in the lives of conventionally religious people. *United States v. Seeger*, 380 U.S. 163, 169-70 (1965).

111. As Dworkin has observed, the “civil rights movement flowed into and merged with a great river of protest against the American involvement in Vietnam.” DWORKIN, *supra* note 3, at 104.

112. For discussions of this right, see, for example, DWORKIN, *supra* note 3, at 107 (defining “integrity-based” disobedience); and RAWLS, *supra* note 1, at 368-71 (defining conscientious refusal).

113. By January 1973, sixty percent of Americans thought that the country had made a mistake in sending troops to Vietnam. 1 GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1972-1977*, at 87 (1978).

114. The student deferments were enacted in the Military Selective Service Act of 1967, 50 U.S.C. app. § 456(h)(1), and abolished by Amendments to the Military Selective Service Act of 1967, Pub. L. No. 92-129, § 101(a)(17)-(18), (20), 1971 U.S.C.A.N. (85 Stat. 348, 350-51) 364, 367 (1971). The connections among the protests against the draft, the elimination of the student deferments, and the democratic rejection of the war are drawn out in William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL'Y 23, 58-59 (1996). See also Joseph A. Califano, Jr., *When There's No Draft*, WASH. POST, Apr. 6, 1999, at A23 (arguing from this experience that broad-based drafts generally constrain warmaking to democratically legitimate cases). The locus classicus of the argument that broad-based military service affects democratic decisions to go to war is SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957).

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the theory of democratic disobedience, and they were obscured and perhaps delayed by the liberal terms in which disobedience of the draft laws was initially presented.<sup>115</sup>

#### CONCLUSION

The theory and practice of political disobedience came of age as an exercise in liberalism. Governments, including democratic governments, treated citizens unequally and deprived some citizens (and occasionally all citizens) of fundamental rights—for example, by writing racism into law or restricting essential religious freedoms. Liberal protesters took aim at these practices, including by disobedient methods, and liberal theorists developed an account of the limits of the authority even of democratic governments that justified the protesters' actions. In this way, discrimination and oppression were resisted, and equality and rights promoted.

Liberal disobedience is, in these ways, expressly democracy limiting, and it is accordingly constrained from encroaching on democracy's legitimate terrain. The liberal theory of disobedience therefore cannot explain cases—for example, involving nuclear deterrence or the Vietnam War—in which political disobedience seems justified, even though the policies it opposes fall within the scope of democratic political authority.

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Here it is worth returning for a moment to the question of judicial review, to contrast the democratic and liberal cases for judicial invalidation of the student deferments. The democratic case for judicial action against the student deferments was strong. The war that lay behind the draft suffered from a democratic deficit, and the student deferments, which enabled the most politically empowered citizens to remain least engaged with the war, helped to keep the war in deficit. Judicial intervention striking down the deferments in support of a sovereign reengagement with the underlying war might have helped trigger a democratic reassessment of the war policy and might therefore have been democratically justified.

A liberal case for judicial action against the student deferments might also have been made out, but only in a much weaker way. It might have been said that the deferments were unfair, and that they made the war unfair—perhaps even in ways that violated basic liberal principles of equal concern and respect and therefore legitimated judicial invalidation. But this argument relies on the least appealing and most politically intrusive elements of liberalism—on the elements that emphasize the gap between liberal and democratic political ideas. It is therefore unsurprising that the liberal argument against the student deferments did not persuade courts. Indeed, challenges claiming that the deferments unconstitutionally discriminated against those who could not afford college were rejected even by courts that acknowledged the deferments' unfairness. Thus one court observed that although “the draft system has its inequities,” nevertheless, “under our Constitution the determinations of national interest and adequate officer supply and the need for college trained manpower in various governmental activities are vested in the Congress and not in the courts.” *United States v. Branigan*, 299 F. Supp. 225, 233 (S.D.N.Y. 1969).

115. The theory of democratic disobedience would have served other cases of protest against the Vietnam War as well, including, for example, Daniel Ellsberg's unauthorized leak of the Pentagon Papers. The leak could have been justified as democratic disobedience on the grounds that the secrecy that it helped upend was a major obstacle in the way of the sovereign reengagement with the Vietnam War that republican democracy required. This would have domesticated and controlled Ellsberg's disobedience and quelled the fear—which so greatly worried Bickel, *see* BICKEL, *supra* note 2, at 115—that Ellsberg seemed to put his own principles before the authority of the democratic government he served.

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Nor can such cases be brought within the liberal model by making marginal adjustments to the liberal approach. Like liberal judicial review, liberal disobedience takes over every question that it properly touches, so that the scope of liberal disobedience can be expanded only by overwhelming the democratic process entirely and (as in the liberal theory of democracy) denying the intuitions that the argument set out to explain.

A satisfactory account of the commonplace intuition that even disobedience directed against laws that fall within the scope of democratic authority can sometimes be justified must therefore look beyond the liberal theory of democracy. The natural alternative is a republican account of democratic sovereignty, according to which democratic politics causes citizens to take authorship of collective decisions, including those that they privately opposed. In order to generate this sense of authorship, to underwrite the formation of a democratic sovereign, the democratic process must involve more than merely the aggregation of private preferences, as in simple majority rule, but must instead encourage or outright require political engagements among citizens. These political engagements are generated by building a variety of inertial practices and institutions into the democratic process, which characteristically appear, in one or another form, in all representative democracies.

But even as such democratic inertia fosters the political engagements on which democratic authority depends, it necessarily, on occasion, entrenches public policies against democratic reevaluation and therefore creates democratic deficits. Policies that carry such democratic deficits—including those related to nuclear deterrence or the Vietnam War—lack democratic authority, on the republican view, because they are unsupported by any political engagement of the form demanded by democratic sovereignty. The policies fall within the scope of legitimate democratic authority, in the sense that a democratic sovereign might properly choose them, but the democratic sovereign has not in fact so chosen. And political disobedience against such policies is justified, on the republican view, by the democratic deficits that the policies carry and, moreover, serves to overcome the political inertia that lies behind these deficits and trigger a sovereign reengagement with the issues at hand. Such disobedience is a necessary part of every well-functioning democratic politics and not merely a defense against authoritarian oppression. It is distinctively democratic disobedience.

Democratic disobedience therefore differs fundamentally from liberal disobedience in its underlying political justification and function, and these basic differences generate further differences in the forms and limits of the two types of disobedience—involving means, ends, and institutional structures. Liberal disobedience may properly impose a substantive outcome on behalf of a fixed class of persons (as the civil rights movement sought to secure equality for American blacks). But democratic

disobedience should coerce only in destabilizing ways, pursue processes rather than outcomes, and serve momentary coalitions rather than entrenched constituencies. Confusing the two—and, in particular, pursuing or regulating along liberal lines disobedience that is properly democratic—carries large costs for democratic practice, as episodes from the Campaign for Nuclear Disarmament and the opposition to the Vietnam War illustrate. The study of democratic disobedience therefore matters in practice as well as in theory.

Furthermore, although here I am only speculating, democratic disobedience appears nowadays to be growing in importance. Certainly, the most prominent disobedient protest movement in the developed world today—the movement against economic, political, and cultural globalization that erupts from time to time at the seats of the new global order<sup>116</sup>—suggests this trend. The liberal justification of political disobedience is clearly inapplicable in this case, because the policies of international coordination and exchange that the antiglobalization movement protests cannot plausibly be cast as violating basic liberal principles of equality or individual freedom but instead fall squarely within the range of democratic authority, at least on the republican view. The model of democratic disobedience, by contrast, seems well suited to defending the antiglobalization protests, which self-consciously present themselves as arising against the backdrop of “an enormous gap between the official [political] parties and what people want.”<sup>117</sup>

Indeed, the antiglobalization movement expressly casts its challenges to the international economic order in democratic terms, as efforts to “expand[] the principles of democratic decision-making from the political sphere to the economic one,”<sup>118</sup> and even as “protecting democracy itself.”<sup>119</sup> These challenges present more than merely formal objections to the lack of democratic accountability within the international institutions of the global economic order. Instead, as the language just recited clearly

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116. This movement had its “coming-out party” in 1999 in Seattle, where it staged massive disobedient demonstrations to protest a meeting of the World Trade Organization (WTO). The protests succeeded in shutting down the meeting for a day and plausibly contributed to the meeting’s ending without agreement among the WTO’s members. For descriptions of the Seattle protests, see generally ALEXANDER COCKBURN ET AL., *FIVE DAYS THAT SHOOK THE WORLD: SEATTLE AND BEYOND* (2000); and KEVIN DANAHER & JASON MARK, *INSURRECTION: CITIZEN CHALLENGES TO CORPORATE POWER* 273-83 (2003).

Since the Seattle protests, the antiglobalization movement has staged disobedient demonstrations in Vienna, Washington, Windsor, Detroit, London, Quebec City, and Genoa, usually in conjunction with meetings of international economic bodies such as the WTO, the Organization of American States, or the Group of Eight. See NEALE, *supra* note 90, at 9-10; John Charlton, *Action!*, in *ANTI-CAPITALISM*, *supra* note 90, at 343, 343-69.

117. NEALE, *supra* note 90, at 61. In support of this claim, Neale cites opinion polls claiming that strong majorities in many European nations support the antiglobalization protesters and oppose their governments’ trade policies. *Id.* at 70.

118. DANAHER & MARK, *supra* note 116, at 20.

119. *Id.* at 225.

expresses, the antiglobalization movement presents substantive challenges to the democratic legitimacy of the proglobalization policies of the nominally democratic states that participate in these institutions. The theory of democratic disobedience provides a conceptual structure into which to fit these claims about the connection between antiglobalization and democracy and in this way frees the antiglobalization movement from the need to defend ambitious claims about economic democracy and corporate conspiracies on which its protests are sometimes thought to depend.<sup>120</sup>

Moreover, the forms and limits of the political disobedience associated with the antiglobalization movement also match up with the theory of democratic disobedience. Thus, the antiglobalization movement has sought principally to force popular attention onto questions of global economic policy.<sup>121</sup> It has emphasized destabilizing existing economic policy instead of promoting any particular, well-specified alternative approach.<sup>122</sup> And it is self-consciously structured as a loose affiliation among environmental, labor, and human rights organizations rather than as a stable hierarchy with a fixed constituency.<sup>123</sup> In all these ways, the antiglobalization movement fits the operational and institutional patterns that I have attributed to democratic disobedience.

Nor, finally, should it come as a surprise that the most prominent contemporary political protests involve democratic rather than liberal disobedience. It seems natural—although admittedly also speculative—to connect the growing prominence of democratic disobedience to more fundamental developments in democratic politics and, in particular, to increases in the democratic deficits that such politics typically, and often unavoidably, involve. On the one hand, groups that might control or capture the political process have increasingly sophisticated techniques at their

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120. It is common to hear antiglobalization protesters themselves characterize the international organizations that incite their protests in conspiratorial terms—for example, as “secret negotiations of trade ministers and corporate lobbyists going on behind the police lines.” Notes from Nowhere, *Emergence: An Irresistible Global Uprising*, in WE ARE EVERYWHERE: THE IRRESISTIBLE RISE OF GLOBAL ANTICAPITALISM 19, 26 (Notes from Nowhere ed., 2003). There is no need for them to do so.

121. The protesters take pride in the “carnavalesque theatres of popular democracy” that their actions create. *Id.*; see also NEALE, *supra* note 90, at 179 (quoting a common chant among protesters in both Seattle and Genoa (“THIS is What Democracy Looks Like.”)). And they brag that “[m]edia coverage of dissent at mass demonstrations . . . has moved the term ‘globalization’ from the pages of policy journals to the kitchen table.” *Introduction to REPRESENTING RESISTANCE: MEDIA, CIVIL DISOBEDIENCE, AND THE GLOBAL JUSTICE MOVEMENT*, at ix, ix (Andy Opel & Donnalyn Pompper eds., 2003); see also DANAHER & MARK, *supra* note 116, at 283 (“In a single day [at Seattle] the WTO had become a household name, and not a very pretty one.”).

122. See *supra* note 90.

123. Some participants describe antiglobalization as “a movement with no name, no manifesto, and no leaders.” Notes from Nowhere, *Opening Salvo*, in WE ARE EVERYWHERE, *supra* note 120, at 14, 14. And groups that make common cause against globalization—for example, labor unions and environmentalists—often come into conflict on other issues. See DANAHER & MARK, *supra* note 116, at 18, 223.

disposal. In the United States, for example, the leadership of the Democratic and Republican Parties has managed, by redistricting and other means, to eliminate real competition for most federal legislative offices.<sup>124</sup> This has created new possibilities for soft authoritarianism, in which ruling elites protect their power and privilege without needing to resort to the repressive practices at which liberal disobedience properly takes aim. On the other hand, dramatic increases in social pluralism and equally dramatic breakdowns in certain traditional institutions of social control have combined to place unprecedented pressures on democratic authority. Forging a sovereign democratic will is becoming harder and harder, and the need for practices and institutions that can underwrite citizens' authorship of collective decisions and save democracy from becoming merely alienated preference aggregation is ever increasing. This increase in the challenge of sovereign creation also generates an increase in democratic inertia and hence in the prominence of democratic deficits. Although the argument here remains especially speculative and impressionistic, this trend will generate an increase in the democratic disobedience that necessarily accompanies even well-functioning democratic politics.

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124. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) ("In the 2000 congressional elections, incumbents won 98.5% of the challenges, with 82.6% of those elections won by a margin of greater than twenty percent."). In 2002, incumbents won 99.0% of the challenges, with 81.9% of the races won by a margin greater than twenty percent. FairVote: The Ctr. for Voting and Democracy, United States Representatives, 1954-Present, <http://www.fairvote.org/dubdem/usreps.htm> (last visited Mar. 8, 2005). Ralph Nader's presidential bids in the last three elections were, of course, obedient protests against this state of affairs.