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THE CONSTITUTIONAL THEORY OF THE COMMERCIAL REPUBLIC

Stephen L. Elkin

INTRODUCTION

Constitutional theory should concern the theory of the political constitution of good political regimes. In the first section of this paper, I will attempt to put some flesh on this spare statement. This will form the body of the paper. I shall then use these ideas to develop briefly the idea of the public interest for a particular kind of good regime, the commercial republic, to which, I will say, we Americans aspire. The idea of a commercial republican regime and its public interest will enable me to point out in what sense we are failing to attend sufficiently to economic equality and to the political place controllers of capital now have—and to consider some of the consequences of our inattention. These arguments will comprise the final sections of the paper. The over-all argument of the paper might best be viewed as a contribution to the revival of constitutional theory as an account of the actual workings of good and good enough regimes; such an account can be found in the work of theorists such as Ackerman, Sunstein, Lowi, and Hayek, as well as in the writings of many of the scholars whose work fills this symposium.

To understand the central concerns of a theory of political constitution, it is useful to have as a contrast some common views of the substance of constitutional thinking. One candidate—perhaps the most obvious one—for the mantle of constitutional theory is the study of constitutional law. It ought to be obvious that, however useful such analysis might be of what the Supreme Court has done and ought to do, it has little to say about what the first theorists of constitutional government worried about, viz. how to limit governmental power so that the propensity of rulers to act arbitrarily and at variance with the deepest interests of the citizenry could be curbed. The closest constitutional law comes to such matters is when it considers the Court's glancing attentions to the frame of government that the

Much the same thing can be said about comparative law, the comparative analysis of written constitutions and any other analysis that looks at the decisions of courts or at the documents called constitutions. In general, these efforts assume that there exists already what it is the task of constitutional theory to help bring about, viz. a regime of laws and of regular and predictable relations between office holders and those who compose the government, as well as between government officials and the citizenry. Such analysis thus assumes that what courts say will have some effect, and in doing so assumes that there is in being a working and reasonably attractive constitution.

Insofar as constitutional theory is composed of these sorts of analyses, it is for the most part empirically bereft and normatively weak. Empirically bereft because it has little to say about how to secure the institutions that are the assumptions behind court decisions and the like. Normatively weak because there is far too little discussion of whether the working constitution contemplated in the written Constitution is one to which we ought to give our allegiance. The normative problem is especially pressing for Americans because those who wrote the Constitution believed that a majority of those who would live under it were incapable of carrying the burden of citizenship. In any event, what needs defending is not the piece of paper itself, but the working constitution of the form of government it is supposed to call into being. And to provide an adequate defense of that requires, at the least, some knowledge of the alternatives, an account of the standards to which each is to be held, and the difficulties of sustaining the preferred form of rule. All of this is in short supply in the kind of constitutional analysis I have mentioned. The result is, among other things, that we do not really know whether the kind of political regime most of us believe we are committed to—a republic—requires a high court with the kind of political prerogatives that the Supreme Court has. We do know that other nations have managed something much like popular, limited government—that is, republican government—without such a court and without a written constitution along the lines of ours.

Still, constitutional analysis as it has developed in the United States has one powerful advantage over other brands of political and social inquiry. It is at least concerned with practice, even if its conception of practice is too narrow empirically and normatively. In this, it is a good deal more useful than its competitors if our concern is to help create an attractive political order. This is especially true in comparison to the kind of positivist social science that is the mainstay of

2. See infra Part II.
3. And elsewhere as well.
contemporary political and social analysis. Whatever its other virtues, such analysis is largely indifferent to what political actors need to do if they wish to bring into being an attractive political way of life. If possible, this social science has even less to say about the content of such a political way of life—and the kind of division of labor that has grown up between empirically minded social scientists and social and political theorists cannot save the day. Much of the analysis by the latter group is textual in form, trying to clarify what the greatest minds have had to say about politics and society. But many of these minds have concerned themselves with such complex matters as the relation between the good life and politics, and the deepest purposes of human beings. However fundamental such questions are, the answers offered are not easily translated into the kind of practical thinking that those who wish to secure good political ways of life require. Or when these powerful minds have addressed questions of practice, they have done so for a world that is in many ways unrecognizable to inhabitants of the twenty-first century. So again, much remains to be done for those who wish to help bring about a more attractive political way of life.

Perhaps a trifle optimistically, we might say that inside the thin law- and parchment-obsessed thinking I have been describing is a fat constitutional theory trying to get out. And this fatter theory, if it is to be of any more use than the kind of analysis I have been considering, needs to be at once empirical and normative, and must somehow bridge the theory-practice divide. Where shall we start if we wish to develop such a theory? By taking seriously the word "constitutional," and instead of thinking of it as pointing to nouns and adjectives—a constitution; a constitutional act—to think of it as a verb—to constitute. But to constitute what? The answer, I have suggested, is good political regimes, and the theory should concern the creation and maintenance of good political regimes. It will perhaps help here to see that, if I am correct, constitutional theory is a branch of political theory—in particular, given a concern with the American political order, that branch of democratic theory concerned with the design of a democratic political order.

I. INSTITUTIONS, VALUES AND REGIMES

While it might be accepted that constitutional theory ought to have something like the form I have been pointing to, the meaning of the term "regime" needs some explanation, since helping to secure good regimes, I have said, is the task of constitutional theory. This can best be done by considering the relation between institutions and values.

4. Consider here Plato on the one hand and Locke on the other.
A. Values and Institutions

The most common form contemporary discussion takes concerning the relation between political-moral value and political institutions is to be found in a certain style of political and moral philosophy. In such discussions it is thought to be enough to spell out the meaning of, and the justification of, a particular value or set of values. The implication is that the question of the design of political institutions to serve these values can be taken up later, and probably by someone else. Values and institutional form are two separate matters, it is suggested, and as such can be treated through a division of labor. The underlying idea in this sort of work is that political institutions are means to achieve valued ends, and we should settle the latter first—for example, by giving an account of distributive justice, individual autonomy or some other desirable end or ends.

Consider here the remarks of Philippe van Parijs who describes his effort as one “of trying to find an optimal fit between a consistent set of principles and one’s considered judgments.” Unless consistency here means that a crucial part of one’s “considered judgments” must concern how various political-economic institutions can plausibly be made to work—which is not, in fact, a central concern of the book—the implication is that the question of whether there are institutions that can effectively give life to the principles can be put aside until later. In this context, it is important to note that talking about a policy—for example, one that will provide a guaranteed income to all, which is van Parijs’ major concern—is not sufficient. Without an attendant account of whether political institutions can work in the necessary ways—including whether there can be consistent political support for their workings—talking about policy doesn’t add much to the discussion. It is akin to saying in a different language that giving people income is a good way to serve equality. That tells us something, but it is far from settling the question whether this conception of equality is a good thing. We don’t know which institutional arrangements are necessary to give it life and then to maintain it.

Similarly, it is commonly observed, in defending an account of justice against the charge that it is too indeterminate to be of much use, that this is “more of a practical than a theoretical objection.” Again, the implication is that the question of whether it is possible to create institutions whose workings will give life to a conception of justice—no less institutions that can effectively decide on the content of rights—can be left until later.

Much of the work in this vein—indeed in much moral philosophy

generally and political philosophy that is akin to it—draws its inspiration from what is often termed analytical philosophy where rigorously inspecting value terms to see if they can or should include value concepts captured by other terms is the order of the day. Must the idea of rights, for example, include the idea of equality, and what kind of equality is consistent with the idea of people having rights? It is an exercise in conceptual analysis. My suggestion here is that much more important is an account of the institutions that are to give the values life: can they co-exist and under what terms? This tells more about the consistency of our values than an analysis of how we use words.

Some moral and political theorists working in this tradition do give some consideration to institutions. Consider again van Parijs, who says that “the intellectual endeavor in which I am engaged, along with many other political philosophers in the Anglo-American tradition, consists of trying to rigorously clarify political ideas by proposing some explicit general principles and critically scrutinizing the concrete institutional implications.” Insofar as van Parijs considers institutions, as opposed to policies, this is how he describes his efforts.

Much plainly depends on what “critically scrutinize” means. Mostly, for van Parijs and others, it seems to mean asking whether we can think up institutions that would do the job. That is something, but it isn’t much. For, to really “scrutinize,” we would need to know whether the citizens of the political order under consideration are inclined to operate the institutions in the necessary fashion; whether they can be induced to so operate them if they are not so inclined; whether those who are to operate the institutions will have the relevant skills and dispositions; and how the given institution will work in the context of other institutions. Otherwise said, to deal with these questions, we must look at actual citizens with their history, virtues and vices, their institutional inheritance, and so on.

More generally, in thinking about the relation between values and institutions, it is all too easy to defend a table of values and then turn to consider how existing or proposed institutions conform. As a guide to practice, such evaluations are, however, of little help: they are about the wrong thing. If our concern is with practice, it is deeply misleading to treat as two separate matters what we value and the institutional means of realizing it. If we are concerned with practice, we cannot know how much moral weight to give to our purposes unless we know what it takes to realize them. With an eye to practice, it is misleading simply to say that X is a value, or even that it is more valuable than Y, and then with this in mind turn to evaluating the means to achieve it. Evaluation in the context of practice cannot be

7. See, for example, the remarks about van Parijs that follow.
8. Van Parijs. supra note 5. at 42.
an abstract exercise, pursued as if it were outside of the features of the world in which the values are to be realized. This means that in our evaluation of whether we should attempt to alter some practice, we must know a good deal about the specific socio-political context in which our efforts are to be made. In short, our evaluative weightings must combine the normative and the empirical: they cannot be abstract but must be concrete in the sense that how valuable we count some end or standard will vary by context. As Lon Fuller says in discussing equality, "[u]ntil we find some means by which equal treatment can be defined and administered, we do not know the meaning of equality itself." There aren't two separate points—one about the value itself, the other about practice and what it takes to serve it. There is only one judgment: how much we value something given what it takes to realize it.10

Our evaluations then should be a mix of what we value tutored by what it takes to realize it in the world.11 For many readers this will all be obvious, and indeed I think it is. But a perusal of the contemporary literature in moral and political philosophy suggests otherwise. There is far too little sense that political-moral evaluation without institutional detail is seriously deficient. A good institutional design requires that those who operate and support it are willing and able to do so—or that they will plausibly come to do so. Justice—for some the first virtue of political institutions—is after all a practical virtue concerned with how our collective life should be carried on. Stated differently, coherence in theory need not mean coherence in practice: to assume otherwise is to give more weight to words than they can bear. Similarly, to show incoherence in theory does not mean incoherence in practice. We often act in contradictory fashion, and continue to do so because, as often as not, we can proceed without terrible consequences.

Behind these failures of what might be called means-ends moral and political philosophy, lies, I think, a deeper failing. Implicit in such arguments is that there exists a decision-maker to whom advice is being tendered concerning the appropriate ends of political action. But this is to misconstrue the fundamental problem of political action,
at least in the pluralistic political systems that have most of our allegiance. Political judgment ought instead to start with the design of the political institutions that will make the value choices, because fundamental to deciding what we wish for is whether and how it is possible to get those who are willing to do the judging, to actually do so. This includes not only authorities but citizens as well—at least in a democracy—since citizens will reward or punish these authorities depending on what judgments they arrive at. Or, at least, they ought to do so. In saying all this, it becomes obvious that what we have is a constitutional problem: how to constitute the institutions that will do the job of judging. We are now concerned with multiple decision-makers and the crucial questions become how they are to be related to one another, what will induce them to behave in the necessary ways, what will insure that they have the necessary abilities, and so forth.

Now, some will object that we cannot escape the language of means and ends. What are the values of liberty, justice and equality and the like, if not ends—and institutions are the means to serve them. Here I want simply to say that in pointing to the institutions that compose a political order, I am talking about purposes. But purposes are not necessarily ends. If I say I wish to develop certain of my capabilities, I am talking about the ability not to achieve a particular end but a series of ends, most of which I cannot conceive of as I set out to develop these capabilities. I am saying, in effect, that the best I can do is to prepare myself for a whole host of situations where I will want to serve particular ends, and my purpose is to enable me to respond intelligently to these situations. So it is with political societies. The substantive ends we wish to pursue are difficult to define. There is too much we do not know. We cannot design our institutions as means to serve values if they are understood as substantive ends in the direct service of which we shape our institutions. I will come back to this matter below.

Many of these problems concerning the relation between political institutions and value, and the more general problem of good political practice, arise in what is widely perceived to be the most important work in political philosophy in the twentieth century, John Rawls' *A Theory of Justice.*

The outline of Rawls' theory is well known. He offers a theory of justice anchored in an account of organizing principles for a whole society that rational people would choose if they made their choices behind what Rawls calls the "veil of ignorance." Behind this veil,
people will not know what their position would be in a society designed to serve these principles. The rest of the book is devoted to developing the implications of these principles of justice, as Rawls calls them, for the organization of various important elements of a society. It is, says Rawls, an exercise in ideal theory, whose concern is with “the form a just society would take in a world in which, for theoretical purposes, everyone is presumed to act justly.”

Let us suppose that an important aim of political philosophy is to help create the best political regime of which we are capable. This seems to be a view Rawls shares. Otherwise why does he bother with lengthy discussions of the rule of law, the organization of the economy and how a sense of justice might develop since each of these is not, or not only, a deduction from the principles of justice but things found in the world as it is? Moreover, Rawls is clear that he is not only concerned with a “strict compliance theory” of justice where everyone is assumed to act justly but also with a “partial compliance theory” which concerns “how we are to deal with injustice.” And crucially, Rawls says that “the reason for beginning with ideal theory is that it provides the only basis for the systematic grasp of” the “more pressing problems” such as “weighing one form of institutional justice against another,” and he goes on to say that “I shall assume that a deeper understanding can be gained in no other way.”

There are other reasons to do political philosophy besides a concern to promote good political practice. These include developing utopias that highlight the differences between where we are now, what humankind is capable of, and what would simply be best. In doing such work, we may provide humankind with an impulse toward great change. This kind of effort may also tell us much about the human condition, as well as what sort of enterprise politics is compared to other forms of human endeavor.

13. Philip Pettit says this effort in ideal theory is one in which Rawls and similarly inclined philosophers “have preferred to spend . . . their time reflecting on the meaning of consent, or the nature of justice, or the basis of political obligation.” Philip Pettit, Republicanism: A Theory of Freedom and Government 240 (1997). Bernard Williams says, a propos of philosophers like Rawls who have been shaped by it, that “[a]nalytic philosophy has been much taken up with defining things.” Bernard Williams, The Reluctant Philosopher, Times Literary Supplement, May 29, 1998, at 18.
16. Id. at 8.
17. Id. at 9.
18. “May” because there may be no way to bridge the gap between where we are and progress along a path marked out by the utopia. On whether we should take such a path see the discussion below.
19. The aim of utopias is: to picture the awful distance between the possible and the probable by showing in great detail how men could live, even though they always refuse to do so. . . . For the fault [of our refusing] is not in God, fate, or nature,
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But, if as I have said, Rawls' undertaking has a practical side to it—in fact if it is, in the end, partly justified by its value for defining good political practice—then it is an odd and misleading enterprise. Consider the question of whether we are more likely to succeed in creating the best political regime of which we are capable if we start with an account of what might be called the "circumstances of justice" or the "circumstances of politics." In the circumstances of justice there is a veil of ignorance and no problem of compliance once the content of justice is known. At issue is what a political order should look like among people who are already committed to a common sense of justice. The problem, therefore, is to work out what is contained in that conception of justice, and in the structure of politics and society that is consistent with it. The circumstances of politics, on the other hand, may be defined as a state of affairs in which there is a large aggregation of people who have conflicting purposes which engender more or less serious conflict; who are given to attempts to use political power to further their own purposes and those they identify with; who are given to attempts to use political power to subordinate others unlike themselves; and who are sometimes given to thoughts and actions that suggest that they value limiting the use of political power by law and harnessing it to public purposes.

In a phrase, my argument is that we will be "better off" if we start from the circumstances of politics. "Better off" here refers to a political order that will garner wide-spread support in the form of civil peace, and that will be widely thought a good or decent political order. Indeed, it is entirely possible that more of Rawlsian justice will be achieved if we take full account of the circumstances of politics as our starting point. The "ideal" that should guide political practice ought to be built around the circumstances of politics, not abstracted from it.

How should we proceed instead? We should start from the circumstances of politics because these set the problem of securing but in ourselves—where it will remain. . . . If one thinks that the only purpose of political philosophy is to provide serviceable guides to action for politicians and political groups, then indeed utopia [is] a useless enterprise. If critical understanding and judgment, however, are also real ends, then the construction of such models is not only justifiable, it is a perfect instrument.


20. As ideal theory, the argument also leaves something to be desired. How much in the way of Shklar's "critical understanding and judgment" that utopian thinking can bring comes from a theory that invites endless discussion of whether the etiolated instrumentally rational human beings at the heart of Rawls' theory would indeed choose his two principles of justice? Cf. Colin McGinn's comment about a social contract argument that parallels Rawls': "what is the point of unity with purely hypothetical others?" Colin McGinn, Reasons and Unreasons. The New Republic, May 24, 1999, at 34.

21. The first is Rawls' phrase although he uses it for other purposes.
any good political order. We must first prevent the worst before we can achieve the good enough, no less the best. Any plausible account of human motives will posit that human beings are capable of the grossest cruelty, of a desire to tyrannize their fellows and a whole host of lesser evils. If we do not prevent these from happening there is little reason to suppose that citizens and those who speak for them will have the leeway to pursue even the good enough. This is the basic contention of much of liberal theory, or at least of that branch of it that is not attempting to compete with strong democrats on their own turf—and it means that, contrary to Rawls’ theory, we do not best grasp the nub of partial compliance theory by focusing on ideal theory. Rather, we best understand partial compliance theory when we understand just why there can only be partial compliance and what we need to do to make it possible to achieve even this modest state of affairs. Thus, Madison teaches that we cannot have republican government by positing that men are angels.22 The circumstances of politics are, to an important degree, irremediable, and if our account of good political regimes is not tempered by this knowledge then it will fail.

Rawls’ argument is, in effect, that we should first construct a luminous image in order to define the political road down which we should travel. But notice that the road is defined by having a citizenry inclined to act justly. Is it probable that real human beings will more likely achieve a just regime if we start down this road, as compared to one which is defined by the circumstances of politics, and where the conception of justice is inflected by taking account of the facts about human behavior?23 The ideal road is a dangerous road because its basic features do not square with how humankind does or plausibly can behave. Hence my earlier comment that going down a Rawlsian road may well produce less Rawlsian justice than proceeding down the path marked out by the circumstances of politics. As Stanley Rosen says, “[i]t is not enough to say that we advocate the noble as opposed to the base. . . . In politics, whether world-historical or local, it is always necessary to specify the particular case.”

At the most general level, we can say that the road to the good or good enough regime does not coincide with the road to the ideal regime, being just a stop along the way. This is the point of the theory of the second best, and of the phrase that the best is the enemy of the good. Following the road to the best is not likely to avoid engendering major conflicts; and, because we are unlikely to have

made any provision to handle them, they will be devastating. The pursuit of the ideal, which is by definition beyond us, may well bring out the worst in us. Moreover, effort expended on the ideal is effort lost to the good. Not to mention that pursuit of the ideal, which must fail, is also likely to be dispiriting. And finally, if we shape institutions with an eye to moving towards the ideal, there is little reason to suppose that these institutions will be of much use in securing a good regime, which is all we can hope to achieve. Indeed, there is every reason to suppose that these institutions will make it harder to achieve a good regime since they will not be, as I have indicated, well designed for politics as it will emerge on the road to the good or good enough. Again, the prevention of the worst is crucial here.

Rawls, along with many other moral and political philosophers, apparently finds it difficult to accept that the real subject of political theory is politics—the only intermittently principled, more often self-interested play of ambition, power and interest. If this is so, then in the effort to create good regimes we should take humankind as it is, and might plausibly become, as central to our normative claims. We should try to ensure that the worst of what we are does not dominate, and that the best of what we are and can be governs at least some of the time. If we can manage that, we very likely have accomplished all of which we are capable.

B. Regimes

Even if we understand that values and institutions cannot be separated as ends and means, there is more to constitutional thinking. We cannot usefully talk about institutions taken one at a time, as if they exist independently of one another. The temptation, for example, is to look at the distribution of income and the institutions that generate it and announce—given a common definition of equality—that they fall short and must be changed, and to replicate the exercise across the board, taking each value and set of institutions one at a time. Nor is it useful to talk about trade-offs among values without consideration of the institutional means that will give them life—as if we could have any mix we wished and our only problem is how much of one value we wish to give up to get more of the others.


26. The widespread talk about trade-offs reflects the success that economists have had in shaping our talk about the public world. Economists teach that all problems of choice are ones of economizing—how much we must give up of one thing we value in order to get more of another. This is as true of major political institutions as it is of apples and pears. The apparent difference in importance and complexity is just that, apparent, and the sooner we see that everything can be weighed in terms of preference satisfaction, utility or money—all of which enable us to think about what use of our resources is efficient and thus allow us to judge the worth of something compared to something else—then the more rational will be our public life. There are
In making these sorts of arguments, we miss the fundamental point that political institutions are parts of political wholes.

Institutions come, it would seem, in packages—and, very likely, in big packages; that is, they exist as parts of what might be called political regimes. In considering how the various institutions that compose a regime are to be put together, we cannot pick and choose among the various possibilities in a kind of rationalism of the machine shop—considering political institutions one at a time, and using them or not according to their individual capabilities. This might be called the “organ” theory of political design (we ain’t got no body, only individual organs).

It thus is likely that political regimes cannot be composed of just any combination of institutions. Institutions aren’t mechanisms but patterns of behavior—and some patterns will undercut others. These patterns of behavior, or practices, are interconnected; what we can and ought to do about one set of practices has strong implications for what happens or ought to happen elsewhere in the political-economic order.

Thus, Hayek comments that “we are not fully free to pick and choose whatever combination of features we wish our society to possess, or to fit them together into a viable whole: that is, that we cannot build a desirable social order like a mosaic by selecting whatever particular parts we like best.”

If institutions indeed come in packages, what accounts for this? What makes the set of institutions political wholes? The answer, given in classical political theory, is that these wholes—political regimes—are institutional expressions of types of political rule and of the conception of justice that legitimates and helps to define the purposes of that rule. Thus, there is rule by the one, the few and the

lots of sarcastic replies to be made to such hubris—including such choice oldies as, here is a man who knows the price of everything and the value of nothing. But the best comment is probably made by the internationally distinguished economist A.K. Sen who said that a society can be (Pareto) efficient and perfectly disgusting. For my own less pithy view of the matter, see Stephen L. Elkin, Economic and Political Rationality, 18 Polity 253, 253-71 (1985) [hereinafter Elkin, Economic and Political Rationality].


28. Hayek says that:

By “order” we shall throughout describe a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.

Hayek, 1 Law, Legislation and Liberty, supra note 1, at 36 (emphasis omitted).

29. Id. at 59.

30. Aristotle says that “[a] constitution is the organization of offices in a state, and
many. There have also been efforts to elaborate and modify this
typology so that we can, for example, talk about totalitarian tyrannies
and people's democracies.31 A political regime in these accounts
encompasses not only what we might call the political system, but also
what is typically encompassed under the heading of economy and
society. Economy and society are forms of rule without the sword (or
at least without much direct and continuous swordplay) and to a
significant degree they extend the rule of the polity through other
means. In addition, both economy and society draw their legitimacy,
at least in part, from the same conception of justice that helps to
legitimate the polity.

A widespread commitment to a certain conception of rule and to its
accompanying conception of justice will make it difficult for certain
kinds of institutions to flourish. For example, institutional forms
lacking a measure of democratic accountability are difficult to sustain
in popular regimes, as are those whose express purpose is to foster
inequality. We might say that there is an ethos at work which,
through the weight of opinion and the power attached to it, imparts a
logic to the political whole. The form of rule and the conception of
justice generates a set of mores and practices that find expression
throughout the society. Those who wish to and do wield power reach
for these mores and refer to these practices as they claim their right to
exercise that power. Who is to rule and to what purpose is the
defining element of political life—that which gives the regime a form,
a distinctive character.

Being an institutional expression of a type of political rule, the
regime also has a ruling stratum, those who are most devoted to the
particular manner of governing and the justice at which it aims. They
are a principal source of those who claim the right to wield power and
who, in fact, do so. The political influence of the ruling stratum
reinforces the logic of the particular type of political rule. In a
popular regime, the ruling strata will be large in number, perhaps as
much as a majority of the citizenry. As for the rule of one, even kings,
not to mention totalitarian leaders, cannot govern by themselves.
Their rule will inevitably rest on the shoulders of a group of significant

31. See, e.g., Hannah Arendt, Origins of Totalitarianism (1951); Carl J. Friedrich,
Michael Curtis and Benjamin R. Barber, Totalitarianism in Perspective: Three Views
size which, together with the ruler, compose the ruling strata.

The ruling stratum need not be politically dominant in the sense of controlling the substance of law and policy. Indeed, in a modern, organizationally complex and broadly democratic society, such control is unlikely. The ruling stratum rules, at a minimum, in the sense that its conception of political rule and justice is the one given expression in the institutional design of the regime and reached for when political justification is sought.

In good regimes, the conception of rule and of justice aren't just expressions of the self-interest of the ruling stratum. The stratum may benefit in large ways from these conceptions; this, after all, forms part of the reason for their attachment to the conceptions in the first place. But as Walzer emphasizes, the conception of rule and of justice are standards by which the ruling stratum will itself be judged. They express what plausibly is a good way to rule and what plausibly really is a form of justice.

The impact of the regime is not confined to the laws it makes and their direct effects on the citizenry. In well-ordered popular regimes, for example, the impact of public decisions on most people's lives in the sense of direct intervention—an injunction to do this or stop that—is, while significant, not the dominant effect. It isn't the cop at the door or the check in the mail, but a whole background of rules, assumptions, and definitions of what is acceptable, all of which form the context within which individuals make their own decisions. In this sense, political life is not mostly machinery producing outputs of decisions, but is a culture or way of life.

If institutions come in packages, how are the packages to be evaluated? If there are several kinds of good regimes what makes them good in the first place? Why, as in the classical formulation, are kingship, aristocracy and a mixed form of popular rule superior to tyranny, oligarchy and direct rule by the mass? Which among the modern forms of rule are good regimes: that is, which among constitutional or liberal democracy, people's democracy, strong democracy, mild authoritarianism and totalitarianism are to be preferred?

I have suggested a starting point for answering this question. What makes regimes good is simply that they aim at a defensible conception of justice, and in doing so they are lawful. Power is to be constrained by standards inherent in the conception of justice. All good regimes are regimes with limits on how power can be used. Bad regimes then either do not claim to serve justice, or their conceptions are indefensible. A signal trait of such regimes is that power is unbounded, unmarked by standards that transcend the desire of the

32. Below I will consider on what grounds we can call them good regimes.
33. See Michael Walzer, Spheres of Justice 9 (1983). See also the discussion infra.
rulers. Evil is frightening because it knows no bounds, its force is unlimited. It is antinomian.

Thus, large aggregations of people devoted to mass plunder may not be regimes at all if they are held together by force. Similarly, aggregations that aim at ethnic or racial subordination, whether on their own, or with their terrified populations in tow, may not be regimes. For both this is especially clear if the use of force regularly threatens to, or actually becomes, unbounded. Such aggregations advance no conception of justice. Alternatively, the least ferocious of such aggregations may be regimes—albeit bad ones—in that they advance a conception of how political rule should be carried on and a conception of the justice at which that rule aims. There is thus some talk of the limits on political power. But these claims to rule cannot withstand scrutiny even if they are widely accepted by those whose lives are shaped by them. Typically, in such regimes, an elite is defined as those to whom the rules that are to guide the mass of the regime's members do not apply, and no convincing case is or can be made about why this should be so. The claim to secure justice is thus greatly weakened and probably vitiated.34

The evaluation of regimes is not, however, an abstract or universalizing exercise as the preceding might imply. We must look to the circumstances of the people who are attempting to realize a certain sort of regime, or to the circumstances of the people to whom a type of regime is being commended.35 That is, regimes—forms of rule—are not just good or bad; they are also good or bad for a people with particular histories, virtues and vices. Here, again, as with the consideration of particular values and institutions, evaluation must be heavily empirical, since we must have an understanding of how the institutions (those institutions that are to give life to the values) are to work, and how, together, they are to constitute the regime. As part of

34. To say any more here means to move into the deeper reaches of political philosophy. I will only add that my view of how to distinguish between good and bad regimes draws on that strand of classical political philosophy that looks to the kind of beings we are. Defensible conceptions of justice are rooted in defensible conceptions of human nature—what goods or ends or virtues we can say are necessary to human well-being and what states of affairs, purposes and vices we should guard against. For an excellent argument along these lines, see generally Salkever, supra note 30.

While it is here—on the questions of what it means to say that something is good and on what basis we can say it—that moral philosophy and political theory influenced by it have much to say, once again when we get to the matter of good regimes, we are making heavily empirically informed judgments. The good is an amalgam of the desirable and the possible.

35. If the western economists who gave advice to the Russian government on how to affect the transition to a democratic regime married to an enterprise-based market system had given this matter more than passing attention, Russia and the United States would both be better off than at present. At a minimum, disciplinary blinders reinforced by disciplinary chauvinism made what ought to be the starting point of any competent regime analysis into a heroic feat of intellectual sophistication, and thus was not much in evidence among those advisors.
this inquiry we need to investigate how and whether the requirements for making these institutions work in the necessary ways square with what we know of the habits and outlook of the people who are to operate them. The recent sad experience of various African attempts to realize stable and attractive forms of popular rule indicates how important such empirical understanding is. The one obvious thing about political life is that it happens in particular places among particular peoples with particular characteristics. This does not mean that no universal definitions of the right and the good are possible. But it does mean that if we are interested in political practice, the definition of criteria must be tailored to the broadly understood situation in which the particular people find themselves.

Much of the preceding can be brought together in a single formulation. A regime is a conception of rule aimed at a conception of justice. The aim of constitutional theory is to specify the institutions needed to realize that form of rule and the political sociology that gives political energy to that rule. To which can be added, as we shall see, that constitutional theory also needs to spell out the public interest of the regime. Constitutional theory is built on the proposition that the most important step in evaluation of political practices is the regime question.

A theory of the political constitution of a good regime then has, among its essential features, a specification of the particular institutions that compose the regime—those that give it its characteristic manner of working—and how they are to be related to one another. We may say that these institutions define how the people who are to carry on their life within the regime are to be related to one another—as they go about coping with the difficult-to-predict possibilities and problems that will arise, and the conflicts attendant on their common fate. A political constitution is composed of the modes of association a people employ as they go about attempting to confront collective problems, cope with the conflicts that will attend such efforts, and deal with the continuing temptation to use political institutions for arbitrary action and political domination. Institutions create what may be termed an environment of choice: they do not force a particular result but rather encourage those who are within their ambit to take account of particular kinds of considerations when they act.

In thus helping to define the terms under which people have access to one another, the political constitution of the regime helps shape the habits of mind and mores of a people. It also reflects in its institutions these mores or more broadly, the dominant conception of justice. The political constitution shapes the over-all way of life of a people; and indeed it makes them a people.36 "Constitution," in the sense

36. Graham Walker says, "[a] constitution is a polity's normative architecture; it is
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employed here, refers to the "shape," "composition," or "establishment" of a people in their political association. The constitution of a regime, then, not only sets out offices and powers, the frame of government, but more generally, an "ordering" by which the organization (order) of something gives it its constitution. A constitution then forms a polity, enabling it to act by giving it form. A theory of political constitution defines the constitutive institutions through which a regime acts.

We can thus say that the central concerns of constitutional theory are the realization of good regimes, their maintenance once they are in being, the prevention of bad regimes, and the problem of transition from bad to good regimes. We can further say that in thinking about good regimes, we can't decide first what to do, and then look for who is to do it and how they are to do it. The question of what to do is deeply shaped by who is capable of doing it and who should be authorized to do it.

II. THE COMMERCIAL REPUBLIC

Constitutional theory proper does not turn on any particular way of establishing which are desirable political regimes in general and for a particular people. All it needs to get started—at least if its practitioners are interested in actual peoples situated in particular places—is some account of what sort of regime is to be realized with the help of a theory of political constitution.

If then we are to think about the American case, what sort of regime is to be the subject of our constitutional theorizing? I have already said that good regimes must have some defensible conception of justice. But which conception? One way to answer the question, the one I will adopt here, is to look to the aspirations of a people—in this case Americans.

What are our aspirations as Americans? Since we are, and must be, situated somewhere, not nowhere, and thus have an inheritance of institutions and language, our aspirations will to some degree reflect these inherited practices. We cannot wholly lever ourselves out of the social world that we inhabit. And thus our aspirations are likely to stem, in part, from the thinking of those who have helped to set these

that ensemble of standards, aspirations, and practices that forms a people's political identity and it is authoritative for their common life and institutions." Graham Walker, The Constitutional Good: Constitutionalism's Equivocal Moral Imperative, 26 Polity 91, 92 (1993).


38. See Michael Walzer, Interpretation and Social Criticism (1987) (discussing the idea that we do not have to discover the moral world because we have always lived in it; and thus we can derive our political and moral standards from an internal critique of our practices).
practices in motion—in our case, the founders of the American republic. It is, in short, likely to be a regime that already has some hold on us, some of whose features are already present and prominently foreshadowed in our present practices.

We must, therefore, start where we are, so to speak, because we cannot start anywhere else—and we use the local language and stock of institutional ideas to give voice to what we hope for. We enter into an on-going "rhetorical community" where words and their meanings, and the argued-for purposes of our collective life have taken on a life of their own, so that a variety of symbols and kinds of justifications are not only ready to hand, but also recognizably "ours."

Given that our aspirations must, to some degree, stem from present practices, a minimum account of our aspirations would point to our desire to be a regime in which government is popular and limited, and in which economic life is to be, at least in significant part, organized through markets and private control of productive assets. Thus, we want, first and foremost, to be a regime that has its foundations in popular self-government, whose office holders are either chosen through popular election or are chosen by those who have been. Our aspiration is to realize a republican regime. The regime is republican in the sense that the opinions of the governed will be regularly consulted and will constrain the actions of governors. Moreover, while government is to be popular, it is also to be limited, to carry on its business through well-understood forms and towards well-defined destinations. It is to be a regime of limited powers exercised according to law so that each of us will be able to conduct our lives free from the arbitrary exercise of governmental power.

The regime is also to be a commercial one in the sense that republican government is to be combined with a business enterprise system which has a substantial private component, and in which these enterprises are subject to the test of consumer preference through the marketplace. We suppose that many of the decisions about how to use society's resources ought to be in the hands of private persons and private groups who will enter into a variety of cooperative and exchange relationships to deploy these resources. Such an economy, it is believed, will bring us high levels of material well-being. It is also thought to facilitate republican government, not least because the prosperity which it will bring, will, in turn, increase attachment to republican principles. Commerce is thought to be useful for self-government, not a principal source of its subversion. 39

The idea of a republican regime is a capacious enough conception of a desirable regime to secure agreement upon it from those who count themselves legatees of both the Federalists and Anti-Federalists, and from people generally who otherwise might disagree about political matters. Members of both of these traditions, or at least those who first articulated the views that have come to be associated with them, typically argued that free government depends on some sort of marriage between popular limited government and commerce. These are very broad commitments then, which is why it is reasonable to think that they constitute the heart of our aspirations.

Insofar as our aspirations reflect our inheritance of institutions and practices, we aspire then to be a commercial republic. I take it as given, however, that to the degree we have a choice in the matter, we do not wish to be a certain kind of regime simply on the grounds that it is an inheritance that we must live with. The case for the commercial republic as the focus of our aspirations would be more convincing if it could be shown that this regime is not one whose features sadden or horrify us, that it has value over and above what can be claimed for it as an inheritance. What can be said to suggest that this is so?

Since the regime we aspire to is essentially the one the founders of this republic hoped to bring into being, can this distinctive fact about our inheritance suggest anything about the value of our aspirations? Lincoln indicates something of what this relation might be. He says:

I do not mean to say we are bound to follow implicitly in whatever our fathers [i.e., those who framed the government under which we live] did. To do so, would be to . . . reject all progress—all improvement. What I do say is, that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand; and most surely not in a case whereof we ourselves declare they understood the question better than we.

Lincoln might be interpreted as saying that we, contemporary Americans, should show fidelity to the thought of the founders not

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40. The latter would include those who are presently attempting to develop civic republicanism as a guide to political practice.
41. This is not to say that the Anti-Federalists, like their successors, had no doubts about the value of commerce. They had reservations about where it might lead, but they still thought some version of it was essential if republican government was to succeed. See Herbert J. Storing, What the Anti-Federalists Were For (1981). Cf. J.G.A. Pocock's comment that "all serious thinkers in the eighteenth century accepted commerce, and all had doubts about it" J.G.A. Pocock, Letters to the Editor, N.Y. Review of Books, Oct. 19, 2000, at 68.
42. Abraham Lincoln, Address at Cooper Institute New York City (Feb. 27, 1860), in Lincoln: Speeches and Writings 1859-1865, at 111, 119 (Library of America 1989).
because it is old but because it is a source of what is valuable in us. It has helped make us who we are. While it is possible to escape from whom one is, and from whom we collectively are, it is not easy. Nor is it desirable, at least if we have reason to believe, as Lincoln claimed we do, that the thought and practice of those who came before us, at their best, deserve not only our deepest consideration but also our assent. We are rightly bound to them then for the same reason that we are bound to honor any worthy part of ourselves. We thus can only deny the aspirations built upon the thought and practice of the founders of this republic by denying a significant portion of ourselves. And in doing so, we not only are likely to feel bereft, having cut something out of ourselves, but we are also likely to find it difficult to answer the question of just who we are.

The same conclusion can be arrived at by a different route. Some of our most powerful and sustained arguments on great political matters concern the picture bequeathed to us by the founders of this republic of the kind of regime we should aim to realize. And crucially, the conclusion drawn among those willing and able to exchange reasons has been that something very much like the founders' vision of a commercial republic should guide us. This is not the only account we have of what our aspirations should be, but it is the one of longest standing, the most elaborated and the one that has been subject to the greatest degree of searching argument. 43 This reasoning has operated through the invitation that many have offered to their fellow citizens over our history to consider whether the outline of the regime the founders commended to us ought to be widely assented to—and this invitation has been eagerly taken up.

The normative force of our aspirations thus lies to a significant degree in there being aspirations, since they have the authority of reasoning not numbers behind them. They are the product of intensive reasoning among many people—those, spread out over many generations, who have been free enough and willing and able to exchange reasons about the regime that is worthy of us. 44 "We" who have aspirations are not those who merely talk about the political right and good, nor those who are powerful.

Our aspirations then are a kind of halfway house between counting opinions as a guide to what is valuable—all norms are conventional—and foundational justifications. The element of reasoning is the link

43. Those who are willing and able to so reason are the heirs of Bacon who thought that a "wholly new politics of liberty was possible if the appetite of 'perfecting oneself' were harnessed to commercial and manufacturing instruments for increasing prosperity." Hiram Caton, The Politics of Progress: The Origins and Development of the Commercial Republic 1600-1835, at 48 (1988).

to foundational justifications since our aspirations are open to revision in light of more universal standards. Yet they are rooted in opinion in the sense that they start with the present practices that are counted as valuable among us.\textsuperscript{45} It should be added with regard to this universal aspect of our aspirations that, given that we aspire to be the best form of a commercial republic that we can manage, we are also committed to looking to other regimes that may be counted as the best of their kind. For, if we aspire to making the regime to which our aspirations point the best of its kind, and this should prove impossible, we are committed to looking to other regimes of similar stature. Having already decided to aim at the best, why would we not? We, therefore, must know how to identify the best—and we thus naturally move back and forth between the municipal and the universal. In short, we are always drawn outside our own community of thought and practice.

But why should we think of our inheritance from the founders as our aspirations—that is, as our hopes not just for ourselves, but realistically, mostly for those who come after us. Why should we have aspirations at all since, given the way the world works, it is unlikely that we who work to achieve them will receive many of the benefits? It will be those who come after us whose lives will be made better by any significant increase in the extent to which a commercial republic is realized. Why should we care about them?

It is no answer to say that it is because they are our children. All of them? Of course not. And in any case, if it is only our particular offspring that we care about, it is surely irrational to try to improve the political regime to which we are committed when it would be a more efficient use of our resources as individuals to find a relatively secure niche for our kin and otherwise leave things as they are.

Burke, who thought about this matter a good deal, commented that “[p]eople will not look forward to posterity who never look backward to their ancestors.”\textsuperscript{46} We might interpret him as saying that our aspirations, as they are rooted in the thought and practice of those who came before us, are also our pledge to future generations. But again, why make the pledge?

Justice or fairness might dictate that just as we think we deserve some things from those who come before us, we should attempt to provide the same or similar things to those who come after us. A sense of justice and fairness is surely at work. But the deepest point, I

\textsuperscript{45} Consider here Leo Strauss’ comment that in “a politically relevant” sense evaluative distinctions “cannot be ‘demonstrated’” and so classical political philosophers addressed “men who, because of their natural inclinations as well as their upbringing, took those distinctions for granted.” Leo Strauss, \textit{On Classical Political Philosophy}, in The Rebirth of Classical Political Rationalism: Essays and Lectures by Leo Strauss 49, 58 (Thomas L. Pangle ed., 1989).

think, is more nearly that, as we understand that our very identity as citizens has depended to some degree on those who came before us, we can only think poorly of ourselves if we do not attempt to pass on things of value—especially things of value which we ourselves have inherited and which have shaped us in ways of which we approve. If we cannot avoid shaping the very souls of those who come after us we can only be disgusted with ourselves if we pay no attention to the matter, or even act with malice, just as we will be disgusted with those who have come before us if they have acted hatefully or thoughtlessly. This is not a question of the right distribution of valued goods, which is the principal concern of most accounts of justice and fairness—this time concerning justice between generations. It is a more fundamental matter, perhaps best expressed as a recognition of a fundamental human injunction: just as those who come before us have an obligation not thoughtlessly or cruelly to make it harder for us, the living, to make our own way, so we must do the same for those who follow us. We ought then to wish to exercise the deepest care about what we pass on if indeed the very souls of those who come after us are at issue. Of course, we wish also to attend to our present concerns, but we also have reasons to forbear from only thinking about ourselves.

Here then is Burke's partnership between the living and the dead and those yet to be born.47 It all depends on recognizing that we do not spring full blown from our own wombs so to speak. The kind of reasoning that I have said lies at the base of our aspirations is a kind of dialogue between the living and the dead and the unborn, a dialogue conducted perhaps with more rationality than Burke may have thought possible, but a conversation of sorts with just those interlocutors he thought were essential to political evaluation.

The normative force of our aspirations thus lies finally in their being the product of reasoning among many people—those, spread out over many generations, who have been free enough and willing and able to exchange reasons about the regime that we should aim at, and not only for their own sakes but for the sake of those who come after them.

In the end, perhaps the most convincing argument for starting with our aspirations, understood as freely given accounts of people able and willing to reason, comes in the form of a rhetorical question. Are there likely to be a significant number of Americans who would think that a move toward a fuller realization of our aspirations in the form I have set them out would be a bad thing? Some no doubt would, including for example, those who cannot conceive of any regime they would find acceptable that had any significant measure of private

control of productive assets. Racists and misogynists would also find such fuller realization unattractive. But once we lay aside the demands of either complete agreement or of a dispositive rationality—assuming these are even plausible foundations—might not most of us actually say, after we bring to greater fruition a commercial republican regime, that we are better off? In any event, the experience of political reform efforts over the last two centuries tells us that it will be hard enough to move closer to the realization of our aspirations, no less to realize even very imperfectly something more demanding.

There is always, of course, the chance that I am wrong in all of this—and in two ways. First, a great deal of evidence of the quality and content of this conversation over the generations I have been describing would be needed to test my argument, and that evidence might show that my account is inaccurate. My reply here is simply that what I have suggested to be the case is enough to start the discussion of the theory of political constitution. No one will contend, I think, that the aspirations I have set out are not held by a significant number of people, even if they are not in fact the most elaborated and the product of the most searching argument.

Second, it might be the case that what I say are our aspirations are not in fact the product of reasoning, but are no more than cynically offered justifications by the powerful for the purpose of protecting their well-padded and dominant places in our collective life. To take the worst case, what I have called our aspirations might be mere ideology. They can’t be just that, however, since as Michael Walzer says, the principles of justification offered by the powerful are not ones they would choose to offer if they were choosing now. Having offered them at some earlier point, their actions are now likely to be criticized in light of them. They can, of course, attempt to offer new criteria and standards, but this is a losing game since the more they do this the more obvious it becomes that they are merely cynical power-grubbers and not worthy of our allegiance. We then may obey out of fear but not out of respect, and respect is valued even by cynical power-seekers since it is useful to them—being a cheaper way to get their plans carried out than through the use of even the most carefully calibrated violence and terror.

E.P. Thompson, a historian widely noted for being deeply critical of the English ruling class, makes the point as well as anyone.

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of the power, but, at the same time, they may curb that power and check its intrusions.

48. See Walzer, supra note 33, at 9.
And it is often from within that very rhetoric that a radical critique of the practice of the society is developed. . . . \textsuperscript{49}

III. THE PUBLIC INTEREST

We are now in a position to consider the idea of the public interest for the commercial republic and with it, the problems of economic equality and the political place of controllers of productive assets as they are manifest in this sort of regime.

As one of several kinds of good regimes, a commercial republic is a conception of rule aimed at a conception of justice. Which conception of justice? A commercial republic is a liberal regime—and, as such, a plausible conception of the justice at which it aims centers on the creation of a free and equal people capable of self-government.

There may be some dissent about whether I have properly characterized liberal justice. But for the purposes of constitutional theory this matters much less than is often supposed. \textit{Any} conception of liberal justice is too broad to be of much direct guidance to the law-making that is a central concern of constitutional theory. Moreover, even differing conceptions will point in similar directions, and it is unlikely that any differences in the conception of liberal justice will point law-making down substantially different paths.

Our aspirations are also of limited help in giving strong guidance to the substance of law-making. They, too, are a source of normative guidance; they are the flip side of liberal justice, and concern the kind of liberal regime that is to realize this justice. But our aspirations are also too broad in form. It could hardly be otherwise, since normative commitments of the kind found in aspirations are, in general, very broad; they are meant to orient us in a wide range of situations, many of which cannot be predicted beforehand.

Both our aspirations to realize a certain kind of regime and the conception of justice that constitute the deepest purpose of that regime do, however, indicate something of what law-making should consist. It is to be used to help realize a free and equal people capable of self-government through the securing of a commercial republican form of rule. But this is not specific enough. What is needed here is the kind of guidance that is not so broad as to provide little direction for law-making but not so specific as to turn law-making into administration. The name usually given to this in-between formulation is the "public interest."

What reason is there to think that there is anything that corresponds to the idea of the public interest? This is an especially pressing question since social science and political theory are shot through with arguments that there is no such thing. Thus, there are

the mid-twentieth century behavioral political scientists and late
century post-modern social theorists, and many in between, who hold
views that run from one extreme, that the public interest is merely a
rhetorical cover for the exercise of power, to the other extreme that
individuals can have no other palpable interests beyond what can
accrue to them personally. In the riveting words of Margaret
Thatcher, there is no such thing as "society."

Any conception of the public interest thus must walk a precarious
path between the view that there isn't any such thing, only the
aggregated interests of those who compose the society, and that there
is such a thing and it possesses detailed specifications. The
weaknesses of each are apparent. If there is only aggregation, what
shall we say about the rules that make aggregation possible? Are we
indifferent to how it occurs, whether it is fair? If we do care about
such matters, what will promote and make those rules secure? A
citizenry with a certain character situated in a certain economic
condition? This begins to look very much like a discussion of the
public interest. Moreover, if we think that the rules of aggregation
must be fair, the justification of such rules cannot itself rest on an
aggregation of preferences. It is unlikely that rules of fairness and the
like would emerge from any such procedure—and so, again, we are
more than halfway to a conception of the public interest as the rules
that ought to structure our politics.

Very much the same thing occurs with those we might call strong
proceduralists—those who look, for example, to democratic
deliberation itself to guarantee the goodness or rightness of the laws
that emerge. Notice first that deliberation is exceedingly difficult if
those involved are understood as living nowhere in particular. What
will they talk about? Where will they start? Is any starting point
sufficient? If not, why? If yes, what, if anything, distinguishes this
from the public interest? In addition, many procedural theories
smuggle in substantive conceptions of the public interest in their
specification of the circumstances in which reasoning is to occur.
Thus, it is sometimes said that the reasoners must be equal. Yes, very
likely, but that amounts to saying that one of the things the reasoners
must do in their deliberations is to try to secure equality. The
difference between such a procedural conception of the public interest
and a more substantive one is not readily apparent.

Again, there are those who argue that the only real test for the
goodness or rightness of a political order is that the people shall rule.
These we may call strong democrats. But what is being claimed in this
argument? That whenever a large aggregation of people come
together, whatever they decide must be right? Any aggregation?
How about a howling mob? If not, there must be criteria to
distinguish a band of thieves from other groups of people—and if
there are such criteria, then surely it is the task of good law-making to
secure them. The difference between this task for law-making and the public interest is not easily discernible either.

The view that there is only one detailed conception of the public interest, which commits law-makers in detail and in advance of the choices they will need to make, is both impossible and unwise. No one can see far enough into the future to provide detailed guidance for law-makers. Moreover, why should we attempt to bind law-makers in this hard and fast manner if we want them to be law-makers, not clerks? Why, indeed, do we want law-makers at all, if the substance of the public interest is so readily discernible in all its detail? If we are to have law-making, law-makers must have discretion, and a significant part of the burden of giving content to the public interest must fall on them.

If it is accepted that there is something to talk about under the heading of the public interest, we already have a clue how to proceed. I have indicated that in thinking about political value, one must think simultaneously about the possibility and the cost of institutions that can give such values life.

An institutional conception of the public interest has impressive advantages. It is, for a start, broad enough to be applicable to changing circumstances. Whatever else the public interest is, it must provide direction in what are largely unknown, variable circumstances. By contrast, a conception of the public interest made up of policy goals quickly outlives its usefulness, and it can provide little guidance once the particular world it was designed for passes away, as it must. A focus on institutions or modes of association designed to enable members of a political community to cope intelligently with such unknowns is more promising.

An even more important advantage of this institutional conception is that it enables us to make sense of the common intuition that politics is less about getting to some destination than about how we stand in relation to another wherever we are going. Many political theorists have sensed that destinations are hard to define for whole political orders: the world is too uncertain and we differ too much to agree on anything very detailed. What seems more important is that we are related to one another in durable and attractive ways. Such a view also draws on a deep sense on the part of many theorists that too much in the way of substantive social purposes undercuts liberty: individuals should be the principal holders of purposes. In addition, it draws upon the sense that society-wide planning has been shown to be very unattractive and unmanageable: after all, if there really is a public interest composed of a comprehensive set of substantive ends, then our politics should be an exercise in planning to serve those ends.⁵₀

⁵₀. See David Braybrooke and Charles E. Lindblom, A Strategy of Decision
Finally, an institutional view of the public interest makes sense of the idea that if we desire a certain political way of life we must put a good deal of effort into creating and maintaining it. Such a complex form of collective life is unlikely to come into being by itself, and it is not very likely that it will maintain itself through its ordinary workings. If we value a regime, we must value the efforts of lawmakers to secure it, which is to say, we must have a conception of the public interest. Not to value these efforts is to belie our commitment to that regime, and to render ourselves both foolish and feckless.

A similar evaluation of an institutional conception of the public interest has been offered by both Samuel Huntington and Bernard Crick. Huntington comments that "the capacity to create political institutions is the capacity to create public interests." Crick says that the public interest is simply a way of "describing the common interest in preserving the means of making public decisions politically."

There is a second thread to follow in giving substance to the public interest in addition to its institutional content. I have argued that institutions come in packages, in regimes. Taken together then, we are after a conception of the public interest that will be derived from our aspirations to be a commercial republican regime and from the liberal justice it is to serve, and that will be institutional in substance— as well as pointing to the assembly of institutions that compose this regime.

The first step then in giving an account of the public interest is to see what of some specificity can be derived from liberal justice and our aspirations. There are, at least, seven components of the public interest that can be so derived, and their status as an element of the public interest comes from this derivation. Each element has been the subject of considerable scrutiny—and it has been argued by a wide range of theorists of liberalism and popular self-government that any good political order must aim to realize them. Moreover, each can be more or less easily translated into an institutional form without significant loss of content. This further suggests that we are on the right track in giving an account of the public interest.

In the present context I can do no more than briefly set out each element in the public interest and point to its derivation. The public interest of a commercial republican regime consists of:

1) The development of a means to prevent law-making from being captured by those who wish to use the power of the state to serve unlimited purposes, whether in the service of self-aggrandizement or...
in the service of a goal that is said to be of great worth. This is what Madison called the problem of "faction," and the concern here is to make it possible for law-makers to attempt to give concrete meaning to the public interest. This element of the public interest derives from our commitment to republican government, which is impossible if faction is not controlled. It is also included in the idea of a free people capable of self-government.

2) The development of deliberative forms of law-making. This derives from our commitment to become a self-governing people. Self-government is valued, in significant part, because it allows a people to serve their collective purposes. If they are actually to serve those purposes, they must be able to talk about their specific content and how to realize them. In short, they must deliberate.

3) The securing of those rights that characterize a commercial republican people, viz., those that make them a free and equal people capable of self-government. At the least, these will consist of what Dahl calls "primary political rights," as well as rights that insure that there will a significant measure of private ownership of productive assets.

4) The securing of a degree of political equality sufficient to ensure that the politics of interest aggregation that will be a feature of any free society, will not be so heavily biased that significant portions of the citizenry regularly find themselves on the short end of law and regulation.

5) The securing of a degree of economic equality sufficient to undergird an equal people capable of self-government. Republican government requires political equality not only as the basis of an acceptable form of its aggregative politics, but also because if there is to be real self-government, then all citizens must have the ability to participate in it. Political equality requires in turn at least moderate economic equality. Since we aspire to be a commercial regime, the principal source of this economic equality must come from a system in which there is a significant measure of private ownership of productive property—and this means, more than likely, that it must come through a wide availability of at least moderately remunerative work.

6) The development of ways to give those who control productive assets a degree of discretion in the use of them so that they can use their detailed knowledge in efficiently deploying these resources—and to provide these asset-controllers with an array of inducements that will encourage them to take the risks that are an inevitable feature of

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55. See id. at 52-83.
large-scale wealth creation. This is what a commercial regime requires, and very likely any regime in which high levels of economic growth are wanted.

7) The development of a vibrant civil society in which private cooperative undertakings are common, both to serve the interests of those who participate in these organizations as well as those of some larger slice of the society. A free people cannot have all of its important business carried out by the state. Such a state will end up giving detailed directions to its citizens and will, in the end, be able to quash all criticism of its actions, since citizens will have no resources of their own. For much the same reasons, they cannot be self-governing either.

These components of the public interest can be restated in an institutional form, giving us an account of the public interest of a commercial republic precise enough to guide the efforts of law-makers involved in giving the public interest concrete meaning. To serve the public interest means to secure political institutions that control faction, are significantly deliberative in form, secure rights, and aggregate interests in a politically equal fashion; it also means to create and sustain market institutions that create widely available and at least moderately remunerative work, and that give significant discretion and inducement to controllers of productive assets; and it means to create institutions that facilitate a vibrant civil society which makes possible non-governmental forms of cooperation for large numbers of individuals.

The emphasis in this conception of the public interest is on creating and maintaining crucial institutions—constitutive institutions that is—the ones that give the regime its characteristic manner of working. In doing so, serving the public interest helps to bring into being a political way of life that has at its center a free and equal people capable of self-government. To serve the public interest of a political order whose citizens wish for a good regime is to secure and maintain the institutions that constitute the regime. In the American case, we who share the aspiration to be a fully realized commercial republic must want that republic to be the best that it can be, which means keeping in good repair the institutions that give it its distinctive character. In the broadest terms, the public interest is that which makes possible that there will be a commercial republican regime, a regime whose institutions realize liberal justice. The public interest is thus both "subjective" and "objective." It derives from the citizenry's preference for a certain kind of regime whose realization requires a certain kind of law-making.

It would be odd indeed if something very much like what I have

described were not the public interest of a good political regime. If the regime is a good one, the institutions that give it its character must also be. To wish for one is to wish for the other. The spirit of this conception of the public interest is nicely captured by a remark of Neil MacCormick, who ties this view of the public interest to a "long, spun-out thread in Western thought" that "politically ordered societies...each have a 'common good' not in principle divisible into individual goods, but a condition of them." A more or less fully realized good political regime is the foundation for the realization of the particular goods of the individuals that compose such a political community.

IV. LAW-MAKING, THE PUBLIC INTEREST AND ECONOMIC EQUALITY

Now that we have a conception of the public interest of a commercial republic, we can turn to the question of economic equality and related matters, including the place of controllers of productive assets in the political sociology of the regime. To do so, I must first make clear the relation between constitutional theory as I have been describing it, and law-making in a more or less fully realized republican regime. In doing so, I will summarize much of the preceding discussion.

Since the public interest focuses on the constitutive institutions that give the regime its character, the task of law-making in the public interest and the task of constitutional theory mirror one another. Both are concerned with the realization of these constitutive institutions. Law-making is the principal means by which the constitutive institutions set out in constitutional theory are to be given life.

As I have suggested, the task of constitutional theory is to define which institutions are constitutive of the regime, how they relate to one another, how these interrelated institutions are to be supported by a political sociology—and, on the basis of this analysis, set out an account of the public interest. In different language, a central task of constitutional theory is to devise the set of incentives—those that arise from the design of the constitutive institutions and from the political sociology of the regime—that will induce law-makers to legislate in the public interest. In particular, constitutional theory is to concern

58. There will be other kinds of law-making, but that cannot be addressed here.
59. Law-making in the public interest is also reflexive since its principal concern is, among other institutions, to secure the very institutions that are involved in that law-making.
60. Although there is no room here to pursue the point, since not all law-making in the commercial republic will need to aim at the public interest, a full theory of political constitution will need to devise incentives so that whatever other types of
itself with the problem of what will induce law-makers to consider the public interest at all, especially in the sort of regime like a commercial republic where private interest is given so central a place. Beyond that, constitutional theorists need to consider what will induce law-makers to consider the particular components that constitutional theorizing points to as the content of the public interest.

While constitutional theory and law-making in a more or less fully realized commercial republican regime share a set of concerns, it is, however, law-makers who must decide the concrete meaning of the public interest. Even if the public interest could be specified to the degree sufficient to direct law-makers on how to decide specific cases, it would be undesirable to do so. This would put government in the hands of constitutional theorists, and, however attractive this may be for some who ply this trade, most of the rest of us would prefer a political order where elections play a significantly larger role than under a reign of theorists. But, in fact, it is not possible for constitutional theory to set out how the various elements of the public interest are to be weighted in particular cases. After all, law-making in a more or less fully realized commercial republic is still law-making for a specific people with a history, and the virtues and vices that arise out of the particulars of their historic existence. Such a people inhabit a particular place and time, unlike the kind of constitutional theory I have been discussing which can only speak in generalities. Law-making in the public interest will, therefore, consist of an effort to consider the concerns that grow out of the particulars of the society which call for legislative action, in light of what is called for by the public interest. Assuming that law-makers are inclined to consider how to serve the public interest, their task is to give it concrete meaning by seeking to resolve questions of policy and law in a fashion that at least does no harm to the public interest, and, if possible, furthers it. In this they are working to secure the constitutive institutions that compose the public interest.

In attempting to serve the public interest, it is worth noting that law-makers will also need to concern themselves with the political sociology of the regime. The maintenance of particular institutions inevitably affects the interests of the various strata or classes that compose the society—and since a commercial republic, like any regime, rests on a political sociology, law-making in the public interest cannot be indifferent to such effects. Indeed, it must pay the closest attention where possible and choose institutional maintenance strategies that strengthen the kind of political sociology the regime requires.

law-making are needed will also take place.

61. Consider here those constitutional theorists who do not hesitate to pick up the mantle of instruction, and who work to reserve all important societal decisions to judges who then are enjoined to follow the theorists' directions.
Law-makers at their best then will examine the details of the policy matter under consideration and consider what the public interest calls for in the particular instance. Since there will be disagreement about the precise content of something as important as the public interest, it is the job of republican law-makers to resolve those disagreements, insofar as this is possible, in the course of giving the public interest substance. In giving the public interest concrete meaning, law-makers will not be free to decide these matters just as they please—not if they wish to legislate in the service of that public interest.

In describing the interrelations among the institutions that constitute a commercial republican regime, constitutional theory will point to the "tensions" or "contradictions" between the institutions that compose the regime and thus the fault-lines in its public interest. It will often be the case that the efforts to secure one constitutive institution will make it more difficult to secure others. Thus, strengthening the institutions of civil society may pull in the opposite direction from institutions that are designed to secure rights. The autonomy that a vibrant associational life requires opens up the possibility that civil rights may be undercut. Similarly, strengthening the separation of powers aimed at preventing factional government may make it harder to maintain political institutions that strengthen political equality, as the latter may require concentrated legal authority. Consider here what an effective system of campaign finance regulation will require. Or, consider in this vein, the institutions needed to promote the kind of full employment that can generate the moderate economic equality that, arguably, is needed for political equality. Law-makers trying to legislate in the public interest will need to take these contradictions into account.62

Perhaps the most difficult of such contradictions are the ones that arise from the need to keep up a steady flow of the kinds of inducements to asset-controller that are needed if there are to be effective market institutions. Such inducements are among the requirements of keeping in good repair market institutions rooted in private ownership. In particular, a market system rooted in private ownership of the means of production is also a system that, by definition, gives significant discretion to those who control these productive assets. This means asset-controllers must be induced to perform the large-scale task of wealth creation. The risks of large-scale investment are too great without inducements to reduce them, and prospective rewards must also be large enough to compensate for the uncertainty. Moreover, the need to induce means that the views of asset-controllers on how to operate an enterprise-based market system will be given the most careful attention by law-makers. This is

62. Not all law-making will confront such tensions or contradictions, but it is probable that these will be the most important pieces of law and policy since they cut deep into what constitutes the regime.
itself one of the inducements to significant investment, and it ensures that the other inducements offered are of the kind asset-controllers find attractive.\textsuperscript{63} Thus, as part of the efforts to secure market institutions, law-makers must maintain the privileged political access of asset-controllers.

A central difficulty of law-making in the public interest now comes into view. In trying to keep in good repair the economic institutions of the regime, law-makers in a commercial republic will be regularly tempted, if not to give away the store, at least to work to secure these institutions in what can perhaps be described as an over-enthusiastic manner. To serve the public interest, their doors must not only be open to asset-controllers, but the latter's views, I have said, must be given weight beyond their number. Law-makers, like most people, will be inclined to act on the messages they regularly hear, and it is asset-controllers that they hear more than others. Thus in considering the design of market institutions and how best to maintain them, and in weighing the various elements of the public interest, law-makers are likely to give undue weight to the views of large-scale businessmen. Otherwise said, law-makers acting in the public interest—which includes keeping the doors wide open to asset-controllers—will need to resist mightily the temptations simply to follow asset-controllers' views of the proper design of a market economy and to undervalue other aspects of the public interest, i.e., to give too little attention to those elements of it that are of limited concern to controllers of capital. If the present American politics are any indication, these temptations are very real.

Thus, a plausible view of contemporary American political order is that, instead of moving us closer to a full realization of a commercial republic, law-making undercuts efforts to do so. The source of the problem is not only the political privilege that we have just noted, which is undoubtedly at work. But to it we have added the Madisonian privilege that the founding design built in: the advantages conferred on the propertied by an extended republic and large electoral districts. It should not be surprising then that we have had considerable difficulty politically in creating a market economy that regularly produces full employment with at least moderately remunerative work for all able to participate in the workforce, and in doing so, promote a moderate kind of economic equality. This is unlikely to arise only from uncertainty about how to get market institutions to work in the necessary fashion. There has regularly been a lack of political will. In large part we have the kind of market institutions that asset-controllers prefer.

More elaborately, much the same point is true of the weight given

\textsuperscript{63} Lindblom, supra note 56, at 161-233; Elkin, \textit{Market and Politics in Liberal Democracy}, supra note 27, at 720-32.
by our law-making to strengthening institutions necessary for political deliberation. Our legislative process has been largely indifferent to, and sometimes actively hostile to, fostering the public-spirited citizenry that is needed if we are to have deliberative law-making. Since much in the politics of a commercial republic will push against deliberative law-making—attending to particular interests will still be high on law-makers’ agendas—there must be strong countervailing powers at work. When republican citizens come to think about political life, they must have some sense that law-makers ought to display the kind of reasoning about the concrete meaning of the public interest that only a deliberative way of law-making can provide. In short, a public-spirited citizenry is needed. From where is this public-spiritedness to come? Only the briefest sketch is possible here. Ordinary day-to-day life in a commercial society will not incline very many people to give any great weight to the public interest. Much points to attending to their own interests. Thus, if the citizenry is to have any significant measure of public-spiritedness, there must be places where its arts can be learned and the value of attending to it brought home. To judge whether law-makers are themselves acting in public-spirited ways, citizens must have some experience of trying to give it concrete meaning. Hence the greatest of social science laws: it takes one to know one.

Where can this school of citizenship be located? Two of the most important students of democracy, de Tocqueville and Mill, pointed to local political life as the only place where the concerns are broad enough to invite discussion of the public interest and where it is possible for large numbers of people to take part in such discussions. However, in a world in which capital is mobile and where local governments are heavily dependent on the revenues generated through local taxation, much of local politics will consist of trying to retain and attract mobile capital. The principal means of doing so is through rearranging land use; hence the crucial role it plays in local political life. The result is that any sustained discussion of the broader interests encompassed within the public interest is, at best, difficult to carry on. Instead of regular deliberation about the concrete meaning of the public interest, there is complex bargaining around land use allocation.

Therefore, if there is to be the kind of local political life that will foster public-spiritedness, some modification must occur in the need for local governments to attract and keep mobile capital. Virtually all such efforts will cut across the interests of those who control productive assets. Consider, for example, how they would respond to

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64. For a more complete discussion, see Stephen L. Elkin, Citizen and City: Locality, Public-Spiritedness and the American Regime, in Dilemmas of Scale in America’s Federal Democracy 37, 37-60 (Martha Derthick ed., 1999).
65. On this question, see Elkin, City and Regime, supra note 30, at 18-101.
any effort to reduce capital mobility. More importantly, national lawmakers, in fact, have made no such efforts.\(^6\)

Our law-making then is badly flawed: we are probably moving further away from a more or less full realization of a commercial republic—from the public interest. A legislative agenda aimed at a full realization of a commercial republic must include in it measures that: reduce business privilege; reform markets so that they regularly create full and at least moderately remunerative employment; and reform local political life so it engenders more public-spiritedness. Like all significant political changes, this will be a bootstrap operation. Law-makers and citizens must attempt advances beyond where the distribution of power and sentiment now points them. They will, however, only be this adventurous if they have a sense of what is at stake. It is a central task of constitutional theory to make them aware that it is the realization of the regime to which they aspire that is at issue.

**CONCLUSION**

Do we need the kind of constitutional theory I have outlined here? It might be argued that such an elaborate theory of political constitution is surely of no interest given our present contentment. But even those who feel a flush of pleasure when they contemplate our present political and economic arrangements need such a theory. Like those in political orders past and present, they too will have to face the more or less certain deterioration of our political practices and institutions. It is doubtful whether any social arrangements can, unaided, long withstand the forces of inattention, corruption and conflict. If the legions of the contented are to understand what is happening to our constitutive institutions and what might be done about it, they will need a theory of political constitution. Moreover, even if their contentment reflects the underlying reality, they will still need such a constitutional theory of the kind I have described, since there will always be proposals for reform whose results, and perhaps purpose, will be to undermine the working constitution that is the object of their sense of satisfaction.

Those who are not content with present institutions and practices, but are still committed to some version of what we now have, will, of course, also need a theory of political constitution. For them, it

\(^6\) The kind of economic equality that steady and at least modestly remunerative work will generate will probably not be enough to make a local deliberative politics possible. Deliberation requires mutual respect—people who do not respect one another will be unlikely to listen to one another’s arguments—and one of the sources of that respect is a kind of rough economic equality. Thus, to a full employment with good wages, a commercial republic will almost certainly need to add other equality-producing measures. Again, this will not be easy given Lindblomian and Madisonian political privilege.
provides guidance on how to realize more fully the regime to which they (and we) aspire. For them the question will be: Are the problems they see incidental weaknesses of the kind that characterize any attractive political order? Or are they something of greater moment? Is the regime in crisis where an all out effort is called for, where, if action is not taken, the political order will dissolve, probably into something less attractive? Or, again, are they witnessing the more or less usual complaining, conflict and mild disarray that are commonplace in a vibrant democratic political order? To answer such questions, critics of our present practices need a theory which points to the remaking of our political institutions in the service of a full realization of a commercial republic. If they are to do more than wring their hands or charge off in all directions, chasing after the panaceas of the moment, they will also need such knowledge.

Whatever else is true then about the constitutional parties that carry on the debate about the state of our working constitution, they have, or ought to have, a community of interest in developing the kind of constitutional theory I have outlined. Not the least of the reasons is that this theory is the substance of the public interest of the American commercial republic.