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James Madison, the father of the Constitution, is not often held responsible for the concept of equality as it has emerged in American constitutional law. On the contrary, Madison's political theory is frequently understood as an attack on the egalitarian themes that played a prominent role in classical republican thought. *The Federalist* No. 10 announces that "the most common and durable source of factions has been the various and unequal distribution of property."[1] For Madison, the unequal distribution of property was not a problem calling for legal remedy. In his view, unequal distributions result from "diversity in the faculties of men," diversity that could not be altered without extinguishing liberty, which "nourishes faction."[2] That understanding is not what one would expect from a vigorous advocate of equality.

Notwithstanding all this, Madison set out conceptions of politics and representation that lie very close to the principles underlying the notion of equality in constitutional law. Indeed, Madison's solution to the problem of faction lay largely in a conception of the role of national representatives that powerfully illuminates the understanding on which modern equal protection doctrine is largely based. Before defending that claim, however, it is useful to start with some basics.

I

In considering the constitutional concept of equality, the first point to recognize should be a familiar one: The principle of equality is by itself largely formal. To say that there is equality is to say that those similarly situated are similarly treated. But to give content to that formula, one has to know when people

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1. THE FEDERALIST No. 10, at 79 (J. Madison)(Mentor ed. 1961).

2. *Id.* at 78. For discussion of the Framers' attitude toward property, and its relationship to conceptions of democracy, see J. Nedelsky, Private Property and the American Conception of Limited Government (unpublished manuscript 1985).

are similarly situated.[3] That is a question that the concept of equality, standing alone, cannot answer. Believers in an aggressive judicial role in promoting "equality" tend to believe that many statutory and administrative classifications treat people differently who are in fact similarly situated. Those skeptical of such a judicial role tend to believe that classifications reflected in law generally respond to real differences, or differences that might properly be considered real by the relevant government authority.

All this is to suggest that in order to decide whether the constitutional principle of equality has been infringed, one has to generate some constraint, independent of the bare notion of equality, to tell whether people are or are not similarly situated. In the racial context, this constraint is readily identifiable. Blacks and whites are, for constitutional purposes, similarly situated, at least when the measure in question is not in some sense remedial or compensatory. But the interesting and difficult questions arise outside of the context of race. If blacks are not being disadvantaged relative to whites, and if the government is classifying on some basis independent of race, what does the principle of equality mean?

The problem may be approached through the cases involving so-called "rationality" review. A typical, quite recent, example, is *Minnesota v. Clover Leaf Creamery Co.*[4] The statute there at issue forbade the sale of milk in nonreturnable, nonrefillable plastic containers, but permitted such sale in other containers, including those made from paperboard.[5] The state trial court invalidated the statute on the ground that it was a bow to the paperboard industry.[6] In upholding the statute as "rational," the Supreme Court searched for legitimate justifications for the classification at issue and for plausible connections between those justifications and the classification. According to the Court, the statute could be understood as an effort to promote environmental goals.[7] This is the characteristic mode of analysis in modern rationality cases: a search for a legitimate pur-

3. The point is stressed most recently in Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

4. 449 U.S. 456 (1981).

5. *Id.* at 458-59.

6. *Id.* at 460.

7. *See id.* at 465-70.

pose for a classification and an examination of the ways in which the statute at issue serves that purpose.

To some, that mode of analysis is nonsensical, out of accord with what we know about the political process. That process is, in this view, a matter of unprincipled trade-offs among those with competing social interests.[8] Constituents are self-interested. They impose their preferences on representatives, who are expected to respond mechanically to the relevant pressures. Politics is, in short, another form of market, and laws are another kind of commodity. What emerges is a kind of equilibrium. In these circumstances, review of statutes for "rationality" seems incoherent: It assumes that legislatures are deliberating in an attempt to promote the public interest, rather than responding to constituent desires.

But the inquiry undertaken by the Court in *Clover Leaf* is common—indeed, it is omnipresent. In every equal protection case, the Court searches for some public justification, or value, by which to rationalize the imposition of a burden or grant of a benefit. The exercise of political power is, standing by itself, insufficient. In this framework may lie not an anomaly, but the key to understanding an important feature of the constitutional concept of equality.

The requirement that a state justify its classification in terms of some public value represents a rejection—to what degree is an issue taken up shortly—of the notion that the political process may properly consist of a series of unprincipled trade-offs among those who exercise political power. The political process must, under this view, consist instead of an effort to define and implement public values. This understanding is the central principle of the rationality cases. It also reflects a distinctive conception of politics, one that competes with the market-centered, pluralist understanding of those who are skeptical about rationality review.

At this point it will be useful to return to Madison. In *The Federalist* No. 10, his most important essay, Madison sets out the view that the solution to the problem of faction lies in efforts to ensure that national representatives will be above the fray of private interests, deliberating on and attempting to effect a broader public good. Under this understanding, the virtue of a

8. *See, e.g.*, Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 26-31.

large republic lies largely in its ability to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial conditions."[9] For Madison, the role of the national representative is above all deliberative.[10] Representatives are not to respond to constituent pressures in the hope that such responses will produce some kind of market equilibrium. The hope is instead that representatives will stand above the fray of private interests. Representatives, in short, are to take the place of citizens in the classical republican understanding.

This understanding runs throughout Madison's political writings: his attack on representatives acting as "advocates for the respective interest of their constituents";[11] his preference for large electoral districts; and his belief in long periods of service, which would "render the Body more stable in its policy, and more capable of stemming popular currents taking a wrong direction, til reason [and] justice could regain their ascendancy."[12] It is important in this regard to understand that the Constitution, as originally composed, was designed partly to insulate national representatives from constituent pressures so as to ensure the performance of these deliberative tasks. Thus, the Electoral College was intended to be a deliberative body; the President and the Senate were indirectly elected, and only the House was subject to direct election by the people.

It has been remarked that Madison's conception of representation has a surprisingly Burkean flavor.[13] The Burkean strand seems surprising because of its inconsistency with the frequent readings of *The Federalist* No. 10 as a pluralist document that understands the public good as the outcome of a struggle among self-interested private groups.[14] But such readings misconceive Madison's project, which was based on a belief in a

9. THE FEDERALIST No. 10, at 82 (J. Madison) (Mentor ed. 1961). *See also* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1983).

10. The point is stressed in Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? (R. Goldwin & W. Schambra eds. 1980).

11. 8 J. MADISON, PAPERS 374.

12. *See* THE MIND OF THE FOUNDER 508 (M. Meyers ed. 1958).

13. *See* Barber, *The Compromised Republic*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz ed. 1979).

14. *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1965).

public good distinct from the struggle of private interests.[15]

The understanding that underlies modern review of statutes for "rationality" under the Equal Protection Clause is very similar. The rationality cases reflect a rejection of the notion that the role of the representative is to respond mechanically to constituent pressures. Political behavior is supposed to be to some degree autonomous. Political actors should not take existing private preferences as exogenous variables. They are supposed to stand above the fray. This is the essence of Madisonian republicanism; it is also a central feature of current equal protection doctrine.

It is important to acknowledge that rationality review is extraordinarily deferential. In practice, few statutes are invalidated, even when, to the impartial observer, such statutes are best understood as responsive to the exercise of power by self-interested private groups.[16] The Court's conception of the prohibited end—decisions based on raw power—is accompanied by extraordinary deference to the legislature, deference that is manifested in a nearly conclusive presumption that something other than raw power is in fact at work. The Court is thus willing to hypothesize legitimate justifications for classifications and to uphold statutes even when the means-ends connection is very weak. This phenomenon is largely a product of perceived separation of powers concerns; it may also result from some ambivalence about the idea that pluralist compromise ought to be subject to judicial invalidation. But the fact of deference should not obscure the underlying concern reflected in the rationality cases, and its distinctly Madisonian character.

II

Thus far the discussion has focused on the rationality requirement of the Equal Protection Clause—a requirement that, it turns out, has nothing at all to do with rationality. Nor does it, in any obvious sense, have anything to do with equality. The core of the Equal Protection Clause turns out to be a requirement that representatives deliberate and do not respond mechanically to constituent pressures. That requirement is not, to be sure, vigorously enforced, but the conception of the pro-

15. *See, e.g.*, Epstein, *supra* note 9; Meyers, *Beyond the Sum of the Differences*, in THE MIND OF THE FOUNDER, *supra* note 12.

16. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

hibited end turns out to be both identifiable and coherent. It is also Madisonian.

The Equal Protection Clause does not, however, always involve judicial deference, though it should be remembered that deference, captured in a rule of nearly per se legality, occupies most of the territory. In a few contexts, the Court's approach to statutory classifications is more stringent. The principal examples here involve discrimination on the basis of race, gender, legitimacy, and alienage. In such cases it is insufficient to show a merely plausible connection between the classification under review and some public value. In this context, the rationality framework has been altered in two principal respects. First, judicial scrutiny of the connection between statutory means and legitimate purposes is "heightened"; the mean-ends connection must be closer than is normally required. This step stems from an understanding that the prohibited evil is peculiarly likely to be at work in this category of cases. Second, and perhaps more controversially, the Court has narrowed the category of permissible public ends. Belief that women should do housework rather than wagework, that illegitimates should be punished because of the immorality of their parents, or that aliens are less worthy than citizens—all of these justifications, which might be accepted by a deliberative legislature, are excluded from the category of permissible public ends. How might this be explained?

A possible answer is supplied by the Court's suggestion, in the *Mississippi University* case,[17] that the purpose of careful judicial scrutiny is to ensure that classifications are based on "reasoned analysis" instead of a "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[18] The basic understanding is that representatives must not react mechanically to constituent desires, but must reflect on those desires to see if they survive critical review. That understanding is surprisingly similar to what appears in the rationality cases. In both contexts, the role of the representative is to deliberate rather than to respond to constituent pressures. That sort of mechanical response is precisely the target of the cases involving gender discrimination.

17. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (admission of men to women-only state nursing school required).

18. *Id.* at 726.

The "heightened scrutiny" cases do, however, have an important twist on those involving rationality review. When there is heightened scrutiny, the "public value" justifications for classification must themselves be subject to critical scrutiny. It is insufficient that one is able to point to a public value that the classification can be said to serve. The value itself must instead survive scrutiny designed to ensure that it is not merely a reflection of existing relations of private power. In the gender and racial contexts, for example, the concern is that classifications between men and women, or whites and blacks, will be the product of existing power relations; heightened scrutiny is designed to see if "reasoned analysis" in fact supports those classifications.

The same notions are at work in other contexts involving careful scrutiny of classifications. In the legitimacy cases, for example, the government is required to show that its actions do not depend on a perception that the illegitimate are "worse" than those born to married parents, or on an effort to deter parental misconduct by punishing children. In the alienage cases, the judicial concern is that measures that classify persons on the basis of citizenship may be rooted in a desire to disadvantage aliens as an end in itself.

What all this suggests is that even in the area of heightened scrutiny, the Equal Protection Clause manifests a Madisonian conception of the role of national representatives. The requirement of equal protection turns out to be a requirement that representatives engage in a deliberative task, rather than responding mechanically to constituent pressures. The requirement of deliberation helps to explain a surprisingly large amount of modern equal protection doctrine.[19]

III

This description of modern equal protection doctrine should give rise to a number of questions. For purposes of this brief essay, I will discuss two of the principal concerns here.[20] The first, substantive in character, questions whether Madisonian

19. This is hardly to say that the framework in entirely coherent. For suggestions for reformulation, see Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

20. For further discussion, see *id.* and Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1839 (1984).

republicanism is, under modern conditions, preferable to pluralism as a conception of politics. The second is institutional, and asks whether, even if Madisonian republicanism is an appropriate ideal, the federal courts have the competence or authority to try to implement it. To answer either concern fully would require an elaborate statement; I will only sketch the outlines of a response here.

To modern pluralists, the conception rejected by Madison—that politics should consist of responses to constituent pressures—is an attractive principle, one that captures the notion of majority rule. Pluralism is a market model of politics; it treats judgments of value as matters of taste, and believes that the role of government is to register numbers and intensities of preferences, reaching an equilibrium like that at work in any other market.

On what ground did Madison—and do the courts—reject this understanding? There are two underlying reasons. The first, and perhaps less fundamental, is that it would take an extremely optimistic view of the workings of modern politics to believe that constituent pressures, as they are currently administered, produce outcomes that are desirable from some utilitarian standpoint.[21] The idea that the political process operates as a well-functioning market is highly romantic. In these circumstances, a requirement of deliberation should move political outcomes in appropriate directions by diminishing the power of self-interested private groups.

The second reason is that the job of political actors is sometimes to evaluate constituent wishes, not simply to implement them. Such wishes are the product of public and private power; they should not be regarded as inviolate or exogenous. The task of the representative is at least sometimes to reflect critically on those wishes, to see whether they might themselves be the product of power or be otherwise subject to critical scrutiny. There is, in short, a "public interest" distinct from the aggregation of private utilities. This understanding is based on the proposition that there is such a thing as "reasoned analysis" that can expose certain outcomes and values as the product of private power. That proposition will be controversial both to those who believe that moral questions are largely aesthetic—a

21. *See, e.g.*, M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1981).

matter of taste—and to those who believe that there is no category of "reason" distinct from "power."[22]

Even if these obstacles can be surmounted, there remain familiar institutional concerns. Why should deliberative requirements be entrusted to the courts? Even if one accepts Madisonian conceptions of the role of national representatives, and even if one believes that interest-group pluralism is an inadequate or abhorrent form of governance, one might reject that view that theories of politics ought to be enforced by unelected judges. It has often been remarked that the trend in American politics has been to increase the democratic character of the electoral process.[23] If this is true, the argument goes, remedies for political failure should hardly involve augmenting the power of the courts; the remedy should lie in efforts to promote democracy.

Perhaps surprisingly, Madison's views of politics and representation turn out to be helpful here as well. In Madison's view, it will be recalled, the role of the national representative was not merely to reflect the views of constituents. Those views were to be "refined and enlarged" by a group to some degree insulated from partisan pressures. The purpose of the insulation was to ensure that representatives would be able to evaluate, not simply to implement, the desires of the constituency. As noted above, the Framers' Constitution is, to the modern reader, strikingly undemocratic. In important respects, the "undemocratic" insulation was a surrogate safeguard, promoting deliberation by representatives, developed in the wake of the Federalists' rejection of the traditional republican notion that citizens generally should engage directly in the deliberative tasks of politics.[24]

For a variety of reasons, that insulation has been removed over the course of the last one hundred years. Elections are, for all practical purposes, direct; the system of national representation no longer serves, as Madison hoped it would, to protect representatives from factional pressures. The ideal of national responsibility to a national constituency has often given way to

22. *See generally* M. FOUCAULT, POWER/KNOWLEDGE (1982); J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1972).

23. *See* J. ELY, DEMOCRACY AND DISTRUST 7 (1980).

24. *The Federalist* No. 10 is the most celebrated place in which direct democracy of this sort is rejected. For discussion, and counterargument, see H. STORING, WHAT THE ANTIFEDERALISTS WERE FOR (1980).

a process of government as interest-group deal.[25] Parts of modern equal protection law attempt to deal with this phenomenon.

With the declining role of national representatives in "refining and enlarging" the public view, the federal courts have carried out some of the important tasks of Madisonian representatives. The constitutional principles of equal protection, by requiring justifications for differential treatment beyond the existence of political pressure, are an important example of this phenomenon. It is fanciful to believe that the courts might be able, on their own, to create a genuinely deliberative political process, or one in which relations of power do not play an important role. But they might be able to incline politics in desirable directions and, in the process, to invalidate those classifications that have been most transparently a usurpation of public power by private interests. An active judicial role in the service of the equality principle, as understood here, is desirable, and, in some important respects, likely to promote rather than undermine the form of constitutional government designed by the Framers.

25. *See* Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). *But see* Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); A. MAASS, CONGRESS AND THE COMMON GOOD (1983).