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Beyond the Republican Revival

Cass R. Sunstein

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In this Article, Professor Sunstein describes those aspects of republicanism that have the strongest claim to contemporary support, outlines the role of republican thought in the founding period, and explores some of the implications of republicanism for modern public law. Sunstein claims that the basic republican commitments involve (1) deliberation in government; (2) political equality; (3) universality, or agreement as a regulative ideal; and (4) citizenship. Professor Sunstein contends that all of these commitments played an important role during the founding period, generating a distinctive conception of governance. In his view, the common opposition between liberalism and republicanism is a false one; the founders were liberal republicans—a position that, Sunstein argues, is superior to its principal competitors. Sunstein claims that republican ideas suggest reformation of a number of current areas of modern public law, encompassing such contexts as statutory construction, campaign finance regulation, federalism, and discrimination. Professor Sunstein concludes with a discussion of recent proposals for group or proportional representation, arguing that such proposals can be supported by reference to the republican belief in deliberative democracy.

For modern republicans, the task is not simply one of excavation. History does not supply conceptions of political life that can be applied mechanically to current problems. Circumstances change; theoretical commitments cannot be wrenched out of context without great risk of distortion; contemporary social and legal issues can never be resolved merely through recovery of features, however important and attractive, of the distant past. Difficulties of this sort severely complicate modern efforts to revive principles of classical republicanism.

In addition, much in traditional republican thought gives little cause for celebration. Various strategies of exclusion—of the nonpropertied, blacks, and women—were built into the republican tradition. The republican belief in deliberation about the common good was closely tied to these practices of exclusion; it cannot be neatly separated from them. In some of its

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† Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. Earlier versions of this paper were presented at the annual meeting of the American Philosophical Association and at the legal theory workshop at McGill University. Bruce Ackerman, Akhil Amar, Drucilla Cornell, Richard Craswell, Jon Elster, William Eskridge, Richard Fallon, Philip Frickey, J. David Greenstone, Stephen Holmes, Larry Kramer, Catharine MacKinnon, Michael McConnell, Frank Michelman, Martha Minow, Richard A. Posner, Stephen Schulhofer, Richard B. Stewart, Kathleen Sullivan, Allan Sykes, Mark Tushnet, Robin West, and Iris Young provided valuable comments.

manifestations, moreover, the republican tradition has been highly militaristic, indeed heroic—exalting, as the model for public life, the fraternity of soldiers during wartime.[1] Equally important, the republican belief in the subordination of private interests to the public good carries a risk of tyranny and even mysticism. The belief is also threatening to those who reject the existence of a unitary public good, and who emphasize that conceptions of the good are plural, and dependent on perspective and power.[2]

In spite of all this, republican theories of politics have a tenacious hold on political actors and observers, inside and outside of the judiciary. The characteristically republican belief in deliberative democracy continues to influence both legal doctrine and contemporary evaluations of the political process. Political advantages are generally sought through appeals to the public good, however cynical and transparent such appeals may sometimes appear.

One of the largest accomplishments of modern historical scholarship has been the illumination of the role of republican thought in the period before, during, and after the ratification of the American Constitution.[3] It is no longer possible to see a Lockean consensus[4] in the founding period, or to treat the framers as modern pluralists believing that self-interest is the inevitable motivating force behind political behavior.[5] Republican thought played a central role in the framing period, and it offers a powerful conception of politics and of the functions of constitutionalism.

Recent work in law has started to explore the place of republican theory in the American constitutional tradition.[6] The republican revival is

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1. *See* H. PITKIN, FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICCOLO MACHIAVELLI (1984); J. WITHERSPOON, THE DOMINION OF PROVIDENCE OVER THE PASSIONS OF MEN, A SERMON 34 (1778); P. PAYSON, A SERMON PREACHED BEFORE THE HONOURABLE COUNCIL . . . OF THE STATE OF MASSACHUSETTS BAY 32 (1778). *See generally* Bloch, *The Gendered Meanings of Virtue in Revolutionary America,* 13 SIGNS 37, 44–47 (1987).

2. This criticism comes from those with quite diverse political views. *See, e.g.,* Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory,* 5 PRAXIS INT'L 381 (1986); Young, *Social Movement Challenges to the Idea of Universal Citizenship,* ETHICS (forthcoming 1989) [hereinafter Young, *Social Movement Challenges*]; S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 148 (1984); K. Sullivan, Against Republicanism (1988) (unpublished manuscript on file with author); Herzog, *Some Questions for Republicans,* 14 POL. THEORY 473 (1986).

3. *See, e.g.,* T. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); G. WOOD, THE CREATION OF THE AMERICAN CONSTITUTION 1776–1787, at 46–90, 430–67 (1969); Appleby, *Republicanism in Old and New Contexts,* 43 WM. & MARY Q. 20 (1986); Appleby, *The Social Origins of American Revolutionary Ideology,* 64 J. AM. HIST. 935 (1977–78); Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in The New American Republic,* 43 WM. & MARY Q. 3 (1986); Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793,* 31 WM. & MARY Q. 167 (1974); Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787,* 45 WM. & MARY Q. 3 (1988); Shalhope, *Republicanism and Early American Historiography,* 39 WM. & MARY Q. 334 (1982).

4. At least not if Locke is understood in the familiar fashion. *See* L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). For a different view, see, for example, J. ASHCRAFT, JOHN LOCKE AND THE REVOLUTIONARY TRADITION (1986).

5. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

6. *See* Michelman, *Supreme Court, 1985 Term—Foreword: Traces of Self-Government,* 100 HARV. L. REV. 4 (1986); Sherry, *Civic Virtue and The Feminine Voice in Constitutional Adjudica-*

now firmly in place, in legal scholarship if not in legal doctrine. The tasks for the immediate future are twofold. The first is to spell out, with some particularity, those aspects of republican thought that have the strongest claim to contemporary support. The second is to describe institutional arrangements and doctrinal shifts, inside and outside the courts, that might serve to implement the most attractive features of the republican vision.

This Article has two principal parts. The first is relatively abstract. Its goal is to outline and defend a particular version of republican thought, one that avoids some of the difficulties associated with competing conceptions of public life, both republican and antirepublican. This version of republicanism, I argue, is not antiliberal at all;[7] it incorporates central features of the liberal tradition. Liberal republicanism is characterized by commitments to four central principles. These principles are related to one another; each republican commitment serves to inform and define the others. All of the principles derive from the republican understanding of individual and political freedom. All of them provide distinctive ways of controlling and limiting governmental power.

The first principle is deliberation in politics, made possible by what is sometimes described as "civic virtue."[8] In the deliberative process, private interests are relevant inputs into politics; but they are not taken as prepolitical and exogenous and are instead the object of critical scrutiny.

The second principle is the equality of political actors, embodied in a desire to eliminate sharp disparities in political participation or influence among individuals or social groups. Economic equality may, but need not, accompany political equality; in this sense, as in others, the political process has a degree of autonomy from the private sphere.

The third principle is universalism, exemplified by the notion of a common good, and made possible by "practical reason." The republican commitment to universalism, or agreement as a regulative ideal, takes the form of a belief in the possibility of settling at least some normative disputes with substantively right answers.

The fourth and final principle is citizenship, manifesting itself in broadly guaranteed rights of participation. Those rights are designed both to control representative behavior and to afford an opportunity to exercise

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tion, 72 VA. L. REV. 543 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); *see also* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (discussing conceptions of "normal" and "constitutional" politics in framing period).

7. Many recent writers have described republicanism as an alternative to liberalism. *See, e.g.*, Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1831–35 (1987) (opposing liberalism to republicanism).

8. Some of those who value civic virtue emphasize the improvement of individual character—as in the classical formulation—while others understand it as a precondition for the achievement of social justice. On the second view, civic virtue is necessary for participation in public deliberation, and it is instrumental to a well-functioning deliberative process. The second view is the principal object here. *See infra* text accompanying notes 55–56. For an emphasis on character, see A. Kronman, The Cooley Lectures (unpublished) (on file with *The Yale Law Journal*).

and inculcate certain political virtues. Citizenship often occurs in nominally private spheres, but its primary importance is in governmental processes.

The second part of this Article is quite concrete. Its goal is to describe some of the implications of republicanism, thus conceived, for a number of controversies in modern public law. I suggest that republican understandings call for a reformulation of many current legal rules, inside and outside the courts. For example, republican themes would affect governing principles in such contexts as campaign finance regulation, federalism, statutory construction, and discrimination law. Recent proposals for proportional or group representation raise especially interesting issues here. While posing serious risks, such proposals raise important issues about republican theory, and hold out considerable promise. Efforts to ensure group representation can be closely connected both with institutions in the original Constitution and with the republican belief in deliberative democracy. In all of these areas, the tasks of spelling out the contemporary appeal of republican thought, and of exploring its implications for traditional institutional arrangements and legal rights, make it necessary to go well beyond classical republicanism.

I. Conceptions of Politics

American public law might be understood as a set of conflicts among competing conceptions of the nature of American political life. Elements of these conceptions played a role at the time of the framing; they continue to influence modern disputes.

A. *Pluralism*

The first view, which takes both descriptive and normative forms, might be described as pluralist.[9] Under this view, politics consists of a struggle among interest groups for scarce social resources. Laws are a kind of commodity, subject to the forces of supply and demand. Various groups in society compete for loyalty and support from citizens. Once they are organized and aligned, they exert pressure on political representatives, who respond, in a market-like manner, to the pressures thus exerted. The ultimate result is political equilibrium.

9. As used here, the term refers to interest-group theories of politics. For examples, see A. Bentley, The Process of Government (1908); R. Dahl, *supra* note 5; D. Truman, The Governmental Process (1951); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. Econ. 371 (1983); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971). For general discussion, see D. Held, Models of Democracy 186–220 (1987); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873 (1987). I do not use the word "pluralism" to refer to conceptions of politics and society as involving different groups pursuing divergent conceptions of the good life. *See* N. Rosenblum, Another Liberalism 155–60 (1987).

The pluralist approach takes the existing distribution of wealth, existing background entitlements, and existing preferences as exogenous variables. All of these form a kind of prepolitical backdrop for pluralist struggle.[10] The goal of the system is to ensure that the various inputs are reflected accurately in legislation; the system is therefore one of aggregating citizen preferences. This understanding carries with it a particular conception of representation, in which officials respond to constituent desires and exercise little or no independent judgment.[11]

The appeal of the pluralist understanding—if used normatively—stems from its utilitarian underpinnings, its effort to respect current preferences, and its desire to avoid the risks of tyranny that are associated with active and self-conscious preference-shaping by public officials. The most objectionable exercises of governmental power are often associated with approaches that see character formation as an end of politics. In these respects, pluralism is committed to familiar conceptions of majority rule[12] and to a healthy revulsion to regimes that take citizen preferences as an object of collective control. But several risks threaten to undermine a pluralist system. In the aggregate, they suggest that pluralism is an altogether unattractive conception of politics.

1. *Bad Preferences and Problems of Unequal Power*

The case for pluralism becomes much weaker if some preferences can be shown to be objectionable or the product of unjust background institutions.[13] A significant purpose of politics may be to reveal objectionable preferences as such through processes of political discussion and debate.[14]

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10. Existing entitlements are, of course, the product of positive law; in this sense they cannot be understood as prepolitical. *See* Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923).

11. *See* H. PITKIN, THE CONCEPT OF REPRESENTATION 144–67 (1967) (discussing this view and its competitors).

12. This understanding seems implicit, for example, in Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, in RATIONAL MAN AND IRRATIONAL SOCIETY? 229 (B. Barry & R. Hardin eds. 1982); *see also* C. OFFE, *Legislation Through Majority Rule?*, in DISORGANIZED CAPITALISM 259 (1985) (discussing weaknesses in traditional justifications for majority rule and suggesting reform). A different view is presented in E. SPITZ, MAJORITY RULE 198–216 (1984) (defending majority rule in part by reference to improvements in social deliberation).

13. An external standard is of course necessary to explain why preferences are objectionable and to identify unjust background institutions. Usually such judgments depend on a belief that the consequences of certain preferences are to subordinate social groups or that preferences are partly a function of social institutions that restrict available opportunities. *See infra* notes 18–20, 49–52.

14. Objectionable preferences may of course play a part in political debate, and they have resulted in laws based on (for example) racist premises; the republican hope is that deliberative processes will reduce their incidence. *See* Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (J. Elster & A. Hylland eds. 1986). Pluralists, of course, believe in legal constraints on private behavior, as represented by criminal law and by some aspects of the common law of property, tort, and contract. To the extent that legal constraints impose limits on force and fraud, they do not take private preferences as exogenous variables: The target of such laws is character as well as behavior. The point in the text is that pluralism might be objectionable to those who see a function in "laundering preferences" through discussion quite outside of the context of force and fraud.

Consider laws prohibiting discrimination on the basis of race or gender. Such laws owe their origin, at least in part, to a perception that the preferences that give rise to discrimination are objectionable or distorted by unjust social institutions.[15] Preferences of that sort may be objectionable because of their effects in subordinating a social group. They may also derive from various distortions, including the phenomenon of adaptive preferences on the part of victims—preferences that are based on the absence of available opportunities.[16] Preferences may be distorted as well by interest-induced beliefs on the part of the beneficiaries of existing practice.[17] A pluralist system is indifferent among preferences, so long as force and fraud are not involved; because it disregards the sources and effects of bad preferences, such a system will produce unacceptable results.

The existence of objectionable or distorted preferences suggests that politics should not simply implement citizen desires, but should also allow for a measure of critical distance from and scrutiny of those desires, bringing new information and different perspectives to bear.[18] In this sense, the political sphere should have a degree of autonomy. The difficulties of pluralism in this regard are compounded by the fact that pluralism tends to ignore the power of some groups to limit the number and nature of issues set for democratic resolution,[19] or, most generally, the fact that preferences are formed against the backdrop of disparities in power and limitations in both opportunities and information.[20]

2. *Countering "Deals": Deliberation More Generally*

The pluralist understanding increases the likelihood of undesirable lawmaking for another reason. Under republican approaches to politics, laws must be supported by argument and reasons; they cannot simply be fought for or be the product of self-interested "deals." Private-regarding reasons are an insufficient basis for legislation. Political actors must justify their choices by appealing to a broader public good. This requirement has a

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15. *See, e.g.*, Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 745–48 (1986) (discussing effects of segregation on preferences).

16. *See* J. ELSTER, SOUR GRAPES 109–11, 125–40 (1983).

17. This idea is a prominent strand of the social contract tradition. *See* J. RAWLS, A THEORY OF JUSTICE 136–42 (1971) (using device of original position to eliminate distorting effects of this sort). For further elaboration of the role of self-interest in political attitudes, see Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982); J. ELSTER, MAKING SENSE OF MARX 459–61 (1985); R. GEUSS, THE IDEA OF A CRITICAL THEORY 12–22 (1981).

18. This idea is associated with a Kantian idea of individual autonomy and an analogous conception of political freedom. As individual freedom is seen in private self-determination, political freedom is seen as the collective choice of ends. For discussion, see H. PITKIN, *supra* note 1, at 7, 240, 281–82, 315–16, 324–25; T. NAGEL, THE VIEW FROM NOWHERE 113–20, 130–37, 166–71 (1986). On the differences between politics and markets, see, for example, Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987); Elster, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY, *supra* note 14, at 103.

19. *See* Bachrach & Baratz, *The Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962).

20. *See* S. LUKES, POWER (1974); J. ELSTER, *supra* note 16, at 125–40.

disciplining effect on the sorts of measures that can be proposed and enacted. The requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation will actually be enacted.[21]

The central idea here is that politics has a deliberative or transformative dimension. Its function is to select values, to implement "preferences about preferences,"[22] or to provide opportunities for preference formation rather than simply to implement existing desires.[23] The point is a quite general one, extending beyond discrimination law to environmental measures, regulation of broadcasting, welfare expenditures, and many other areas. Under the pluralist understanding, there is reason for skepticism about such laws; they might appear to be impermissible "rent-seeking," or illegitimate wealth transfers.[24] Indeed, on pluralist assumptions it is unclear why laws should not be bought and sold like commodities in a marketplace; such a process of sale might accurately aggregate preferences. But for those who believe in a deliberative function for politics, the marketplace metaphor will be misguided, and laws of these sorts must be understood in nonpluralist terms.

3. *Utilitarian Malfunctions*

Much of the appeal of pluralism stems from its connection with utilitarianism.[25] But even if one believes that an entirely utilitarian approach to politics is desirable, it is by no means clear that ordinary majoritarianism, understood in pluralist terms, should be accepted.

First, accurate aggregation of preferences through politics is unlikely to be accomplished in light of the conundrums in developing a social welfare function.[26] Public choice theory has shown that cycling problems, strategic and manipulative behavior, sheer chance, and other factors prevent majoritarianism from providing an accurate aggregation of preferences.[27] Sec-

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21. Tocqueville so suggested. *See* A. de Tocqueville, *Democracy in America*, in JOHN STUART MILL ON POLITICS AND SOCIETY 186, 222–23 (G. Williams ed. 1976); *see also* W. NELSON, ON JUSTIFYING DEMOCRACY 94–130 (1980) (emphasizing public deliberation as a value of democracy); J. ELSTER, *supra* note 16, at 35–42 (critically discussing this view).

It would of course be a mistake to exaggerate the extent of this effect. Self-interested motivations may merely be concealed; the requirement of deliberation can be an invitation to hypocrisy and deceit.

22. *See* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986).

23. *Cf.* Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983) (discussing noncommodity values in regulation and criticizing efforts to understand statutes as "deals"); Kelman, *On Democracy-Bashing*, 74 VA. L. REV. 199, 224–35 (1988) (arguing that political choices involved in regulation must be evaluated according to criteria other than "rent-seeking").

24. A framework of this sort underlies some of the normative aspects of the economic approach to regulation. Almost every issue of the *Journal of Law and Economics* has at least one contribution confirming this point.

25. *See* Becker, *supra* note 9.

26. *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); W. RIKER, LIBERALISM VS. POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF PUBLIC CHOICE (1982).

27. *See* W. RIKER, *supra* note 26.

ond, majority rule is indifferent to variations in intensity of preferences,[28] and it is fanciful to think that the various supplements to majoritarianism in a pluralist democracy—different levels of participation and financial contribution, for example—will take up the slack.

Even if these problems might be surmounted, one would have to be optimistic indeed to believe that there is an identity between the result that would be reached by the considered utilitarian and that which would be reached by a legislature responding to constituent pressures as they are generally imposed. In any representative democracy, there is simply too much slippage between legislative outcomes and constituent desires.[29] These various considerations converge on a single conclusion: Although pluralist approaches are often defended as a means of ascertaining the "public will," that concept is an incoherent one within pluralist theory.[30]

Sometimes republicans and others invoke considerations of this sort in order to support constitutional protections against the operation of the public sphere. In particular, some observers, often drawing on public choice theory and purporting to follow Locke, argue in favor of rigid property rights and severe restrictions on collective interference with the existing distribution of wealth and entitlements.[31] But this strategy disregards the other failings of pluralism. As we will see, it also depends on an undefended belief in a prepolitical or exogenous private sphere, greatly overstates the real-world failings of deliberative government, and ignores the ways in which existing distributions and preferences are a product of law.[32]

4. *Absence of Participation*

Pluralist approaches place no premium on political participation. Indeed, for pluralists the absence of political participation is an affirmative good, suggesting general contentment with the status quo and proximity to the equilibrium point.[33] Pluralists will therefore be unwilling to take steps

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28. This is a standard economic objection. For recent discussion, see J. Elster, Nuts and Bolts (1987) (unpublished manuscript on file with author).

29. This is the foundation of the economic critique of interest-group politics. *See, e.g.*, R. HARDIN, COLLECTIVE ACTION (1982); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

30. *See* Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 381–88 (1988). One should not, however, overstate this conclusion by denying that there is a connection between democratic outcomes and the public will, or by suggesting that nondemocratic institutions would be as accurate as democratic ones in capturing public desires. Historical evidence suggests precisely the contrary, as do recent developments in public choice theory. *See* Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 429–37 (1988); Sen, *Social Choice and Justice: A Review Article*, 23 J. ECON. LITERATURE 1764, 1770–74 (1985).

31. *See* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN (1985).

32. *See infra* notes 49–62 & 221–25.

33. *See, e.g.*, L. MILBRATH, POLITICAL PARTICIPATION: HOW AND WHY DO PEOPLE GET INVOLVED IN POLITICS? (1965); B. BERELSON, P. LAZARSFELD, & W. MCPHEE, VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN (1954).

to promote political activity. But the absence of participation may reflect instead a collective action problem[34] or an adaptation to practices that are believed intractable;[35] and in any case, a system lacking widespread participation will suffer from the failure to cultivate the various qualities that may accompany political life—self-development, feelings of empathy, social solidarity, and so forth.[36] One need not believe that the political life is uniquely valuable, or that a system lacking widespread and frequent citizen participation is necessarily oppressive,[37] in order to conclude that political activity is often an important individual and collective good.

There is considerable doubt about the descriptive power of pluralist understandings for contemporary political life;[38] but it would be hard to deny that elements of pluralism provide a central feature of modern politics. And in light of the multiple failings of pluralism, critics have often pointed to republican conceptions of politics as possible alternatives. Such conceptions appear, at every turn, to oppose pluralist approaches. Aspects of classical republicanism found an American home in the work of the antifederalists; and antifederalist thought has exerted a continuing influence on American public law. But elements of republican thought can be found in the views of the federalists as well.

B. *The Republican Alternative*

Republican conceptions of politics diverge substantially from one another; there is no unitary approach that can be described as republican.[39] Classical republicans emphasized the role of the polis as the locus for achieving freedom through active citizenship. On this view, political participants were to subordinate their private interests to the public good through political participation in an ongoing process of collective self-

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34. *See* R. HARDIN, *supra* note 29.

35. *See* J. GAVENTA, POWER AND POWERLESSNESS (1980); J. ELSTER, *supra* note 16, at 125–33; Boudon, *The Logic of Relative Frustration*, in RATIONALITY AND REVOLUTION 245 (M. Taylor ed. 1988).

36. *See* C. PATEMAN, PARTICIPATION AND DEMOCRACTIC THEORY (1970); *cf.* J. ELSTER, *supra* note 16 (showing that such effects are "essentially by-products").

37. Some republican approaches are premised on the idea, traceable to Aristotle, that political life is the best life for human beings (or at least for certain classes of them). *See, e.g.*, H. ARENDT, ON REVOLUTION 215–82 (1963); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980). This view also appears to underlie M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). But modern republicanism respects other conceptions of the good life as well.

38. *Compare* M. DERTHICK & P. QUIRK, THE POLITICS OF DEREGULATION 8–27, 237–58 (1985) (arguing that congressional behavior cannot be explained by reference to interest-group pressures) *and* S. KELMAN, MAKING PUBLIC POLICY 44–66 (1987) (same) *and* A. MAASS, CONGRESS AND THE COMMON GOOD (1983) (same) *with* Becker, *supra* note 9 (discussing interest-group power over legislative outcomes) *and* Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (same).

39. For general discussion, see Pangle, *Civic Virtue: The Founders' Conception and the Traditional Conception*, in CONSTITUTIONALISM AND RIGHTS (G. Bryner & N. Reynolds eds. 1987); J.G.A. POCOCK, *supra* note 3; Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987).

determination.[40] Civic virtue was thus a central organizing principle of classical politics.

Many of those in the framing period defined republicanism much more generally, opposing it to monarchy, aristocracy, and despotism. Madison, for example, defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[41]

Despite the differences among various forms of republicanism, republican theories tend to be united by four central commitments, and in any event it is in these commitments that the contemporary appeal of republican thought can be located. The elaboration of those commitments will be necessarily abstract. It would be possible to describe versions of republicanism that are quite concrete but far less attractive to modern observers;[42] and as we will see, the republican commitments, as characterized here, have important implications for a number of controversies in modern public law. All of these commitments are united by the republican conception of individual autonomy as involving selection rather than implementation of ends, and the republican conception of political freedom, which prizes collective self-determination.[43]

1. *Deliberation*

Many republican conceptions treat politics as above all deliberative;[44] and deliberation is to cover ends as well as means. Although elements of this idea can be found in Aristotle and, even more, in Harrington, the belief in political deliberation is a distinctly American contribution to republican thought.[45] The function of politics, on this view, is not simply to implement existing private preferences. Political actors are not supposed to come to the process with preselected interests that operate as exogenous variables. The purpose of politics is not to aggregate private preferences, or to achieve an equilibrium among contending social forces. The republican belief in deliberation counsels political actors to achieve a measure of

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40. *See* H. ARENDT, *supra* note 37, at 248–55; D. HELD, *supra* note 9.

41. Madison continued: "It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it. . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . . ." THE FEDERALIST NO. 39, at 241 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

42. *See infra* notes 136–46 and accompanying text (describing various forms of republican thought).

43. *See infra* text accompanying notes 95–100. On some of the conundrums here, see T. NAGEL, *supra* note 18, at 113–20, 130–34, 166–71.

44. J.G.A. POCOCK, *supra* note 3, at 287–90; H. PITKIN, *supra* note 11, at 300–04; *see infra* text accompanying notes 104–18 (discussing Madison and anti-federalists).

45. By contrast, Rousseau, an important inspiration for many republicans, did not believe in deliberation among the citizenry. *See* J. ROUSSEAU, *The Social Contract*, in JEAN JACQUES ROUSSEAU: POLITICAL WRITINGS 29–30 (F. Watkins trans. 1986).

critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review.[46]

To say this is not to suggest that deliberation calls for some standard entirely external to private beliefs and values (as if such a thing could be imagined).[47] The republican position is instead that existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information. Thus, for example, republicans will attempt to design political institutions that promote discussion and debate among the citizenry; they will be hostile to systems that promote lawmaking as "deals" or bargains among self-interested private groups; they may well attempt to insulate political actors from private pressure; and they may also favor judicial review designed to promote political deliberation and perhaps to invalidate laws when deliberation has not occurred.[48]

A central point here is that individual preferences should not be taken as exogenous to politics.[49] They are a function of existing practice, including legal rules; such rules cannot, without circularity, be justified by reference to current preferences. As we have seen, private preferences may be a product of adaptation by the disadvantaged[50] and interest-induced beliefs on the part of the relatively well-off.[51] Republicans are thus unlikely to take existing preferences and entitlements as fixed. Both are permissible objects of political deliberation. In the republican view, for example, the distribution of wealth is a matter for political disposition; there is no hostility to redistributive measures. Republicans believe that if used as a term of opprobrium, the notion of "rent-seeking" is badly misdirected.

The republican belief in deliberation is aspirational and critical rather than celebratory and descriptive. It is a basis for evaluating political practices. Modern republicans do not claim that existing systems actually embody republican deliberation. The republican commitments may reveal that actual deliberation, and purportedly deliberative processes, are badly distorted. On the republican view, moreover, the requirement of delibera-

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46. Here there is a connection between republicanism and conceptions of politics associated with Kant. *See* I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 114 (H. Paton trans. 1984).

47. *See* M. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986) (contrasting Platonic belief in foundations with Aristotelian practical reason); H. PUTNAM, THE MANY FACES OF REALISM (1987) (arguing against foundationalism); M. WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987) (discussing interpretation as mode of social evaluation).

48. *See infra* text accompanying notes 216–20 & 229–48 (describing statutory construction and constitutional controls); Sunstein, *supra* note 6, at 49–79.

49. *See* Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987); H. PITKIN, *supra* note 11, at 93–97; J. Rawls, The Priority of the Right (unpublished manuscript on file with author); Beer, *The Strengths of Liberal Democracy*, in A PROSPECT OF LIBERAL DEMOCRACY (W. Livingston ed. 1979). On government by discussion and the liberal tradition, see *infra* note 155.

50. *See* J. ELSTER, *supra* note 16, at 105–11, 121–31; *see also* K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 26–30 (1987) (discussing mechanisms by which victims of discrimination decide not to complain or to drop complaints once initiated).

51. *See supra* note 17 and accompanying text.

tion is not purely formal. The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups; republicans emphasize that deliberative processes are often undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence. The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad agreement) among political equals.

Thus understood, the requirement disciplines political outcomes,[52] carrying with it constraints that exclude some results and compel others. The requirement of deliberation embodies substantive limitations that in some settings lead to uniquely correct outcomes.[53] Modern examples include the protection of freedom of speech and the prohibition of discrimination against blacks and women.[54] In this respect, the republican commitment to deliberation is closely allied with the republican beliefs in equality and universalism, taken up below. The commitment to deliberation is particularly controversial to those who believe either that its role is inevitably minimal in modern politics or that even as an aspiration, deliberation, standing by itself, is of little assistance in generating desirable outcomes.

The emphasis on deliberation in republican thought is closely allied with the republican beliefs that the motivating force of political behavior should not be self-interest, narrowly defined, and that civic virtue should play a role in political life. There is no mystery to this claim; it refers simply to the understanding that in their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general[55]—understood as a response to the best general theory of social welfare. Thus understood, the requirement accommodates a wide range of possible positions; but it is a constraint nonetheless. Sometimes the appeal to civic virtue is designed to improve individual character—a particularly important theme in classical republican thought. But modern republicans

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52. *See* Pitkin, *Justice: On Relating Public to Private*, 9 POL. THEORY 327, 346-47 (1981).

53. Whether and to what extent these outcomes are culturally specific is beyond the scope of this discussion. *See, e.g.*, M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUITY (1982); Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). The republican conception of political truth is, moreover, better thought of as pragmatic than foundationalist. *See infra* text accompanying notes 79-81.

54. The idea here is that in its meaning in ordinary language, the term "deliberation" includes constraints on inputs and outcomes; as a consequence, certain results could not be the product of a genuine deliberative process.

It is important to note as well that antidiscrimination measures are a product of a wide range of social developments, not of deliberation alone. Exercises of social power on the part of the disadvantaged, changing economic conditions, technical advances, and other factors play an important role. (It is ironic in this regard that the prohibition of sex discrimination was added by the opponents of title VII and was adopted without deliberation.)

55. *See, e.g.*, J.G.A. POCOCK, *supra* note 3, at 209 (noting that political actors should look "to the public good"); *see also* J. RAWLS, *supra* note 17, at 361 ("Each rational legislator is to vote his opinion as to which laws and policies best conform to principles of justice.").

invoke civic virtue primarily in order to promote deliberation in the service of social justice, not to elevate the character of the citizenry.

Republican approaches are often said to be antagonistic to private rights[56]—an understanding traceable to the fact that republicans see the private sphere as the product of public decisions, and deny the existence of natural or prepolitical entitlements. Republican theories are not, however, hostile to the protection of individual or group autonomy from state control. Indeed, legal rights have quite consistently accompanied republican systems.[57] What is distinctive about the republican view is that it understands most rights as either the preconditions for or the outcome of an undistorted deliberative process.[58] Thus, for example, the principle of deliberation argues in favor of liberty of expression and conscience and the right to vote; these are the basic preconditions for republican deliberation. Liberal systems could be, and have in fact been, founded on premises of this sort;[59] but understandings that point to prepolitical or natural rights[60] are entirely foreign to republicanism. On the republican point of view, the existence of realms of private autonomy must be justified in public terms.

The difference is illustrated by different approaches to private property. Republicans have historically believed in the importance of property rights as a shield against the state and as a guarantor of security, independence, and virtue.[61] Modern-day republicans might well share that view; but because of the republican emphasis on the social construction of property rights, republicans are hardly hostile to redistribution or to collective efforts to reassess the existing distribution of wealth and entitlements.[62] Indeed, because of the republican emphasis on the social conditions for republican deliberation, republican commitments point powerfully in the direction of equalizing political influence—a point to which I now turn.

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56. *See, e.g.*, Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

57. It is noteworthy here that it was the antifederalists, closely associated with republican thought, who were most strongly in favor of a bill of rights during the framing period.

58. Notions of this general sort are at work in J. RAWLS, *supra* note 17, and J. HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 294–326 (1987). *See also* D. HELD, *supra* note 9, at 182, 298–99 (discussing "ideal normative agreement").

59. *See* J. RAWLS, *supra* note 17, at 205–21 (discussing liberty of conscience); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4–10, 357–59 (1980). Both of these efforts have much in common with republican understandings as set out here. *See also* J. HABERMAS, *supra* note 58, at 294–326 (suggesting nondistorted communicative action as regulative ideal for politics).

60. For modern examples, see R. EPSTEIN, *supra* note 31, at 3–18; R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

61. *See* J.G.A. POCOCK, *supra* note 3, at 386–87, 390 (discussing Harrington); Pocock, *Oceana; Its Argument and Character*, in THE POLITICAL WORKS OF JAMES HARRINGTON 43, 68 [hereinafter Pocock, *Argument and Character*] (J.G.A. Pocock ed. 1977); Pocock, *The History of the Ideology: Harrington's Ideas After His Lifetime*, in *id.* at 150–51 [hereinafter Pocock, *Harrington's Ideas*] (discussing Jefferson).

62. *See* Dahl, *On Removing Certain Impediments to Democracy in the United States*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz ed. 1985).

2. *Political Equality*

Many republican writers have placed a high premium on political equality. Political equality, in republican terms, is understood as a requirement that all individuals and groups have access to the political process; large disparities in political influence are disfavored.[63] Republicans are likely to be highly receptive, for example, to measures designed to reduce the effects of wealth in the political process[64] or to furnish access to the media.[65] On at least some versions of the pluralist conception of politics, such measures point in exactly the wrong directions. Government is inevitably the enemy of freedom of expression; the distribution of private power is off limits to politics.[66] By contrast, many republican writers emphasized the close connection between republican systems and economic equality. Dramatic differences in wealth and power are, in this view, inconsistent with the underlying premises of a republican polity. Montesquieu was particularly insistent on this point, envisioning equality as a necessary precondition for republicanism.[67] Even for republicans who accept a large degree of economic inequality, sharp disparities in political influence are a severe source of concern.[68]

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63. For Madison's view, see *supra* note 41; *infra* note 75. On this score, there is a connection between the republican belief in political equality and some pluralist efforts to promote access to the political process, *see, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980), but the pluralist view places little premium on deliberation or citizenship.

Of course the republican aspiration to political equality was violated by important features of republican practice. The relationship between the republican belief in political equality and republican social hierarchies was quite complex; republicans saw political equality in surprising places. *See* J.G.A. POCOCK, *supra* note 3, at 467–70; H. PITKIN, *supra* note 11, at 23–90.

64. *See infra* notes 204–07.

65. *See infra* note 206.

66. Buckley v. Valeo, 424 U.S. 1 (1976); 52 Fed. Reg. 31,768 (1987) (decision by FCC to repeal fairness doctrine). It is important to note in this connection that some pluralists, growing out of the utilitarian tradition, seek to minimize side-constraints on government in order not to interfere with political struggle. *See, e.g.*, Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 5 (1984). Other commentators, believing in pluralism as an accurate description of politics, fearful of "rent-seeking," and purporting to be associated with Locke, attempt to create rigid, property-based barriers to government action. *See* R. EPSTEIN, *supra* note 31. Both of these views are at odds with republicanism.

67.

> Love of the republic in a democracy, is a love of the democracy; love of the democracy is that of equality. Love of the democracy is likewise that of frugality. As every individual ought to have here the same happiness and the same advantages, they ought consequently to taste the same pleasures and to form the same hopes; which cannot be expected but from a general frugality. The love of equality in a democracy limits ambition to the sole desire, to the sole happiness of doing greater services to our country than the rest of our fellow citizens. . . . A true maxim it is therefore, that in order to love equality and frugality in a republic, these virtues must have been previously established by law.

MONTESQUIEU, THE SPIRIT OF LAWS bk. V, chs. iii-iv (D. Carrithers ed. 1977).

68. *See infra* note 75 (discussing Madison); *see also* H. PITKIN, *supra* note 1, at 88–90; J.G.A. POCOCK, *supra* note 3, at 258 (discussing political equality amid economic disparities), 467–70, 537 (distinguishing equality of position from republican idea of political equality); Pocock, *Oceana: Its Ideological Context*, in THE POLITICAL WORKS OF JAMES HARRINGTON 15, 18 [hereinafter Pocock, *Ideological Context*] (J.G.A. Pocock ed. 1977) (describing republican inequality as "relations of dependence among citizens who should be equally subject to none but the public power"); *cf.* S. VERBA & G. ORREN, EQUALITY IN AMERICA: THE VIEW FROM THE TOP 7–20 (1985) (discussing American

Some of the American antifederalists emphasized the threats of commercialism and argued in favor of material equality. Thus Centinel wrote that a "republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided; in such a government the people are the sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its ruin."[69] Thus Cato wrote that "Dominion follows Property . . . An Equality of Estate will give an Equality of Power; and an Equality of Power is a Commonwealth, or Democracy," and feared that "Very great Riches in private Men . . . destroy . . . that Balance of Property and Power, which is necessary to a Democracy."[70] Captain Welton claimed that for a popular or democratic system "an equal distribution of property was necessary."[71] It should not be surprising that a disproportionate number of those in favor of paper money and debtor relief legislation fell within the antifederalist camp.[72]

The republican belief in political equality is itself highly controversial, as the debate over campaign finance regulation reveals.[73] The notion that political equality depends on economic equality is even more so, and has hardly been shared by all republican theorists.[74] But many of the American framers, including Madison, expressed concern about both political and economic inequality.[75]

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commitment to political equality but ambivalence about economic equality); S. VERBA, ELITES AND THE IDEA OF EQUALITY 264–65 (1987) (noting that many people not committed to economic equality believe in political equality).

69. THE ANTI-FEDERALIST 16 (H. Storing ed., M. Dry abr. 1985).

70. CATO'S LETTERS 113, 161, 207.

71. Middlesex Gazette (Middletown, Conn.), June 18, 1787.

72. *See* J.T. MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 162–67, 261–70 (1981).

73. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

74. *See* THE FEDERALIST No. 10 (J. Madison) (including equal distribution of wealth as "an improper and vicious project"). Burke of course believed in political deliberation but not in equality; for a modern illustration of a similar view, see A. Kronman, *supra* note 8. On some of the risks in such approaches, see *infra* text accompanying notes 249–65 (discussing value of proportional representation).

75. Consider these excerpts from Madison's list of the means of combating the "evil of parties":

> 1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.

14 J. MADISON, THE PAPERS OF JAMES MADISON 197–98 (R.A. Rutland ed. 1983) (emphasis in original).

See also Jefferson's suggestion:

> I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislatures cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. . . . Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. Whenever there is [sic] in any country, uncultivated lands and unemployed poor, it is clear that the laws of

3. *Universalism: Agreement as a Regulative Ideal*

Republican thought is characterized by a belief in universalism, a term that I will use in a somewhat idiosyncratic sense. The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue.[76] The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals. It is because of the belief in universalism that republican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process.[77] Republicans thus reject ethical relativism and skepticism, and believe that different perspectives are sometimes subject to mediation both in theory and in the real world. The institutional consequence is that republicans will be hostile to bargaining mechanisms in the political process[78] and will instead seek to ensure agreement among political participants. The republican belief in agreement as a regulative ideal, and the republican conception of political truth, are pragmatic in character. They do not depend on a belief in ultimate foundations for political outcomes.[79]

Under pluralist assumptions, the notion of a common good is alternatively mystical or tyrannical.[80] Republican theories, on the other hand,

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property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on.

8 T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 681-82 (J. Boyd ed. 1953).

See also T. PAINE, *Dissertation on the First Principles of Government*, in 5 LIFE OF THOMAS PAINE 221 (1795) ("The true and only true basis of representative government is equality of rights."); 4 J. ELLIOTT, DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 320-23 (1888) ("mediocrity of fortune is a leading feature in our national character . . . we may with safety assert that the great body of national wealth is nearly equally in the hands of the people, among whom there are few dangerously rich or few miserably poor; that we may congratulate ourselves with living under the blessings of a mild and equal government, which knows no distinctions but those of merits or talents—under a government whose honors and duties are equally open to the exertions of all her citizens") (remarks of Pinckney).

76. *See* J.G.A. POCOCK, *supra* note 3, at 255 (discussing republican "function of universalizing decision, of ensuring that it was free from corrupting particular interests. The role of the many was less to assert the will of the non-elite than to maximize the impersonality of government."); *see also infra* notes 108-17 (discussing Madison).

77. *See* J.G.A. POCOCK, *supra* note 3, at 132-36; H. PITKIN, *supra* note 11, at 85-87. Of course this process occurs within cultural limits.

78. See, for example, the critical discussion of regulatory negotiation in Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

79. For the pragmatic view, see J. DEWEY, THE QUEST FOR CERTAINTY 259, 265, 272-73 (1929) (claiming that there is a need for critical reflection on the "conditions under which objects are enjoyed" and "the consequences of esteeming and liking them" and arguing that "*judgments about values are judgments about that which should regulate the formation of our desires, affections and enjoyments*" (emphasis in original)); H. PUTNAM, *supra* note 47; C. PEIRCE, *Pragmaticism in Retrospect: A Last Formulation*, in PHILOSOPHICAL WRITINGS OF PEIRCE (J. Buchler ed. 1955); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

80. *See* J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1976).

rely on the deliberative functions of politics and on practical reason,[81] and embrace the notion of the common good as a coherent one. To some degree this belief depends on a commitment to political empathy,[82] embodied in a requirement that political actors attempt to assume the position of those who disagree. Political outcomes are, on this view, not limited to the achievement of Pareto improvements or to the supply of collective goods. Measures that attempt to select and pronounce values—embodied in, for example, broadcasting regulation, environmental measures, or antidiscrimination law—attest to the republican belief in universalism. Such measures represent the outcome of a deliberative process among political equals; they do not take existing preferences and practices as exogenous.

To say this is not to suggest that republicans believe in a unitary public good, or that they deny that differently situated individuals and groups will frequently be unable to resolve their disagreements through conversation.[83] Sometimes compromises are necessary;[84] sometimes there will be political losers; some issues—religion is a familiar example—should be entirely off-limits to politics.[85] It would be fanciful to suggest that different conceptions of the good life can or should always be mediated through politics. The republican position is not that every issue is subject to political resolution; it is instead that some questions can yield general agreement through deliberation. A conception of politics that disregards this fact will be doomed to repeat the failings of pluralism.

4. *Citizenship*

Republican approaches place a high premium on citizenship and participation,[86] and thus seek mechanisms both for citizen control of national

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81. *See* Michelman, *supra* note 6, at 24–36.

82. *See* Okin, *Reason and Feeling in Thinking about Justice,* in ETHICS (forthcoming 1989); *see also* J. RAWLS, *supra* note 17, at 358 ("In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us.").

83. [U]niversalism . . . plays a part [in politics], but it is not assumed at the start. It seems to be the ideal term of the process. In truth, no party will ever become an actually universal party; there will always remain opponents; this is the core of political pluralism. Nevertheless the structure of the deliberative system usually makes the protagonists strive to enlarge their points of view and propose more and more general positions. There is a sort of competition for generality.

Manin, *On Legitimacy and Political Deliberation,* 15 POL. THEORY 338, 358–59 (1987); *see also* S. WHITE, THE RECENT WORK OF JURGEN HABERMAS 75–77 (1988) (discussing role of compromise); E. SPITZ, MAJORITY RULE 211–16 (1984) (discussing compromise, deliberation, and majority rule).

84. *See* S. WHITE, *supra* note 83, at 75–77.

85. This exclusion of religion from politics has been based both on the notion that religious conviction is a matter of private right and on the view that removal of religion from the political agenda protects republican politics by ensuring against stalemate and factionalism. In this somewhat ironic latter sense, rights are preconditions for republican deliberation. *See* Holmes, *Gag Rules and Democracy,* in CONSTITUTIONALISM AND DEMOCRACY (J. Elster ed. 1988).

86. *See* Pocock, *Harrington's Ideas, supra* note 61, at 4, 142–44, 393–94 (describing Harrington's effort to construct "a scheme of participation for all citizens, based on the frequent assemblies of local communities").

institutions and for decentralization, local control, and local self-determination. A large purpose of participation is to monitor the behavior of representatives in order to limit the risks of factionalism and self-interested representation. But on the republican view, political participation is not only instrumental in the ordinary sense; it is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community[87] (and this is so even if the motivation for participation is instrumental[88]). The belief in citizenship is part of the republican antipathy to certain versions of political individualism. It repudiates approaches that place no premium on political participation as an independent good; republicans therefore attempt to provide outlets for the exercise of citizenship.

According to the antifederalists, for example, representation was at best a necessary evil, and its risks were to be limited by ensuring that public officials would be tightly controlled by the citizenry. It was for this reason that in evaluating the institutions of the proposed Constitution, the antifederalists were least suspicious of the House of Representatives and regarded the President and the judiciary with most alarm; the Senate was an intermediate case.[89]

Allied with this idea is the familiar belief that republican systems should be small and decentralized. A large republic threatens to diminish the connection between rulers and ruled and decrease opportunities for participation. "[T]he civic humanist ideal had originated in a re-assertion of the *vita activa*, and it was the ultimate goal of the citizen to assert his virtue in action, of which the republic was the frame."[90] A large republic would thus tend to produce corruption, the greatest obstacle to a well-functioning republican system. Moreover, and equally important, the republican belief in deliberation about the common good is most easily sustained when there is homogeneity and agreement about foundations. Where such agreement is entirely absent, deliberative processes may break down.[91] A belief in decentralization and a fear of the diversity of a large republic naturally accompany this concern. This point raises important difficulties for efforts to revive republican thought in a large and heterogeneous nation.

At the same time, traditional republican thought was hostile to com-

87. *See supra* note 36.

88. See J. ELSTER, *supra* note 16, at 91–100, which shows that these effects cannot plausibly be the motivating force for political participation; they must instead be "essentially by-products" of activity engaged in for instrumental purposes.

89. *See* J.T. MAIN, *supra* note 72, at 135–42.

90. *See* Pocock, *Ideological Context*, *supra* note 68, at 18.

91. The antifederalist Brutus emphasized this point: "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other." 2 THE COMPLETE ANTIFEDERALIST 369 (H. Storing ed. 1980). *But see infra* text accompanying notes 126–27, 201–02 (discussing importance of disagreement to republican deliberation).

merce and luxury.[92] Commercial development tends, in this view, to produce avarice and to weaken the attachment to the public good on which republican systems depend. Other forms of republicanism approach commerce quite differently, regarding it as a means of achieving cordial relations among potential adversaries and thus of softening social tensions.[93]

The four basic republican principles are closely related to one another. For example, the commitment to political equality is allied with the belief in deliberation. The norm of equality constrains both inputs and outputs of the deliberative process; particular groups may not be excluded from the process, and results that subordinate politically weak groups are proscribed.[94] The belief in universalism and agreement as a regulative ideal is a natural consequence of the republican faith in deliberation and political equality. Citizenship is a predicate for political deliberation, and the norm of political equality has consequences for the desirable forms of citizenship. The various republican commitments thus help to qualify and inform each other.

The commitments are in turn traceable to the republican conception of individual and political freedom. On this view, individual freedom consists not in the implementation but instead in the selection of ends.[95] Such a process emphasizes the existence of second-order preferences,[96] the value of overcoming weakness of the will,[97] the possibility that private ends have been distorted by unjust social institutions, and the importance of increasing available opportunities and information. The republican commitment to political freedom is a generalization of these ideas.[98] Although alert to possible malfunctions in the governmental process, republicans envision that process as a forum in which alternative perspectives and additional information are brought to bear, problems are occasionally revealed to be systemic rather than individual,[99] second-order preferences may be vindi-

92. MONTESQUIEU, THE SPIRIT OF LAWS, bk. XX, ch. ii (spec. ed. 1984) (Dublin 1751) ("We see that in countries where the people are actuated only by the spirit of commerce, they make a traffic of all the humane, all the moral virtues; the most trifling things, those which humanity would demand, are there done, or there given, only for money.").

93. *See* THE FEDERALIST No. 12 (A. Hamilton); T. PAINE, *Rights of Man,* in 7 LIFE OF THOMAS PAINE 6-7 (1792) ("I have been an advocate for commerce, since I am a friend to its effects. It is a pacific system, operating to unite mankind by rendering nations, as well as individuals, useful to each other."). *See generally* A. HIRSCHMAN, THE PASSIONS AND THE INTERESTS (1973) (discussing softening effects of commerce).

94. *See* Goodin, *supra* note 14, at 93-96 (discussing role of deliberation as a constraint on racist preferences); *supra* note 41 (Madison's view).

95. For recent discussion, see J. ELSTER, *supra* note 16, at 15-26; R. LINDLEY, AUTONOMY 63-70 (1980); R. YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY 49-62 (1986).

96. *See supra* text accompanying notes 22-25; Frankfurt, *Freedom of the Will and the Concept of a Preference,* 68 J. PHIL. 5 (1971).

97. *See generally* Elster, *Weakness of the Will and the Free Rider Problem,* 1 ECON. & PHIL. 264 (1985).

98. *Cf.* D. HELD, *supra* note 9, at 270-73 (discussing centrality of autonomy to seemingly diverse conceptions of democracy).

99. *See* H. PITKIN, *supra* note 11, at 347-49.

cated, and collective action problems and weakness of the will may be overcome. As we will see, these ideas have powerfully influenced the liberal tradition as well.[100]

C. *American Constitutionalism*

There can be little doubt that elements of both pluralist and republican thought played a role during the period of the constitutional framing. John Adams, for example, was at times quite skeptical about the idea that anything other than self-interest could be the basis for political behavior.[101] Noah Webster wrote that "the system of the great Montesquieu" might be improved by removing the word "virtue" whenever it appears in *The Spirit of Laws* and replacing it with "property or lands in fee simple."[102] Patrick Henry said that the "real rock of political salvation is self-love, perpetuated from age to age in every human breast, and manifested in every action. . . . When we consult the common good, we consult our own."[103]

More important, much of Madison's own work, most notably *Federalist* No. 10, reflects skepticism about important elements of classical republican thought. Thus Madison believed that a small republic would be torn by factional warfare, endangering both private rights and the public good.[104] Hamilton expressed similar views.[105] Indeed, central features of the framers' thought consisted of fears about the consequences of decentralization and widespread citizen participation,[106] lack of enthusiasm for material equality,[107] belief in the social and economic advantages of a commercial republic, and a thoroughly modern recognition that self-interest is often the mainspring of political behavior. In such ideas one can find a rejection of central features of traditional republicanism.

At the same time, there can be little doubt that elements of republican thought played an important role in the framing period.[108] For example,

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100. *See infra* text accompanying notes 154–60.

101. *See* J. ADAMS, *Defence of the Constitution of Government of the United States*, in 6 WORKS OF JOHN ADAMS 130–31, 206–08 (C.F. Adams ed. 1851).

102. *See* Webster, *An Examination into the Leading Principles of the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 59 (P. Ford ed. 1888). *But see* Letter of Richard Henry Lee to Henry Laurens, in 2 LETTERS OF RICHARD HENRY LEE 62–63 (J. Ballagh ed. 1914) (criticizing "Mandevilles among you who laugh at virtue, and with vain ostentatious display of words will deduce from vice, public good!").

103. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 164, 232 (1888); *see id.* at 536–37.

104. *See* THE FEDERALIST No. 10 (J. Madison).

105. THE FEDERALIST Nos. 9, 12 & 71 (A. Hamilton).

106. Note Madison's claim that the distinguishing mark of the American governments was "*the total exclusion of the people in their collective capacity*" from governmental processes. THE FEDERALIST No. 63, at 387 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

107. *See* THE FEDERALIST No. 10 (J. Madison); J.T. MAIN, *supra* note 72, at 261–63.

108. The account offered in the text is controversial. For general discussions, often from competing perspectives, see J.G.A. POCOCK, *supra* note 3; G. WOOD, *supra* note 3; Ackerman, *supra* note 6; R. DAHL, *supra* note 5; Diamond, *Ethics and Politics: The American Way*, in THE MORAL FOUN-

the framers did not abandon the traditional republican belief in deliberative government and the need for civic virtue. First, and probably foremost, the framers stressed that their system was likely to attract and produce representatives who would have the virtue associated with republican citizens. Above all, Madison's conception of representation incorporated important features of traditional republican thought. Thus *The Federalist* No. 10 emphasized the capacity of a large republic to obtain public-spirited representatives, operating above the fray of constituent pressures. Madison wrote that in a large republic, representation would "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 considerations."[109]

The belief in deliberative representation led to particular enthusiasm for indirect elections. In describing the electoral process, Madison argued that state legislatures should choose "those men only who have become the most distinguished by their abilities and virtue."[110] And Publius expressed particular enthusiasm for the President, suggesting "a constant probability" that the presidency would be filled by characters "preeminent for ability and virtue."[111] Significantly, the electoral college was to be a deliberative body.[112] And in a remarkable series of debates after the founding, early Congresses rejected a constitutional amendment that would entitle constituents to "instruct" their representatives about how to vote. In those debates, Madison and others made it clear that the representatives' task called for deliberation, and that task was inconsistent with a right to instruct.[113]

DATIONS OF THE AMERICAN REPUBLIC 75 (R. Horwitz ed. 1986). Consider also the view that the "debates of the Philadelphia Convention are notoriously the highest power ever reached by civic humanist theory in practice." Pocock, *Cambridge Paradigms and Scottish Philosophers*, in WEALTH AND VIRTUE 239 (I. Hont & M. Ignatieff eds. 1983).

109. THE FEDERALIST No. 10, at 82 (J. Madison) (C. Rossiter ed. 1961). This idea of course confined deliberative aspirations by limiting the category of political deliberators.

110. THE FEDERALIST No. 64, at 391 (J. Madison) (C. Rossiter ed. 1961).

111. THE FEDERALIST No. 68, at 414 (A. Hamilton) (C. Rossiter ed. 1961).

112. *Id.* at 412.

113. Consider Sherman's statement: "[T]he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation. . . ." 1 ANNALS OF CONG. 733–45 (J. Gales ed. 1789).

There was in this debate a struggle between two conceptions of republicanism. The first, represented by the New England towns, borrowed from the classical tradition and saw local self-determination as an argument for the right to instruct. The second, based on Madisonian principles, saw the national government as the locus of republican deliberation, and regarded a local right to instruct as a serious threat.

All this is consistent with Madison's view that "[I]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is

The framers' conception of representation, in short, incorporated the traditional republican faith in the value of virtue and deliberation in politics, with an accompanying belief in agreement of a regulative ideal.[114] Madisonian republicanism calls for substantial autonomy on the part of representatives. They are charged not with implementing what their constituents "want," though that is of course relevant; the deliberative task requires a measure of independence. Thus Madison favored large election districts and long length of service, in order both to limit factionalism by separating representatives from constituents and to encourage deliberation on the general good. Thus it was that the framers had especially high hopes for the Presidency and the Senate, showed little fear of an insulated judiciary, and were modest in their expectations for the House of Representatives—precisely the reverse of the expectations and fears of the antifederalists.[115]

But classical republican thought did not have its exclusive locus in the Madisonian conception of representation. The act of creating a Constitution was itself supposed to depend on the capacity of the public as a whole to behave in the common interest. The decision to write and accept a Constitution serving the long-term interest called for a large degree of republican virtue; and that decision involved the citizenry in general.[116]

The framers stressed more generally the need for virtue among the citizenry as a whole. Thus in the Virginia Ratifying Convention, Madison stated: "I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without

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the mere instrument of the major number of the constituents." Madison to Jefferson, Oct. 17, 1788, in 11 J. MADISON, PAPERS OF JAMES MADISON 298 (R. Rutkind & C. Hobson eds. 1977).

114. *See* Meyers, *Beyond the Sum of the Interests,* in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON xxiv-xxxiii (M. Meyers rev. ed. 1981) [hereinafter THE MIND OF THE FOUNDER]. Jefferson said in a similar vein that with respect to the Senate, "I had two things in view: to get the wisest men chosen, and to make them perfectly independent when chosen." 1 PAPERS OF THOMAS JEFFERSON 503 (J. Boyd ed. 1950). For a recent discussion, see Thompson, *Representatives in the Welfare State,* in DEMOCRACY AND THE WELFARE STATE (A. Gutman ed. 1988).

115. *See* R. LERNER, THE THINKING REVOLUTIONARY 122–28 (1987). Note that Madison described the Senate as the "great anchor of the government." Madison to Jefferson, Oct. 24, 1787. This institutional understanding was closely allied with a controversial substantive position: the desire to protect against certain forms of redistribution of wealth. In the framers' thought, the belief in deliberation, the fear of factionalism, and the protection of existing property rights were tightly connected. *See* Madison, *Property and Suffrage: Second Thoughts on the Constitutional Convention,* in THE MIND OF THE FOUNDER, *supra* note 114, at 501. But the alliance is only contingent. In the New Deal period, for example, the belief in deliberative representation was associated with an altogether different substantive understanding. *See* Sunstein, *Constitutionalism After the New Deal,* 101 HARV. L. REV. 421 (1987) (discussing New Deal belief in deliberation and novel institutional and substantive theories).

116. The point is emphasized, perhaps too strongly, in Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013 (1984). It would of course be a mistake to overemphasize the democratic character of the ratification process, which excluded large categories of the citizenry.

any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them."[117] Even more strikingly, Madison suggested that republican government calls for more virtue from the citizenry than "any other form."[118] In this sense, the very belief in virtuous representation resulted from some optimism about the citizenry.

What emerged is in several respects a hybrid. A number of elements competed in the theory of politics embodied in the American Constitution. First, the framers' conception of human nature synthesized elements of classical republicanism with its emerging interest-group competitor. Thus Publius wrote that "[t]he supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude."[119] In the same vein, he claimed that "[a]s there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence."[120] In these respects, purely pluralist readings of the founding period[121] are badly off the mark.

Second, the federalist conception of representation steered a middle course between Burkean and pluralist approaches. A critical feature of the thought of the founding period is a belief in the deliberative capacities of representatives and the need to insulate public officials from constituent pressures in order to promote the performance of their deliberative tasks. At the same time, however, the framers were well aware of the need to ensure a measure of accountability to the public, and thus they built into the system mechanisms of electoral control.[122]

Third, the base institutions of the Constitution—checks and balances, bicameralism, federalism, and legal rights—continued the fusion of republican and pluralist elements. The system of checks and balances permitted "ambition . . . to counteract ambition";[123] thus *The Federalist* No. 51 suggests that self-interest will be channeled in such a way as to protect the citizenry as a whole. Checks and balances would also increase the likelihood of deliberation in government. The requirement of agreement among

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117. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (1888).

118. *See* THE FEDERALIST No. 55, at 346 (J. Madison) (C. Rossiter ed. 1961).

119. THE FEDERALIST No. 76, at 458 (A. Hamilton) (C. Rossiter 1961).

120. THE FEDERALIST No. 55, at 346 (J. Madison) (C. Rossiter 1961).

121. *See, e.g.*, R. DAHL, *supra* note 5, at 4–32 (1956); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3 (1971).

122. *See* THE FEDERALIST No. 57, at 351 (J. Madison) (C. Rossiter ed. 1961) (the "elective mode of obtaining rulers is the characteristic policy of republican government").

123. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961); *see also* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

the three branches[124] would operate as a check on factionalism and self-interested representation, on instability, and on the risk that government would seek a particular course without having fully considered the consequences.

Similarly, the federal system was designed to ensure that "[t]he different governments will control each other."[125] Their mutual jealousy would operate to protect the citizenry against government invasions. At the same time, the federal system would guarantee an arena for citizen self-determination and promote diversity and responsiveness. The considerable role for the states provided a locus in which to satisfy the traditional republican belief in small republics. To be sure, much of federalist thought was based on a rejection of the traditional republican belief in local democracies; but the Constitution that emerged furnished a secure place for self-determination through the federal system, supplementing and complementing national institutions.

Moreover, the systems of checks and balances, bicameralism, and federalism responded to the central republican understanding that disagreement can be a creative force.[126] National institutions were set up so as to ensure a measure of competition and dialogue; the federal system would produce both experimentation and mutual controls. In all of these ways, the constitutional framework created a kind of deliberative democracy, including Madisonian representation at the national level, safeguards against factionalism and self-interested representation, and opportunities for local self-determination through the federal system.[127]

The rights created by the Constitution share similar ambiguities. Many of the original constitutional rights provide spheres of private autonomy to be insulated from government interference; such rights can be justified in republican fashion, but some of them are more easily understood as an outgrowth of Lockean ideas. Other rights can be read as straightforwardly republican in inspiration. The right to a jury trial is a good example;[128]

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124. *See* Sunstein, *supra* note 115, at 434–37.

125. THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961).

126. *See* THE FEDERALIST No. 70, at 426–27 (A. Hamilton) (C. Rossiter ed. 1961) ("differences of opinion . . . promote deliberation"); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 547–58 (1833) (emphasizing ways in which bicameralism promotes deliberation and diminishes factionalism); J. WILSON, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 290–92, 414–15 (R. McCloskey ed. 1967) (emphasizing how bicameralism improves deliberation and multiplies points of access to government); *cf.* Michelman, *supra* note 6 (emphasizing dialogue and plurality as republican commitments).

127. *See* Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (R. Goldwin & W. Schambra eds. 1980). Controversial understandings of private property were of course a part of this system. *See* Hofstadter, *The Founding Fathers: An Age of Realism*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz ed. 1986). But it would be fully possible to accept the basic institutional understandings of the original regime while accommodating a belief that redistribution of property was desirable in a wide range of settings. Indeed, the New Deal did some of this. *See* Sunstein, *supra* note 115.

128. The civic tradition, placing a premium on an educated citizenry, valued the jury as a means of inculcating virtue and promoting participation.

the right to protection against takings of private property can be understood in both pluralist and republican terms.[129] The right to assembly falls in this category as well.[130]

In a number of respects, then, the American constitutional tradition was influenced at its inception by features of republican thought. But it is not immediately clear why this fact should matter to contemporary constitutional controversies. Questions about the future of American constitutionalism might be approached straightforwardly as issues of political theory. The emphasis on republican and pluralist elements in the founding period would, under this view, be treated as a species of ancestor worship, carrying with it many of the risks of reliance on the framers' intent to solve constitutional problems.[131] Use of Madison might be justified if Madison's thought turns out to be helpful; but his status as a constitutional founder would be beside the point. Madison's views would, in this understanding, carry no more weight than those of, say, Hegel.

But the importance of Madison for current constitutional controversy does not depend solely on the quality of Madison's thought. The fact that the American constitutional regime at its outset owed a great deal to republican thought is an important corrective to approaches that purport to speak for the American constitutional tradition, but proceed from pluralist premises[132] or invoke prepolitical rights.[133] Decisions about the nature and direction of a constitutional democracy cannot be made in the abstract and acontextually; they must appeal to reasons. Interpretation of the meaning of the relevant tradition is always an important method of social criticism;[134] an understanding of inherited beliefs is an inevitable part of the project of constitutionalism. The future of American public law depends in significant part on the way that its tradition is understood—a theme highly congenial to republicanism. And the republican elements of the framers' thought deserve credit for helping to launch many reforms that were in retrospect highly desirable.

To say this is not to insist that American public law would have to adhere to republican thought if republicanism were without contemporary relevance or appeal. Other aspects of the thought of the founding period—its incorporation of Calvinism, for example, and of slavery and racism[135]—should not be revived even if historians were able to show the

129. *See supra* notes 61–62 (discussing place of property within republican tradition).

130. *See* A. Amar, The Bill of Rights: One View of the Cathedral (unpublished draft 1988).

131. *See, e.g.*, Brest, *The Mistaken Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1981).

132. *See, e.g.*, R. DAHL, *supra* note 5, at 4–32; Bork, *supra* note 121, at 2–3.

133. *See, e.g.*, R. EPSTEIN, *supra* note 31, at 3–18.

134. *See* A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 349–69 (1988) (discussing ways in which moral reasoning takes place within traditions); Amar, *supra* note 123, at 1426 n.9 (discussing notion of a "usable past"); M. WALZER, *supra* note 47.

135. *See* D. BELL, AND WE ARE NOT SAVED (1987); A. NORTON, ALTERNATIVE AMERICAS (1987).

tenacity of those commitments during and after the framing period. But the presence of a historical pedigree, one that has accomplished considerable good, adds force to the case for a republican revival.

II. The Variety of Republican Approaches

A. *A Catalogue*

I have presented a set of commitments with which republicanism is often associated. But republican thought has had numerous manifestations, and there are large divergences among them. In its most classical versions, republican thought drew a sharp distinction between public and private interests, and saw in public life an opportunity to abandon or subordinate private interests in order to promote the public good. Such understandings draw the most rigid of distinctions between private interests and public good;[136] prepolitical differences are an inadmissible basis for resolution of political controversy. Understandings of this kind depend on an expectation that citizens should entirely abandon their private identities when they come to politics. This expectation, built on an understandable desire to ensure against the distortion of politics by interest, is of course unrealistic. But the difficulty goes deeper. The notion that, for example, disadvantaged groups must put their interests to one side in the political process hardly seems likely to lead to just outcomes. Universalism ought not to be understood as a desire to obliterate social differences in politics. Deliberation is undermined, not promoted, by an expectation that differently situated individuals and groups will say the same thing.

In other forms, republican thought is militaristic and heroic, associating political behavior with warfare, and valuing in politics the characteristics prized during times of battle.[137] Political life is in this formulation approved as a means of escaping the routine of ordinary life and obtaining a species of immortality.[138] Here one can see the close association, both metaphorical and literal, between republican thought and militarism, and at several levels. It is in times of war that republican virtue, understood in this fashion, is most powerfully displayed; it is war that tends to unite the citizenry in dedication to the public good; and it is war that might serve as the model, even in times of peace, for the subordination of private interests to the general good. The use of metaphors of that sort, as a device for

136. *See e.g.*, H. Arendt, *supra* note 37, at 250–55; J.G.A. Pocock, *supra* note 3, at 67–71, 199–211, 431–32.

137. *See* H. Arendt, The Human Condition (1963); H. Pitkin, *supra* note 1 (discussing Machiavelli); J.G.A. Pocock, *supra* note 3, at 201; Pocock, *Ideological Context, supra* note 68, at 18–19 ("[t]he rigorous equation of arms-bearing with civic capacity is one of Machiavelli's most enduring legacies to later political thinkers"); Pocock, *Argument and Character, supra* note 61, at 54–55.

138. Pocock, *Argument and Character, supra* note 61, at 54.

rallying and unifying the citizenry, is familiar in modern political life.[139] But efforts to assimilate politics to war will often lead in undesirable directions.[140]

In addition, classical republicanism was comfortable with firm social hierarchies, placed a large emphasis on the role of tradition, and was sometimes built on organic conceptions of the state that found common interests among members of different social classes.[141] Understandings of this sort are of course incompatible with modern beliefs in eliminating (at least some) status hierarchies; indeed, they coexist awkwardly with the republicans' own commitment to political equality.

Other forms of republicanism are highly rationalistic, even Cartesian.[142] Here the emphasis on deliberation is designed to enable citizens to transcend bodily drives, to eliminate affective ties or empathy, and to ensure the dominance of reason, narrowly understood, in politics.[143] Forms of republican thought that value militarism and the overcoming of physical drives, and that devalue the private sphere as part of "nature," are often accompanied by misogyny.[144] The exclusion of women from politics, a familiar part of republican regimes, is an outgrowth of ideas of this sort. But an understanding that attempts to eliminate affective ties, or even anger, from the political process will likely be self-defeating, and in any case will lead in undesirable directions. Thus other versions of republican thought are far less Cartesian and also attempt to develop conceptions of politics unaffected by gender and other unjust hierarchies.[145] Some modern forms of republicanism furnish no sharp split between public and private interests, and attempt to channel self-interest in such a way as to promote the common good.[146]

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139. President Johnson's War on Poverty and President Carter's response to the energy crisis are conspicuous recent examples.

140. There is also an issue of gender here: the military metaphor traditionally operated to exclude women. *See* H. PITKIN, *supra* note 1, at 4 (suggesting that Machiavelli was "both a republican and something like a protofascist").

141. See the discussion of Aristotle in J.G.A. POCOCK, *supra* note 3, at 66–80; *see also* J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 5 (1982).

142. *See* H. ARENDT, *supra* note 137, at 86–110 (discussing the social question); *see also* Pitkin, *supra* note 52, at 334–38 (criticizing Arendt); R. BERNSTEIN, PHILOSOPHICAL PROFILES (1985) (same); *compare* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY 273–338 (1985) (emphasizing possible role of reason in generating social norms) *with* I. BALBUS, MARXISM AND DOMINATION (1983) (criticizing Habermas as excessively rationalistic).

143. This view is of course associated with one reading of Kant. *See* C. TAYLOR, *Kant's Theory of Freedom*, in PHILOSOPHY AND THE HUMAN SCIENCES 318 (1985).

144. *See supra* note 140; H. PITKIN, *supra* note 1, at 5 ("From the political ideals of ancient Athens to their recent revival by Hannah Arendt, republican activism seems to be linked to 'manly' heroism and military glory, and to disdain for the household, the private, the personal, and the sensual."); G. LLOYD, THE MAN OF REASON (1984); J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN (1981).

145. *See* B. BARBER, STRONG DEMOCRACY 198–203, 233–44 (1984); H. PITKIN, *supra* note 1, at 300–04.

146. *See also* Ackerman, *supra* note 6; Skinner, *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in PHILOSOPHY IN HISTORY 193 (R. Rorty, J.B. Schneewind & Q. Skinner eds. 1984).

B. *Liberal Republicanism*

Much of recent writing on constitutional history has focused on a supposed tension between liberalism and republicanism.[147] The basic claim here is that before the framing of the Constitution, republican principles predominated. The framing period reflected a conflict between the two ideologies, out of which liberalism emerged victorious; after the Constitution was enacted, the nation entered into a period of liberalism in which republican principles played at most a subordinate role.[148] There is considerable dispute about the precise extent and timing of the victory of liberalism over republicanism,[149] but this basic chronology captures much of the current historical consensus.

The position has something to be said in its favor. Some forms of liberal thought are inconsistent with the basic tenets of republicanism. They see freedom only as protection from the public sphere; limit the role of government to the prevention of force and fraud; regard existing preferences and entitlements as exogenous to politics; place little premium on political or economic equality; downplay the role of deliberation and virtue; and view the protection of individual self-interest, narrowly defined, as the goal of the state.[150] Views of this sort are at the opposite pole of the republicanism found, for example, in Benjamin Rush, and Rush's views conflict with the species of republicanism outlined here.[151] The hierarchical characteristics of classical republicanism are also in severe tension with liberal thought, which places a premium on individual capacity to break out of traditional roles.

Moreover, antifederalist thought was united, albeit somewhat loosely, by fears of commercial development,[152] belief in civic virtue, and desire for equality and local self-determination. On all of these scores, their federalist opponents were sharp opponents.[153] There can be no doubt that the basic program of the federalists was ultimately vindicated.

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147. *See, e.g.*, Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987). *But see* Kloppenberg, *supra* note 39 (arguing that framers were both liberals and republicans).

148. *See* G. WOOD, *supra* note 3; *see also* J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790's (1984).

149. *See* J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS (1984); J.G.A. POCOCK, *supra* note 3, at 333-552; G. WOOD, *supra* note 3; Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982); Banning, *supra* note 3.

150. Some of these ideas can be traced to T. HOBBES, LEVIATHAN (M. Oakeshott ed. 1946). This presentation of liberalism is, however, offered much more often by critics of liberals than by liberals themselves. *See* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); R. UNGER, KNOWLEDGE AND POLITICS (1975).

151. *See* Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania* (Philadelphia 1786), in 1 AMERICAN WRITING DURING THE FOUNDING ERA 1760-1805 (C. Hyneman & D. Lutz eds. 1983).

152. It is important to note, however, that at its inception the belief in commercial development and private markets was self-consciously an attack on aristocratic rule. *See* A. HIRSCHMAN, *supra* note 93.

153. *See* J.T. MAIN, *supra* note 72, at 10-11, 132, 170, 249-81.

The opposition between liberal and republican thought in the context of the framing is, however, largely a false one. Only through a caricature of the tradition[154] can liberalism be thought to be the antonym of the species of republicanism that operated during the constitutional period. The caricature singles out relatively marginal species of liberalism—possessive individualism or modern neo-Lockeanism—and treats them as representative and central. But most of the great liberal thinkers did not take interests as prepolitical. Indeed, they placed a high premium on deliberation and discussion,[155] and on the capacity of political dialogue to improve outcomes and to undermine unjustified disparities in power. It is a similarly large mistake to suggest that liberal thinkers believed that threats lay only in government intrusions and that there was no right to protection from private power.[156] Liberal thinkers have been alert to the threats posed by both public and private power and have sought to design systems to limit both threats.[157] It should not be forgotten that the original purpose of the social contract was to redistribute security.[158] Certain aspects of Rawls' *A Theory of Justice*[159] speak powerfully for these features of the liberal tradition, and embody much of the contemporary appeal of republican thought.[160]

Some elements of the liberal tradition are highly congenial to republican conceptions of politics. In their emphasis on the possibility of forming public policy through deliberation, on political equality, on citizenship,

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154. C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1975); *see* Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV 83 (1987); White, *The Studied Ambiguity of Horwitz's Legal History*, 29 WM. & MARY L. REV. 101 (1987); *cf.* Herzog, *As Many As Six Things Before Breakfast*, 75 CALIF. L. REV. 609 (1987) (criticizing various caricatures of liberalism).

155. *See, e.g.*, J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861); J. MILL, PRINCIPLES OF POLITICAL ECONOMY (1848 & photo. reprint 1965); J. Rawls, *supra* note 17; W. BAGEHOT, PHYSICS AND POLITICS (J. Barzun ed. 1948) (dealing with "government by discussion"); E. BARKER, REFLECTIONS ON GOVERNMENT 67–68 (1942); J. DEWEY, THE PUBLIC AND ITS PROBLEMS 143–84 (1946); S. HOLMES, *supra* note 2, at 141–44.

156. This is suggested by many critics of liberalism, including, for example, C. MACKINNON, FEMINISM UNMODIFIED 32–45 (1987) and M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

157. *See* J. RAWLS, *supra* note 17; Holmes, *Liberal Guilt: Some Theoretical Reflections on the Welfare State*, in RESPONSIBILITY, RIGHTS AND WELFARE (D. Moon ed. 1988).

158. *See* Holmes, *supra* note 157.

159. *See* J. RAWLS, *supra* note 17; *see also* N. ROSENBLUM, *supra* note 9, at 152–86 (discussing ability of liberalism to incorporate, among other things, some goals of communitarian critics of liberalism).

160. The requirements of Rawls' original position, *see* J. RAWLS, *supra* note 17, thus overlap with the basic republican tenets described above. The veil of ignorance ensures that self-interest, as ordinarily understood, is not the motivating force of political judgment; since political actors represent everyone, the distorting force of interest is removed. The purpose of the original position is not to ensure that political actors are disembodied, but to enable them to see from multiple perspectives. *See* Okin, *supra* note 82.

The veil of ignorance also ensures a degree of political equality, and beliefs in universalism and citizenship lie at the core of Rawls' theory. Consider section 54 of A THEORY OF JUSTICE, where Rawls discusses majority rule in strikingly Madisonian terms and offers a straightforward rejection of interest-group pluralism. J. RAWLS, *supra*, at 356–62.

and on the salutary effects of publicity, republicanism and liberalism are as one. All four of the basic republican commitments find a home within the liberal tradition. In both systems, moreover, a requirement of neutrality or impersonality,[161] meant in a particular way, plays an important role. The notion of neutrality is easily misunderstood, and criticism of the notion has become quite fashionable.[162] Such criticisms are justified when the notion is based on an unarticulated substantive theory that denies its status as such,[163] implies unreflective preservation of the existing set of preferences or the existing distribution of wealth and entitlements, or suggests the possibility of developing an elaborate social theory without making value choices.[164] But the notion seems more plausible if it is understood more modestly as requiring (a) that certain considerations not be taken into account and (b) that political actors offer public-regarding justifications for social outcomes, or for deviations from ordinary norms. The requirement of abstraction from certain considerations—like religion or political affiliation—is the most familiar example of the first requirement; much of constitutional law is a product of the second.[165]

On this view, republican neutrality calls for the consistent application of the correct substantive theory, or even the consistent application of the speaker's own substantive theory. This idea is closely associated with the republican belief in political equality. The requirement of consistency or generalization that lies at the heart of notions of neutrality is a prominent equal protection principle.[166] The degree of constraint imposed by this requirement is of course a controversial and difficult question; but it would be a large mistake to abandon the idea altogether, or to attempt to eliminate its antonym, partiality or bias. If such notions were eliminated, similar ideas would undoubtedly arise with slightly different verbal formulations.[167] Consider the idea that theories of moral development are partial because they are based on male models,[168] or that much of the law of sex discrimination embodies a male referent.[169]

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161. *See* J.G.A. POCOCK, *supra* note 3, at 226–27 (the term *liberta* both "denotes a state of affairs in which every citizen participates as fully as possible in decision-making, and . . . one in which laws, not men, are supreme and the individual receives his social benefits from impersonal public authority and not at the hand of individuals").

162. *See, e.g.*, C. MACKINNON, *supra* note 156, at 164–66. *See generally* Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10 (1987).

163. *See* Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

164. *See* Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873 (1987).

165. *See* Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984).

166. *See* Railway Express Agency v. New York, 336 U.S. 106, 111–15 (1949) (Jackson, J., concurring).

167. *Cf.* J. HABERMAS, *supra* note 58, at 336, 294 (criticizing approaches that stress the inevitable relations between knowledge and power for giving "no account of their own position," and for becoming "compelled to a relativist self-denial" and an inability to give an "account of the normative foundations of [their] own rhetoric").

168. C. GILLIGAN, IN A DIFFERENT VOICE (1982).

169. *See, e.g.*, C. MACKINNON, *supra* note 156, at 32–45.

In both liberal and republican systems, moreover, self-interest is an insufficient basis for political outcomes. In both systems, "rights" are not prepolitical givens, but the products (sometimes given constitutional status) of a well-functioning deliberative process. In both systems, social justice requires one "not to be a disembodied nobody," but instead to attempt "to think from the point of view of everybody."[170] The most collectivist forms of republican thought[171] are of course at odds with the most atomistic versions of liberalism;[172] republican thinkers who endorse traditional hierarchies reject the liberal emphasis on political and social freedom for the individual; but in numerous respects republicanism and liberalism are hardly antonyms. Republican thought, understood in a certain way, is a prominent aspect of the liberal tradition.

The elaboration and defense of liberal republicanism is a large task indeed, but it is possible to describe some of the sources of its appeal. Liberal republicanism is responsive to an understanding of freedom as including critical distance from and scrutiny of ends. Republican thought treats this as a plausible conception of both individual and collective freedom; it sees political liberty in collective self-determination;[173] while it does not regard political participation as the sole good life for human beings, it attempts to provide outlets for citizen control and local self-determination.

At the same time, liberal republicans are fearful of public power, and impose numerous constraints on the operation of the public sphere. Both private rights and institutional arrangements are understood, however, as the outcome of a well-functioning deliberative process. Liberal republicanism is simultaneously responsive to possible abuses of both public and private power; it understands that the private sphere is constituted by public decisions, but treats that unsurprising insight as a reason for preservation rather than obliteration of constraints on government. Liberal republicanism attempts to limit disparities in political influence among various groups, including blacks and whites and rich and poor. In this respect, American republicanism must be understood not only in terms of the framing period, with its occasional strategies of exclusion, but also in terms of the Civil War amendments and the New Deal, with their more inclusionary approaches to public life. Endorsing the modern belief in individual rights, liberal republicanism is able to incorporate powerful and widely-held conceptions of both freedom and equality. And it is antagonistic to approaches that see politics as a replication of the existing distribu-

170. Okin, *supra* note 82; *cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) ("I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case.").

171. *See infra* notes 184–89.

172. *See supra* notes 149–50, 154.

173. *See* H. PITKIN, *supra* note 1, at 7, 300–04.

tion of social power, that take existing preferences for granted or downplay the deliberative functions of politics, and that deny the possibility of mediating social disputes in ways that are generally acceptable.

To outline these points, or to suggest that political actors should "think from the point of view of everybody," is not sharply to limit the category of permissible approaches, let alone to solve particular problems. A large task for the future is to be quite concrete about the consequences of republicanism, properly understood, for social theory and legal reform. That task has three components. The first is to generate the appropriate device, or standpoint, from which to develop principles of social justice; the second is to describe those principles, having carried out the first task; the third is to describe institutions and rights with which to implement the relevant principles.

A number of prominent efforts draw on one or more of the principles to which republicanism is committed. Thus utilitarian understandings, committed to universalism, attempt self-consciously to take account of everyone's point of view.[174] Other theories, making deliberation and political equality central, attempt to derive substantive constraints from the ideas of neutral dialogue[175] and undistorted communication.[176] Rawls' own approach of course relies on the original position, attempting to ensure that those developing principles of justice are not influenced by factors that are irrelevant from the moral point of view.[177]

It would be foolish to attempt in this space to evaluate these various approaches, which, for all their diversity, overlap in important ways with liberal republicanism as set out here. From the republican standpoint, however, some of the difficulties in these approaches are apparent. In many forms, utilitarian understandings take existing preferences as exogenous variables—an approach entirely foreign to republicanism.[178] Moreover, on republican grounds it is unclear that "neutrality" among competing conceptions of the good life is always desirable[179] evèn if it were possible for governmental institutions[180] to achieve it. It is also quite doubtful that the notion of neutrality, at least as understood by some, can generate powerful substantive constraints on political outcomes.[181] Enor-

174. *See, e.g.*, R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT 107-16 (1981).

175. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12, 327-48 (1980).

176. Habermas has so suggested in numerous places. *See, e.g.*, J. HABERMAS, *supra* note 58, at 294-326.

177. *See* J. RAWLS, *supra* note 17, at 17-22.

178. *See* J. ELSTER, *supra* note 16, at 109-40. It is possible, however, to have forms of utilitarianism that do not do this. *See, e.g.*, J. RILEY, LIBERAL UTILITARIANISM (1988).

179. *See* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). The "neutrality" endorsed *supra* notes 160-69 and accompanying text is a much weaker constraint.

180. *See* West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985) (discussing Dewey's liberalism).

181. Fishkin, *Can There Be a Neutral Theory of Justice?*, 93 ETHICS 348 (1983) (arguing against use of neutrality as basis of social theory).

mous work is necessary to unpack the notion of "distortion" in communication and to explain its role in developing theories of social justice.[182] Standing by itself, the concept depends on a highly ambiguous ideal case.

For republicans, the problem with the original position as a guide to political institutions or as a political ideal[183] is that it is too solitary and insufficiently dialogic. The task for political actors is to generate institutions that will produce deliberation among those differently situated, not to mimic the decisions that would be made by the unsituated—a problem taken up below.

We may therefore suggest that the basic republican commitments will tend in the direction of guarantees of political deliberation, including the basic rights of political participation; the republican beliefs in political equality and citizenship will generate strong antidiscrimination norms; republicanism is likely as well to furnish basic guarantees of security, in the form of both private property and minimum welfare entitlements; and republican approaches will attempt to promote deliberation among multiple voices in the political process.

C. *Antirepublicanism*

In all of its various forms, republican conceptions of politics have been subject to vigorous criticism. Some observers have suggested that the belief in deliberative government is romantic and anachronistic—incompatible with the inevitably self-interested character of modern political life.[184] In this view, efforts to ensure civic virtue on the part of citizens and representatives are simply impractical—a diversion from more promising strategies for reform. A related objection would suggest that deliberation is purely formal, imposing no substantive constraints on political outcomes; on this view, any such constraints are the product of something other than deliberation.

Others stress the dangers of totalitarianism that are built into the traditional republican belief in the subordination of private interests to the common good.[185] Consider in this regard Benjamin Rush's suggestion that each citizen

> should be taught that he does not belong to himself, but that he is public property. Let him be taught to love his family, but let him be

182. Lukes, *Of Gods and Demons: Habermas and Practical Reason,* in HABERMAS: CRITICAL DEBATES 219, 234–37 (J. Thompson & D. Held eds. 1982) (criticizing Habermas for failing to do that work).

183. This is not, of course, the way Rawls intended the original position to be understood. Institutions of the sort described below might be necessary in order to generate real-world processes and outcomes that the original position is designed to produce as an analytical tool.

184. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1 (discussing self-interested character of legislative process).

185. *See* Herzog, *supra* note 2; K. Sullivan, *supra* note 2.

> taught at the same time that he must forsake and even forget them when the welfare of his country requires it. . . . From the observations that have been made it is plain that I consider it as possible to convert men into republican machines. This must be done if we expect them to perform their parts properly in the great machine of the government of the state.[186]

In the same vein, Rousseau suggested that the "newly-born infant, upon first opening his eyes, must gaze upon the fatherland, and until his dying day should behold nothing else."[187] Such understandings of republicanism allow and indeed encourage the imposition of a comprehensive view of social life on the nation as a whole.[188] From this point of view, interest-group pluralism seems quite attractive in its willingness to allow pursuit of divergent conceptions of the good. Pluralism understood in quite another sense—as respect for diverse social groups, public and private, living different lives—appears to be an especially desirable alternative.

Some of the most interesting criticisms of republican theories have come from those who have little sympathy for interest-group pluralism as it is conventionally understood. The basic point here is that some of the central notions of republican politics—deliberative politics, universalism, and citizenship—ignore the persistence of differences and oppositions among groups in society.[189] In a large and diverse nation, there is no common good to be mediated through discussion; there is no unitary political truth; there are instead irreducibly opposed perspectives and interests. In this view, the problem of modern politics is emphatically not that political actors have been disabled from bringing prepolitical interests to the process.

Above all, social groups—especially the disadvantaged—should not, in this view, be prevented from invoking their private interests in the political process. A central purpose of political discourse is to enable such groups to bring about reform by doing precisely that. The conception of a civic public thus depends on a denial of difference and a belief in transcendence of context—unrealistic aspirations that threaten to forestall desirable change. An approach to politics that seeks to remove such issues from politics, to operate on the basis of a myth of commonness, and to remove prepolitical interests, leads in unproductive directions. What, in such a system, will politics be about?[190]

This view stresses the difficulties of basing a modern political system on beliefs in deliberation, common good, and universalism. A related problem with republican understandings is that they put a high premium on delib-

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186. *See* Rush, *supra* note 151, at 684, 687.

187. J. ROUSSEAU, THE GOVERNMENT OF POLAND 21 (W. Kendall trans. 1972).

188. *See* J. Rawls, The Priorty of the Right (1987) (unpublished manuscript on file with author).

189. I draw heavily here on Sullivan, *supra* note 2, and Herzog, *supra* note 2. *See also* Minow, *supra* note 162 (discussing problems of differentiating among various social groups).

190. *Cf.* Pitkin, *supra* note 52 (arguing against Arendt's conception of politics on this ground).

eration through public processes and through the state, and undervalue the need for intermediate organizations, often nominally private, that serve both as checks on government and as arenas for the cultivation and expression of republican virtues.[191] The most powerful statement of this position can be found in Tocqueville.[192]

Citizenship, understood in republican fashion, does not occur solely through official organs. Many organizations—including labor unions, religious associations, women's groups of various sorts, civil rights organizations, volunteer and charitable groups, and others, sometimes marking themselves outside of and in opposition to conventional society—serve as outlets for some of the principal functions of republican systems. These functions include the achievement of critical scrutiny of existing practices, the provision of an opportunity for deliberation within collectivities, the chance to exercise citizenship and to obtain a sense of community, and the exercise of civic virtue, understood as the pursuit of goals other than self-interest, narrowly conceived. The problem with at least some forms of republicanism is that they tend to ignore or devalue groups of this sort. What is needed, on this view, is a more differentiated approach to the relationship between citizen and state than that afforded by republican theories.

Antirepublicans of this sort do not rely on possessive individualism, and they are at pains to distinguish themselves from pluralists. Many of them are dissatisfied with the existing distribution of resources and opportunities. Interest-group deals, under the pluralist conception, are no more attractive to them than to republicans, and for the same reasons; they simply replicate the existing distribution of social power. But there is considerable overlap between the view of antirepublicans of this sort and that of the pluralists. In both approaches, interests are seen as largely exogenous and prepolitical; in both, politics in governmental processes is a matter of self-interests, and largely of deals; in both, it is normal and legitimate for political actors to seek goods or opportunities solely on the ground that it is in their interest to do so; in both, there is reason for considerable suspicion about the state, and in particular about measures that purport to reflect a unitary public good; in both, spheres of individual and group autonomy are highly valued; in both, the notion of mediation among conflicting conceptions of the good seems fanciful. The republican belief in a disjunction between prepolitical interests and political behavior is the principal object of attack as an ideal that is both unrealistic and undesirable.

These challenges to republican approaches correctly emphasize the im-

191. *See* N. ROSENBLUM, *supra* note 9, at 143-47, 155-60.

192. *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 68-70, 189-93, 242-43, 520-24 (J. Mayer ed. 1969).

portance of private association and the difficulties in some conceptions of universalism. The task of incorporating into republican theories the need for intermediate organizations to be insulated from the state is a large and critical one. But antirepublicanism of this sort carries serious risks as well. Intermediate organizations serve a variety of important functions, but recognition of that point does not eliminate the need to describe the appropriate role of the state and national governments. One must, in short, explain what it is that the government should do, and here the reference to intermediate organizations is inadequate.

This is so for two principal reasons. First, an approach that sees the locus of republican virtues exclusively in private institutions undervalues the distinctive capacities of the state. In view of those capacities, political deliberation and citizenship must occur within public institutions as well. It should be a familiar point that the government is uniquely able to undertake a wide range of tasks, including (for example) the elimination of discrimination, the regulation of broadcasting, and the protection of the environment. Tasks of that sort cannot be undertaken entirely by private actors.

Second, multiple threats are posed by private power, including that wielded by intermediate organizations, which are themselves a source of oppression.[193] Government must therefore play a role in limiting the powers of such organizations[194] without denying the importance of their continued existence. A system that allowed intermediate organizations to proceed without regulation would lead to intolerable results.

The unifying theme of antirepublican arguments is an attack on the ideals of universalism and impartiality; the relevant arguments stress the importance of situatedness and perspective, but it is here that the attack is itself most vulnerable. Properly understood, the principle of universalism[195] does not deny the existence of different perspectives, and it does not assert that political participants must put their private complaints to one side when they come to politics. The belief in universalism affirms instead that some perspectives are better than others, and that that claim can be vindicated through discussion with those initially skeptical. Republican theories do not claim that there is a standpoint unsituated in the world; they do not impose a particular, parochial perspective in the guise of neu-

193. On the latter point, see C. TAYLOR, HEGEL AND MODERN SOCIETY 116-18 (1979); N. ROSENBLUM, *supra* note 9, at 155-60.

194. Recent examples include Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) and Roberts v. United States Jaycees, 468 U.S. 609 (1984); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The issue has arisen most frequently in efforts to use norms prohibiting sex discrimination against all-male organizations, *see* Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1986), and here there is good reason for a governmental role in countering practices by intermediate associations.

195. The idea is distinct from impartiality. It would be possible to reject impartiality as an unrealistic aspiration but at the same time to believe in the possibility of mediating different claims about social norms.

trality. Instead they require public-regarding justifications offered after multiple points of view have been consulted and (to the extent possible) genuinely understood.[196] Such an approach is the foundation of contemporary republicanism. It is for this reason that republican conceptions treat an understanding of the partiality of one's own perspective as a regulative ideal for politics, and are highly suspicious of approaches that see prepolitical interests as the exclusive determinants of political participation.

The antirepublican critique rejects this approach as unrealistic and misguided. But the categories to which it refers and the commitments that it embodies are highly likely to reflect republican understandings. For example, spheres of autonomy for individuals and groups must be defended on some ground; they cannot be justified as prepolitical; and if the defense is to be persuasive, it will have to incorporate republican notions of deliberation and universalism. Indeed, the very conception of a disadvantaged group—central to some attacks[197] on republican notions of universalism—depends on a commitment to an understanding of what disadvantage amounts to, and a belief that the understanding can be vindicated through discussion with those initially skeptical.[198] The antirepublican critique, like many arguments of this sort, "can give no account of the normative foundations of its own rhetoric."[199] Arguments that reject universalism tend to disable themselves from supporting their own descriptive and normative commitments; arguments that reject neutrality eliminate a possible source of argument that is not only strategically useful, but an accurate description of what is sometimes at work.[200]

Republicans do not insist that political actors must forget their private concerns, or that differences and disagreement are inadmissible in politics. A belief in universalism need not be accompanied by a desire to erase differences. Indeed, republicans see disagreement as a creative and productive force, highly congenial to and even an indispensable part of the basic republican faith in political dialogue.[201] Discussion and deliberation

196. *See* Okin, *supra* note 82. Of course this idea, standing by itself, will not resolve particular problems—a difficulty that also infects attempts to use "empathy" as a tool for solving political or legal problems.

197. *See* Young, *supra* note 2.

198. The attack on universalism, if it is to be successful, will work not only interpersonally, but also intrapersonally. Deliberation occurs within the self as well as among different people. Theories that incorporate notions of situated selves so as to criticize universalism and to celebrate differences in perspective ultimately threaten to produce solipsism, or highly disaggregated conceptions of the person. *Cf.* D. PARFIT, REASONS AND PERSONS 219–44 (1984) (exploring different conceptions of the person over time).

Problems of the sort discussed in the text severely complicate efforts to describe and value a perspective without claiming its status as truth, understood pragmatically or in some other terms. *See* J. HABERMAS, *supra* note 58, at 294, 336–37.

199. *Id.* at 294.

200. *See supra* notes 161–69.

201. *See* THE FEDERALIST No. 70, at 427 (A. Hamilton) (C. Rossiter ed. 1961) (arguing that "differences of opinion" and "jarring of parties" can "promote deliberation"); H. PITKIN, *supra* note 1, at 90 ("A plurality of classes and interests is necessary to the Citizen vision not merely because

depend for their legitimacy and efficacy on the existence of conflicting views.[202] The basic constitutional institutions of checks and balances and federalism should be understood at least partly in this light. Modern republicanism is thus not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work. As we shall see, this understanding will call for institutional innovations.[203]

It would be extraordinarily foolish to suggest that disparities in perspective and power do not complicate and distort deliberative processes, or to claim that exhortations to citizens and representatives to consult the common good are sufficient to bring about desirable results. And it would be a mistake to suggest that the republican commitments as described here lead directly to a particular social theory or a particular set of institutional arrangements. Large questions—having to do with the appropriate conception of rights, institutions, and groups—remain to be resolved. But the question is one of governing ideals; and here liberal republicanism is superior to its competitors.

III. IMPLICATIONS

Republican thought, thus understood, furnishes the basis for approaching a variety of issues in modern public law in somewhat different ways. To be sure, one cannot simply "apply" republican ideas as if they provided self-evident solutions to contemporary legal problems; there will be room to contest any particular application. But many contemporary controversies look quite different if viewed through the lens of the republican tradition. Some of these controversies involve public law doctrine in the courts; most of them call for initiatives from nonjudicial bodies. For the most part, the discussion of particular areas will be brief and summary, attempting to suggest how republicans would approach a variety of problems rather than to examine those problems in detail.

A. *Campaign Finance Regulation; Marketplaces and Freedom of Expression*

Consider, for example, the problems raised by modern campaign finance regulation. Such regulation has often been challenged on the ground that it is inconsistent with the "marketplace of ideas"—indeed, that it effects a kind of First Amendment taking from rich speakers in

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each has its unique perspective and spirit to contribute to the community, but also because internal conflict is an essential and healthy phenomenon in its own right."); *id.* at 82 ("Citizen *virtue* is not the product of a uniform solidarity of identification or obedience. Indeed, in the Citizen vision, precisely plurality, competition, diversity, rather than uniformity, are the source of . . . strength." (emphasis in original)); *id.* at 300–04; *cf.* Michelman, *supra* note 6.

202. See the discussion of "Machiavelli at his best" in H. PITKIN, *supra* note 1, at 285–327. *See also* Manin, *supra* note 83, at 360–61.

203. *See infra* notes 249–65 (discussing proportional representation).

order to help poorer ones. It was under this rationale that the Supreme Court invalidated campaign finance regulation in *Buckley v. Valeo*.[204] There the Court said that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[205] The Court did not hold that the effort to promote deliberation among political equals was insufficiently weighty, or inadequately promoted by the legislation at issue; the Court held, much more sweepingly, that that effort was illegitimate under the First Amendment.

Under a republican approach to the First Amendment, campaign finance regulation would be treated far more hospitably. At least some forms of regulation would be seen as plausible efforts to promote rather than to undermine First Amendment purposes, by counteracting the distortions brought about by expenditures on political campaigns. A deliberative conception of the First Amendment, incorporating a norm of political equality,[206] would lead to a quite different analysis from the marketplace model, which has significant pluralist overtones. Above all, the *Buckley* Court's hostility to redistributive rationales for regulation would dissipate.

To be sure, there are large difficulties in designing a system of campaign finance regulation that achieves its intended purposes and that does not serve as an incumbent protection measure.[207] But republican understandings would point toward large reforms of the electoral process in an effort to improve political deliberation and to promote political equality and citizenship.

For similar reasons, republican ideas offer reasons to reject recent attacks on the fairness doctrine in the broadcast and print media. Such ideas suggest that efforts to promote access to sources of public deliberation should be treated quite hospitably; and that the exclusive use of the economic market to regulate such access is undesirable. It is for this reason that on the republican view a principal current threat to a well-functioning system of free expression lies, not in government regulation, but in

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204. 424 U.S. 1 (1976).

205. *Id.* at 48-49.

206. *See* A. MEIKLEJOHN, FREE SPEECH IN AMERICA (1946); *see also* Rawls, *Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 76 (S. McMurrin ed. 1982). According to Rawls:

> [T]he Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage. . . . On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.

Id.

207. *See, e.g.*, PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS (M. Malbin ed. 1981).

government "inaction" that allows the political process to be excessively influenced by disparities in private wealth and private access.[208]

B. *Federalism and Intermediate Organizations*

A critical feature of the learning of the New Deal period—one with continuing influence on American law—is that the original constitutional structure of dual sovereignty was a large mistake, allied with anachronistic goals of limited government and inconsistent with the need for continuing national intervention into marketplaces.[209] But one of the great strengths of the original constitutional system was its simultaneous provision of deliberative representation at the national level and self-determination at the local level, furnishing a sphere for traditional republican goals. A central lesson of the republican revival is the need to provide outlets for self-determination in the public and private spheres.[210] The Tocquevillian understanding of a variety of groups, some in local government, some in purely private organizations, furnishes an alternative understanding, far superior to the New Deal model.

Understandings of this sort lead in a variety of directions. In the area of labor law, collective bargaining appears superior to uniform national standards.[211] "Reconstitutive law"—reforms that allow state and local flexibility by restructuring markets rather than imposing inflexible national commands—should be viewed hospitably.[212] Proposals to loosen restrictions in federal grant programs are an example. From the republican point of view, efforts to promote workplace democracy also hold out considerable promise.[213] Interpretations of the establishment clause should recognize the role of religious organizations in the cultivation of republican virtues;[214] approaches to the clause that end up disfavoring religion[215] undervalue the role of intermediate organizations in a pluralistic society.

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208. *See also* Michelman, *Law's Republic,* 97 YALE L.J. 1493 (1988).

209. *See* G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 101-10 (1966); Sunstein, *supra* note 115, at 440-43.

210. *See* B. BARBER, *supra* note 145; McConnell, *Federalism: Evaluating the Framers' Design,* 54 U. CHI. L. REV. 1484, 1493-1511 (1987); Sunstein, *supra* note 115, at 504-08.

211. Thus the proposals in Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects,* 51 U. CHI. L. REV. 1012 (1984), point in precisely the wrong direction. *See* P. WEILER, THE FUTURE OF LABOR AND EMPLOYMENT LAW: REFLECTIONS ON WRONGFUL DISMISSAL WITHIN THE MARKET, THE LAW, AND COLLECTIVE BARGAINING (temp. ed. Oct. 1987).

212. *See* R. STEWART, FEDERALISM AND POLITICAL ECONOMY IN THE GREAT REPUBLIC (forthcoming 1989).

213. *See* R. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985); E. GREENBERG, WORKPLACE DEMOCRACY (1986); C. GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES (1984).

214. *See* McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1. There is no inconsistency between the desire to remove religious issues from politics, *see supra* text accompanying note 85, and the claim that accommodation of religion will be desirable in the interest of neutrality. Measures that accommodate religion may be necessary in order to avoid disfavoring religion through facially neutral statutes that exclude religious organizations; accommodation is thus not inconsistent with a general desire to remove religious controversy from the political agenda.

215. *See, e.g.,* L. PFEIFFER, CHURCH, STATE AND FREEDOM (1975).

C. *Rationality Review*

Courts review statutes for "rationality" under a variety of constitutional provisions, including the due process, contracts, takings, and equal protection clauses.[216] To some, the idea that statues must be "rational" is inconsistent with the nature of the political process, which consists of "deals" among self-interested actors.[217] But the requirement of rationality is best understood as a requirement of deliberation by political officials. The Constitution requires some showing that a burden was imposed, or a benefit denied, for a reason other than the exercise of political power by the advantaged class. In its requirement of an element of deliberation in politics, rationality review recalls republican themes, indeed it is closely associated with Madisonian theories of representation.[218] Whether or not constitutional courts should enforce the rationality norm more vigorously,[219] the norm does have constitutional status, and its continuing existence reveals the tenacity of deliberative conceptions of politics.[220]

D. *The* Lochner *Era*

The republican tradition also furnishes a different angle from which to understand the lesson of the *Lochner* period. In that period, the Supreme Court invalidated a wide range of regulatory measures, frequently by invoking libertarian conceptions of private rights. The *Lochner* period is frequently understood as a lesson in institutional role, revealing the risks of an aggressive judicial function in overseeing the political process.[221] But a different understanding would stress issues of substance as well as of institutional competence.

Such an understanding would emphasize the extent to which the *Lochner* Court posited the existence of a natural and prepolitical private sphere, one that served as a brake on legislation. The creation of such a sphere, based on a theory of natural rights, coexists uneasily with republican conceptions of politics. Republicans do of course believe in rights, understood as the outcome of a well-functioning deliberative process; hence republicans enthusiastically endorse the use of constitutionalism as a check

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216. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Schweicker v. Wilson, 450 U.S. 221 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical, 348 U.S. 483 (1955).

217. *See, e.g.*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Posner, *supra* note 184, at 27–31.

218. *See* Sunstein, *supra* note 6.

219. *See id.*

220. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing constitutional norms not enforced by courts).

221. *See, e.g.*, J. ELY, *supra* note 63 (arguing that courts should protect rights of process rather than substance). *But see* Sunstein, *supra* note 164 (arguing that lesson of *Lochner* lies in common law or staus quo baselines); Horwitz, *supra* note 7, at 1827–30 (suggesting that *Lochner* was rooted in conception of rights as prepolitical).

on popular majorities. But republicans are skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation.

On this view, the problem with the *Lochner* Court was its reliance on common law and status quo baselines; the Court was unable to see the ways in which those baselines were implicated in, indeed a product of law.[222] The heirs of *Lochner*, understood through a republican lens, are not cases like *Roe v. Wade*,[223] but instead such decisions as *Bowers v. Hardwick*[224] and *Washington v. Davis*.[225] Both decisions rely on status quo baselines and downplay the role of law in creating existing practice. Thus *Hardwick* relies on the fact that gays and lesbians have not been permitted to marry, when marriage is in fact a creature of the legal system; thus *Washington v. Davis* disregards the fact that the existing distribution of benefits and burdens between blacks and whites is a function of the legal system, and not exogenous to it. On the republican view, *Lochner, Hardwick*, and *Washington v. Davis* share the same defect: they ignore the constitutive functions of law and the ways in which existing practices are dependent on past and present choices of the legal system.

E. *Disadvantaged Groups*

Republican thought might also provide a basis for understanding that the role of constitutionalism is countering classifications in such areas as race, sex, sexual orientation, and poverty. A central concern here is that

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222. In *Lochner* itself, the problem was that the Court took as natural and prepolitical a sphere whose origins lay in the common law itself. On this view, there is a close association between *Lochner* and Plessy v. Ferguson, 163 U.S. 537 (1896). In *Plessy*, the Court said that the plaintiff's argument

> assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences . . . .

Id. at 551. Arguments of this sort would be at least coherent in the context of a forced integration law; they are plausible in the setting of *Plessy* only if the segregative status quo is treated as prelegal. Both *Plessy* and *Lochner* acted as if the law is facilitative rather than constitutive or—to put the point slightly differently—as if there is perfect transparency between individual will and legal constraints, and the latter has no impact on the former—a belief that infects much of current law, and that would be impossible to sustain under republican premises. *See infra* notes 224–25.

223. 410 U.S. 113 (1973).

224. 478 U.S. 186 (1986). The central point here is that the Court decided the case by noting that it did not involve marriage. But marriage is hardly prepolitical or prelegal; it is the state that decides who may marry whom. The fact that gays and lesbians may not marry should not, on the republican view, be taken as a prepolitical barrier to the plaintiff's claim, but instead as part of a range of data that support an equal protection challenge to measures discriminating on the basis of sexual orientation. *See* Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

225. 426 U.S. 229 (1976). To criticize the Court's reason on this ground is not to deny the difficulties in developing a workable alternative to an "intent" test.

the values supporting such classifications are the product of social power; they must therefore be subject to scrutiny and review.[226]

In this view, judicial decisions that take a skeptical approach to such classifications are consistent with the rejection of the *Lochner* decision, not with *Lochner* itself. Republican premises might eventually serve as the foundation of a theory of social subordination to undergird constitutional hostility to discrimination against various social groups. The republican beliefs in political equality and deliberation would function as the defining notions. The argument here would have to be quite elaborate, but some of its foundations can be found in current law.[227]

There is an irony here. Republican thought has traditionally been allied with exclusionary practices. It is thus odd to invoke republicanism as a basis for rejecting those same practices. But the premises of republican thought furnish an aspiration that turns out to provide the basis for criticism of republican traditions. There is nothing especially unusual in this phenomenon. Frequently cultural commitments are used to revise cultural practices; indeed those who attempt to revise existing practice inevitably draw on traditional commitments.[228] The use of republican aspiration to counteract republican practice is simply an illustration of this general proposition.

F. *Statutory Construction*

In recent years, there has been something of a revival of interest in theories of statutory construction. It should not be controversial to suggest that approaches to construction are informed by theories of the political process. Thus it is suggested that courts should understand statutes as "deals" among self-interested actors and enforce them as such.[229] Suggestions of this sort of course are an outgrowth of interest-group pluralism.[230] The idea that the role of the court is solely to implement congressional purposes in the particular case is also congenial to pluralist understandings. On the republican view, by contrast, one of the tasks of statutory construction is to promote actual deliberation in the lawmaking process and to interpret statutes, within the appropriate confines of the judicial role, so as to minimize the pathologies of pluralism.[231]

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226. This point has been emphasized above all in the gender cases. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

227. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976).

228. *See* P. RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA (1987); M. WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987).

229. *See, e.g.*, Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

230. Easterbrook, *Statutes' Domains*, *supra* note 229, at 553, is an obvious example; it also invokes a *Lochner*-like presumption in favor of private ordering as a tool of construction.

231. *See, e.g.*, Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

The basic defense of canons of statutory construction is that they are literally unavoidable. In hard cases, statutory construction is impossible in the absence of understandings about the background against which Congress legislates. Moreover, it is possible to understand and defend some canons of statutory construction as a straightforward outgrowth of republican conceptions of politics. Many such canons appear alert to possible malfunctions in the legislative process, and attempt to use interpretation to guard against or limit those malfunctions.[232] In these canons, or "clear statement" principles, one can find the foundations of a republican approach to statutory construction, an approach that repudiates the idea that the only role of the courts is to ascertain legislative intent in the particular case.

Consider, for example, the idea that appropriations measures should not readily be thought to amend substantive statutes.[233] Such a rule might be defended on the ground that the appropriations process is comparatively likely to be dominated by well-organized private groups, that it lacks visibility, and that the outcomes of that process should be narrowly construed. One might on similar lines defend the notion that federal statutes should not easily be thought to preempt state law.[234] The central ideas here are that from the founding period, the federal system has furnished an opportunity for state and local self-determination, and that the national government should not be taken to have interfered with that goal unless Congress deliberated on the express point. Finally, courts sometimes suggest that statutes will be understood as an integrated whole;[235] one part of a statute will not lightly be taken to undermine the general statutory structure. This approach to statutes is controversial to those who believe that statutes tend to be unprincipled trade-offs among private groups. But the idea becomes more understandable if it is understood as an effort to ensure that statutes are not undermined by "deals" that serve as largely invisible qualifications of basic statutory purposes.

These approaches to statutory construction might be defended straight-

232. Some canons of construction attempt to discern the intent of the legislature; others, by contrast, operate as a kind of tie-breaker when legislative intent is unclear, and frequently invoke procedural or substantive goals that are sometimes constitutionally inspired. The notions that statutes should be construed so as to promote state autonomy, *see* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), or to avoid harming Indian tribes, *see* Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), are examples of substantive canons; the claims that deference should be given to agency interpretations of statutes, *see* Chevron USA Inc. v. NRDC, 467 U.S. 837, 865–66 (1984), or that courts should not lightly find that appropriations statutes amend substantive statutes, *see* TVA v. Hill, 437 U.S. 153 (1978), are examples of process-oriented statutes. For general and more detailed discussion of these devices, see Sunstein, Statutes and the Regulatory State (1988) (unpublished manuscript); Eskridge, Public Values in Statutory Construction (1987) (unpublished manuscript on file with author).

233. *See* TVA v. Hill, 437 U.S. 153 (1978); *see also* Devins, *Regulation of Government Agencies Through Limitation Riders,* 1987 DUKE L.J. 456.

234. *See, e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157–58 (1978).

235. *See* Philbrook v. Glodgett, 421 U.S. 707, 713–15 (1975) (discussing intersectional harmony).

forwardly on republican grounds. The narrow construction of appropriations statutes is designed to restrict the effect of measures likely to represent interest-group deals; protection of state and local autonomy recalls the republican belief in local self-determination; in interpreting statutes as integrated wholes, courts minimize the pathologies of pluralism.

In light of massive changes in the nature of the national government since the founding, however, it would be surprising if existing canons of construction were sufficient. And it is possible to outline a series of canons of construction that are designed to promote republican goals in a different institutional environment. All of these canons, to be noted briefly here, have some basis in current law; all of them have been used by courts in the interpretive process. The suggestion here is that they ought to be adopted as self-conscious guides to statutory construction.

1. *Proportionality*

Some cases suggest a judicial perception that statutes should be construed so that the aggregate social benefits are proportionate to the aggregate social costs.[236] This principle, implicit in some of the recent cases,[237] recognizes the risk that well-organized groups might be able to obtain legislation that would likely not be the outcome of a well-functioning Madisonian process. On this view, moreover, regulatory statutes should ordinarily be understood to contain de minimis exceptions. Administrators should generally be authorized to refuse to impose costly regulations for highly speculative or de minimis gains.[238]

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236. *See* Asbestos Information Ass'n v. OSHA, 727 F.2d 415, 423 (5th Cir. 1984).

237. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

238. *See* Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1565 (Fed. Cir. 1988); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987); Center for Auto Safety v. Peck, 751 F.2d 1336, 1342 (D.C. Cir. 1985); Monsanto v. Kennedy, 613 F.2d 947 (D.C. Cir. 1979). *See generally* Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause,* 40 ADMIN. L. REV. 267 (1988); Mumpower, *An Analysis of the De Minimis Strategy for Risk Management,* 6 RISK ANALYSIS 437 (1981).

The difficulty with a proportionality principle or a de minimis exception stems from the fact that there is no uncontroversial metric with which to measure social costs and social benefits. If courts understand benefits and costs technically—as in the economic formulation—and make the assessment turn on private willingness to pay, they will be relying on a highly controversial approach, one that is likely to have been repudiated by the legislature that enacted the program in question. An approach that measures costs and benefits in terms of private willingness to pay is hardly consistent with republican tenets; it would be quite odd to invoke republicanism in order to support such an approach. Many statutes are designed to transform rather than implement preferences, to redistribute resources, or to reflect the outcome of a deliberative process about relevant public values. Moreover, there may be symbolic benefits in a statute that protects (for example) endangered species. Noncommodity values of various sorts are served by regulatory programs, and republican understandings treat those values quite hospitably. The proportionality principle becomes workable on the assumption that in some cases, it will be relatively clear that the social benefits are small in comparison to the social costs, and that in some cases statutes should be construed so as not to permit or require the action at issue. In order to make the principle operational, it will therefore be necessary to make a typology of statutes in terms of redistributive, efficiency, and aspirational functions.

2. *Narrow Construction of Procedural Qualifiers*

An analogous principle, also implicit in the cases, counsels courts narrowly to construe procedural limitations on substantive rights. Many cases involve, for example, the question whether to imply a private right of action to enforce a regulatory statute;[239] the appropriate procedures for adjusting or eliminating a substantive benefit, as in a claimed right to a hearing before elimination of welfare benefits;[240] and the availability of judicial review to test enforcement or nonenforcement.[241] Constitutional questions are of course implicated here. But the constitutional issues are avoided if courts construe procedural qualifications narrowly in the belief that the procedures are less likely to be the product of a deliberative process than the substance, and from fear that procedural qualifications might enable well-organized groups to defeat substantive programs.

3. *Consistency and Coordination*

Courts have also employed clear statement principles of statutory construction so as to help bring about consistency and coordination in the law.[242] Such a role has clear precedent in the context of administrative law. Courts have, for example, aggressively construed statutes of the 1920's and 1930's so as to require old-line agencies to consider environmental concerns.[243] The *Bob Jones* case[244] might best be understood as an effort to ensure that the I.R.S. takes account of the widespread social antagonism toward racial discrimination, as part of the general thrust of "public policy." Some cases limiting agency authority to impose significant costs for speculative benefits can be understood in similar terms.[245] Decisions of this sort might be justified on republican grounds, as part of the integration of statutory systems into a coherent whole that could plausibly be understood as the outcome of deliberative processes.

4. *Promoting Accountability*

Finally, republicans would urge that principles of statutory construction be designed to ensure that decisions are made by those who are politically accountable and highly visible. If the issue is one of allocation of institu-

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239. *See* Stewart & Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193, 1206-07, 1289-1316 (1982).

240. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). For a recent example as a matter of statutory construction, see Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987).

241. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

242. *Cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 82 (1983) (arguing that courts should be allowed to treat statutes as precedents to ensure against statutory obsolecence); Eskridge, *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479 (1987) (arguing that courts should interpret statutes so as to allow for changing social conditions).

243. *See, e.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).

244. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

245. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

tional authority, courts should construe statutes in such a way as to promote political accountability. An example is the Supreme Court's decision in *Hampton v. Mow Sun Wong*,[246] in which the Court held—as a matter of due process—that if aliens were to be prevented from serving as federal employees, the decision must be made by Congress or the President rather than by the Civil Service Commission. In other cases the Court, and individual Justices, have suggested that the Constitution requires that certain disabilities may not be visited on certain groups unless an accountable actor has so decided.[247] Decisions of this sort might be understood as involving a kind of clear statement principle.

These examples are designed simply to illustrate some of the directions in which statutory construction might move if republican understandings were taken seriously.[248] Aspects of republican approaches account for some otherwise surprising practices here, and they might spur further developments as well.

G. *Proportional or Group Representation*

In recent years, there has been a revival of interest in systems of proportional or group representation. Blacks, women, the handicapped, gays and lesbians, and other disadvantaged groups have often had little success in the ordinary electoral process. In particular, the problem of racial block voting has sometimes made it impossible for blacks to elect anyone in certain election districts.[249] This problem—sometimes described as minority vote dilution—produces a system in which blacks and other groups have a much lower percentage of representatives than of the population.[250] Be-

246. 426 U.S. 88 (1976).

247. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 597-611 (1979) (White, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J.); *see also* Gewirtz, *The Courts, Congress, and Executive Policy-making*, 40 LAW & CONTEMP. PROBS. 46, 65-83 (1976) (arguing in favor of clear statement principles to limit executive power).

248. There are other possibilities as well. First, statutes should be construed so as to ensure that collective action problems will be overcome. *See supra* notes 25-31 (discussing failure of pluralism to solve collective action problems); Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 323-24, 330-34 (1988) (same). Second, statutes should be construed favorably to traditionally disadvantaged groups. *See supra* text accompanying notes 62-75 (discussing republican norm of political equality); *supra* text accompanying notes 13-20 (discussing adverse impact of interest-group pluralism on such groups). Note that this latter idea has roots in current law. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979) (implying private cause of action to redress sex discrimination); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (implying private cause of action under Voting Rights Act). Note also that the canon in favor of construing statutes favorably to Indian tribes is an explicit example. A more detailed discussion of statutory construction can be found in Sunstein, *supra* note 232.

249. *See* Davidson & Korbel, *At Large Elections and Minority-Group Representation: A Reassessment of Historical and Contemporary Evidence*, 43 J. POL. 982 (1981); Frickey, *Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of Minority Vote Dilution*, 3 LAW & INEQUALITY 209 (1985); Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984).

250. *See* Note, *supra* note 249, at 163 n.1. For a discussion of group representation of blacks, see generally S. WELCH & A. KARNIG, BLACK REPRESENTATION AND URBAN POLICY (1980); S. WELCH & T. BLEDSOE, URBAN RETURN AND ITS CONSEQUENCES (1987).

cause proportional representation might be justified on pluralist and republican grounds, and because it holds out such substantial promise and risk, it will be useful to discuss the problem in some detail here.

There is a solid constitutional pedigree for group representation, notwithstanding the constant and emphatic rejections of constitutionally-based arguments for representation of members of racial minority groups.[251] Despite the rigidity of the one person-one vote formula,[252] with its majoritarian and individualistic overtones, group representation has always been an important feature of American constitutionalism. At the time of the framing, for example, geography was thought to define distinct communities with distinct interests; representation of the states as such seemed only natural.[253] It would not be difficult to argue that racial and ethnic groups (among others) are the contemporary analogue to groups that were defined in geographical terms during the founding period.

Moreover, the basic constitutional institutions of federalism, bicameralism, and checks and balances share some of the appeal of proportional representation, and owe their origins in part to notions of group representation.[254] These institutions proliferate the points of access to government, increasing the ability of diverse groups to influence policy, multiplying perspectives in government, and improving deliberative capacities.[255] In this respect, they ensure something in the way of group representation, at least when compared with unitary systems. Of course both the separation of powers and bicameralism grow in part out of efforts to promote representation of diverse groups; bicameralism allowed representation of the wealthy and the masses; the notion of separation derived from notions of mixed government, which was designed to ensure a measure of representation of groups defined in social and economic terms.[256]

Proportional representation might be designed to ensure representation in the legislature of all those groups that are able to attain more than a minimal share of the vote. Such a system has variants in Germany, Israel, Italy, and many other countries.[257] In another form, the system might be designed to ensure that members of disadvantaged groups are given the

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251. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980); *cf.* A. THERNSTROM, WHOSE VOTES COUNT? (1987) (criticizing Voting Rights Act for producing proportional representation).

252. Reynolds v. Sims, 377 U.S. 533 (1964).

253. *See* THE FEDERALIST NOS. 45 & 46 (J. Madison).

254. *See* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965) (discussing mixed government).

255. *See supra* note 201.

256. *See* J. ADAMS, *Defence of the Constitutions of Government of the United States,* in 4 WORKS OF JOHN ADAMS 290-91 (C.F. Adams ed. 1851) (emphasizing role of Senate in representing the "rich, the well-born, and the able" and the House in representing "the mass"); D. HELD, *supra* note 9, at 55-61. The American system, however, dramatically departed from these origins.

257. *See* A. LIJPHART, DEMOCRACIES 150-68 (1985). Note, however, that the public choice and Arrow problems referred to in connection with pluralist systems must also be taken into account here. *See* Riker, *Electoral Systems and Constitutional Restraints,* in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES (A. Lijphart & B. Grofman eds. 1984).

power to exert influence on political outcomes.[258] Rather than exhorting political participants to seek the common good, advocates of proportional representation claim that the political process should be structured so as to encourage the expression and affirmation of diverse perspectives and interests.

There is a large literature on various voting schemes designed to serve the end of proportional representation.[259] But whatever the scheme, the simple point is this: If interests are irreducibly opposed, the remedy for political life consists in providing mechanisms for group representation, not in arguing in favor of pursuit of the common good.

Various risks, however, threaten to undermine systems of proportional representation. Proportional representation may marginalize rather than help disadvantaged groups; it may also increase the risk of factionalism and political paralysis. The risks of marginalization may be greater in a system in which disadvantaged groups have one representative who speaks for their interests, rather than many representatives who are at least to some degree beholden to them.[260] The dangers of factionalism and paralysis threaten to undermine the political process quite generally.[261] A principal function of proportional representation is to shift the process of coalition building from the electoral process to the representative assembly itself. In so doing, such systems may impair governmental outcomes. This conclusion may follow whether one is looking from the standpoint of politically weak groups or the system as a whole.

From the republican point of view, however, the most significant problems with proportional representation are that it threatens to ratify, perpetuate, and encourage an understanding of the political process as a self-interested struggle among "interests" for scarce social resources, that it may discourage political actors from assuming and understanding the perspectives of others, and that it downplays the deliberative and transformative features of politics. Indeed, in some incarnations, proportional representation tends to accept the basic premises of pluralist politics; it simply reallocates the distribution of power that underlies interest-group (even racial) struggle. The reallocation of power is in some settings highly desirable, but the improvement in politics is only partial.

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258. *See* Young, *Social Movement Challenges, supra* note 2. The Voting Rights Act of 1982 is based on this idea. *See* 42 U.S.C. § 1973(2) (1982). Here of course there are problems in deciding which groups to treat as disadvantaged and in determining which people should be permitted to speak for such groups; ordinary proportional representation eliminates these difficulties.

259. *See, e.g.*, Rokowski, *Representation in Political Theory and in Law*, 91 ETHICS 395 (1981); W. LAKEMAN, HOW DEMOCRACIES VOTE: A STUDY OF ELECTORAL SYSTEMS (4th ed. 1974); D. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (rev. ed. 1971); F.A. HERMENS, DEMOCRACY OR ANARCHY? A STUDY OF PROPORTIONAL REPRESENTATION (1972); CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES (A. Lijphart & B. Grofman eds. 1984).

260. *See generally* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

261. On the extent of the risk, see sources cited *supra* note 259.

These considerations offer powerful arguments against prominent modern defenses of proportional representation; they also offer reasons for skepticism about systems of group representation as a solution to the multiple problems of modern political life. The skepticism is especially appropriate in national institutions, for which Madisonian mechanisms may be better suited.

Ironically, however, efforts to ensure proportional representation become much more plausible if they are justified on republican grounds. The basic argument here would be that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups, particularly the disadvantaged, have access to the process.[262] Group representation, precisely by having this effect, would ensure that diverse views are expressed on an ongoing basis in the representative process, where they might otherwise be excluded. In this respect, group representation would be a kind of second-best solution for the real-world failures of Madisonian deliberation. And the purpose of access is not primarily to allow each group to have its "piece of the action"—though that is not entirely irrelevant—but instead to ensure that processes of deliberation are not distorted by the mistaken appearance of a common set of interests on the part of all concerned.[263] In this incarnation, proportional representation is designed to increase the likelihood that political outcomes will incorporate some understanding of the perspective of all those affected.[264] For this reason proportional representation may be the functional analogue to the institutions of checks and balances and federalism, recognizing the creative functions of disagreement and multiple per-

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262. *Cf.* Michelman, *supra* note 6, at 76–77 (arguing for "plurality" on courts). Aristotle supplied the basic underpinnings of the argument, suggesting that when diverse groups "all come together . . . they may surpass—collectively and as a body, although not individually—the quality of the few best. . . . When there are many who contribute to the process of deliberation, each can bring his share of goodness and moral prudence; . . . some appreciate one part, some another, and all together appreciate all." ARISTOTLE, POLITICS 123 (E. Barker trans. 1972). See the discussion of Aristotle in J.G.A. POCOCK, *supra* note 3, at 72–73 (suggesting Aristotelian effort to work "out the theory of society in which every conceivable individual and social type had its appropriate role in decision-making").

Consider also J. RAWLS, *supra* note 17, at 358–59 (1971) ("In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from the standpoint of others and the limits of our vision are brought home to us. . . . The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.").

263. *See* Young, *Social Movement Challenges, supra* note 2 (arguing for group representation on this ground); Pitkin, *supra* note 1, at 90 (noting that on the republican view, a "plurality of classes and interests is necessary" partly because "internal conflict is an essential and healthy phenomenon in its own right").

264. See Hamilton's discussion in *The Federalist* No. 70 of the creative role of disagreement in political deliberation: "The differences of opinion, and the jarrings of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of the majority." THE FEDERALIST No. 70, at 426–27 (A. Hamilton) (C. Rossiter ed. 1961).

spectives for the governmental process.[265] In this sense there is continuity between recent proposals for proportional representation and the republican elements of the original constitutional regime.

The formal or functional exclusion of important categories of the citizenry has often been an ingredient in republican systems; contemporary politics furnishes several illustrations. For this reason, proportional or group representation may, in some contexts, be a highly desirable reform. Perhaps surprisingly, it is desirable above all from the standpoint of republican premises that its supporters are often at such pains to deny. Distinctly non-Madisonian institutions may be necessary to achieve the Madisonian goal of deliberative democracy.

IV. CONCLUSION

Republican conceptions of politics have taken many forms; only some of them are attractive. I have suggested that the most powerful versions of republicanism are not antiliberal at all. Instead they borrow from a significant strand of the liberal tradition, emphasizing political equality, the need to provide outlets for self-determination by the citizenry, the impossibility of maintaining democracy without a degree of citizen mobilization, the value of institutional and rights-based constraints on factionalism and self-interested representation, and the deliberative functions of politics. Above all, republican theories stress the importance of dialogue and disagreement in the governmental process; they are designed to ensure, not that political actors are disembodied, but that to the extent possible they look through the eyes of all those affected.[266]

It would be a mistake to suggest that by itself, an approach of this sort could lead to a particular set of institutional arrangements or a particular specification of public and private rights. But if understood in this fashion, republican theories have played a central role in American public law. The task for modern republicanism is not, however, one of excavation. Contemporary republicanism is more to be made than found, even if historical commitments can illuminate, in somewhat surprising ways, the nature of American constitutionalism at its inception.

One of the principal tasks for modern constitutional theory is to move beyond the republican revival by integrating aspects of traditional republican thought with the rise of the modern regulatory state, emerging theories of social subordination of various groups, and the need for intermediate organizations, public and private, to satisfy republican goals. I have suggested that many areas of modern legal controversy are illuminated by republican understandings, and that some such areas would be pushed in

265. *See* J. BURNHEIM, IS DEMOCRACY POSSIBLE? (1985); D. HELD, *supra* note 9, at 286; Young, *Social Movement Challenges, supra* note 2.

266. *See* Okin, *supra* note 82.

different directions if republican understandings were taken seriously. In particular, proposals for group or proportional representation hold out considerable promise as well as risk. The basic idea here is that the Madisonian ideal—representative processes operating to filter particular points of view—might in some settings fail to serve its intended purposes; and distinctly non-Madisonian institutions may be necessary to serve republican goals.

The republican revival is designed, above all, as a response to understandings that treat governmental outcomes as a kind of interest-group deal, and that downplay the deliberative functions of politics and the social formation of preferences. The basic republican commitments—to political equality, deliberation, universalism, and citizenship—have played a prominent role at central points in American constitutionalism. The contemporary tasks are to give content to these commitments and to spell out their implications for modern legal reform. To carry out these tasks, it will be necessary to go well beyond the republican revival.