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THINKING CONSTITUTIONALLY: THE PROBLEM OF DELIBERATIVE DEMOCRACY

By Stephen L. Elkin

I. Introduction

A variety of arguments have been advanced that deliberation should be at the center of any good political regime in which there is popular self-government. Deliberation is to be the basis for lawmaking, that is, for the making of the collectivity's binding decisions. Thus, John Rawls says, "[O]f course, actual constitutions should be designed as far as possible to make the same determinations as the ideal legislative procedure." This procedure, in turn, is defined as having laws that result from "rational legislators . . . who are conscientious, trying to follow the principles of justice as their standard." These legislators "are not to take a narrow or group-interested standpoint."[1] Joshua Cohen broadly agrees with Rawls and characterizes Rawls's view as one that argues for a democratic politics that is built around public deliberation.[2] Cohen says (agreeing with Rawls) that "an ideal pluralist scheme, in which democratic politics consists of fair bargaining among groups each of which pursues its particular or sectional interest, is unsuited to a just society."[3] John Dryzek shares these views and comments that the "essence of democratic legitimacy should be sought . . . in the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision."[4] Others have argued along similar lines, including James Bohman,[5] Amy Gutmann and Dennis Thompson,[6] David Gauthier,[7] and Jurgen Habermas.[8]

In this essay, I want to argue that there are two temptations to avoid in theorizing about deliberation in democracy, especially when the argu-

[1] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 360.
[2] Joshua Cohen, "Deliberation and Democratic Legitimacy," in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997), 67–92.
[3] Ibid., 68. Cohen points to Rawls's statement on the matter in *A Theory of Justice*, 360–61.
[4] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York: Oxford University Press, 2000), v.
[5] James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA: MIT Press, 1996).
[6] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996).
[7] David Gauthier, "Constituting Democracy," in David Copp, Jean Hampton, and John E. Roemer, eds., *The Idea of Democracy* (New York: Cambridge University Press, 1993), 314–34.
[8] Jurgen Habermas, "Popular Sovereignty As Procedure," in Bohman and Rehg, eds., *Deliberative Democracy*, 35–66.

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ment concerns building a whole regime around deliberative ways of lawmaking. These temptations are as follows:

1. The belief that deliberation itself—the exchange of reasons—is what is valuable, not reasoning about particular matters that must be addressed if the political regime is to be maintained.
2. The belief that the primary concern of political action in a good regime is to foster the virtues and motives that make deliberation possible, and that the more effort that is put into promoting these virtues and motives and the political processes that revolve around them, the more likely that popular self-government will flourish. These virtues and motives include the ability and desire to set out clear arguments, rhetorical ability, the ability and desire to listen carefully to others, and a willingness to show respect for other deliberators.[9] Political processes that rest on other motives, notably bargaining and the exercise of political power, are to be kept to a minimum. Moreover, in the more radical formulations, they should, if possible, be eliminated. In this view, to the degree that democratic politics revolves around bargaining and the exercise of power, it is badly flawed. A good regime is held together by good motives.[10]

Both of these beliefs are problematic if we are to have a well-designed form of popular self-government. But aspects of these beliefs are not uncommon in works on deliberative democracy. The source of such weaknesses in deliberative theory, or so I will argue, is a lack of deep engagement by theorists with the question of how a political order that revolves around deliberation (although it is generally agreed that none does so at present) will actually work. Even more importantly, there is too little thought given to what will make it work in the required fashion. Once we think about the institutional workings of such a political order—and especially about what is necessary to secure and maintain its crucial institutions—we are likely to have a different view from the one held by those who share the beliefs I have just described. In particular, we are likely to view differently what the role of deliberation in a democracy should be, and how to evaluate what might be called "morally ambiguous" motives and political processes. In other words, once we think constitutionally about these matters—that is, once we think about what is necessary to constitute an attractive and enduring form of popular self-

[9] See Benjamin Barber, "An American Civic Forum," *The Good Society* 5, no. 2 (1995); and Iris Marion Young, *Inclusion and Democracy* (New York: Oxford University Press, 2000), especially chaps. 2–3.

[10] Cf. Harvey Mansfield's comment that "the good . . . think goodness is enough." Harvey C. Mansfield, *Machiavelli's Virtue* (Chicago, IL: University of Chicago Press, 1996), 29.

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government—we will likely end up with a theory of how this might be done that is substantially different from the theories set out or implicit in the work of many deliberative democrats. We will also find ourselves drawn into a discussion of the problem of political evaluation, especially regarding the place of morally ambiguous political motives and processes in good political regimes.

Much of the latter discussion will emerge out of an examination of the mode of theorizing engaged in by John Rawls. A significant portion of the work on democratic deliberation has been influenced by Rawls's manner of theorizing, which he terms 'ideal theory'. Rawls is quite clear that he proceeds in his theorizing by putting aside any consideration of morally ambiguous motives and the political processes that are built on them. These are viewed as matters that get in the way of realizing justice. They are to be discussed only under what Rawls terms 'partial compliance theory', as things that prevent strict or full compliance with the substance of justice that ideal theory is meant to elaborate, and which is his principal subject. Rawls thus explicitly sets out a mode of theorizing, echoed in the work of many deliberative theorists, and he asserts that unattractive motives, skills, and political processes can be laid aside while we concentrate on ideal motives and processes. Moreover, Rawls believes that we can do so without any damage to our understanding of how to create and maintain a good regime of popular self-government. Indeed, proceeding in this manner, Rawls suggests, is the preferred way to theorize. My concern here, then, is not only substantive: the question of how to achieve deliberative lawmaking in a democracy. I am also concerned, through an examination of ideal theory, with the question of how to do political theory. Given the link between Rawlsian ideal theory and much deliberative theory, the two issues are, in fact, interconnected: criticism of one has a bearing on the attraction of the other.

My basic contention is that if we treat political theory as an examination in concrete and institutionally specific detail of how to constitute a regime of popular self-government, then we will value deliberation as such rather less, and value morally ambiguous motives and the political processes built on them rather more, than does much of deliberative theory. Thus, how we do political theory, I will contend, has a significant effect on what evaluation we give to important features of democratic political life and the attendant political practices. Moreover, we are more likely to succeed in creating and maintaining an attractive democratic regime if our actions are guided by what may be called 'constitutional thinking'.

Since what is missing in much deliberative democratic theory is a substantial account of the workings of crucial institutions and what will make them work in the required way, and since a similar account is needed for constitutional thinking, I will develop my argument by considering a particular polity—the United States—and what would be nec-

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essary if it is to have deliberative lawmaking. I will focus on the United States because, from the nation's beginnings, the value of deliberative lawmaking has been a constant theme.[11]

II. Deliberative Lawmaking and the American Regime

We can start by considering what public deliberation or, more precisely, deliberative lawmaking entails. To the degree that a regime of popular self-government engages in deliberative lawmaking, it makes its collectively binding decisions not through the exercise of power or through bargaining, but through reasoning. For such deliberation to occur, there must be political institutions that put lawmakers in a deliberative relation with one another. The legislative process and the institutions that compose it must work deliberatively.

What does it mean for the legislative process to work deliberatively? Crucial is a disposition on the part of lawmakers to think about public matters in terms of how they might affect the public interest, instead of solely in terms of each lawmaker's own interest or the interest of some particular group in the society.[12] As Arthur Maass says, legislators must have "breadth of view."[13] Lawmakers must try to answer the implicit question posed by any piece of legislation, Is it in the public interest? by *discussing* it. Accordingly, they must argue, adduce evidence, point to comparable cases, etc.[14] General ideas about "what constitutes good public policy" will be "important in determining the results of the process."[15] As William Galston says, lawmakers must possess "deliberative excellence."[16]

[11] See *Federalist No. 10* (J. Madison), in Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961); Cass Sunstein, "The Enduring Legacy of Republicanism," in Stephen L. Elkin and Karol Edward Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago, IL: University of Chicago Press, 1993); Joseph M. Besette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago, IL: Chicago University Press, 1994); and Stephen L. Elkin, *Constituting the American Republic* (forthcoming), esp. chaps. 2–4, 9–10.

[12] Some theorists have doubted whether deliberation must or ought to be directed at giving content to the public interest. See, e.g., Young, *Inclusion and Democracy*, chap. 1. As will become apparent, I think it must. At this point in the argument, however, the reader need not decide the matter, since I will show below in the text that even deliberative theorists who deny that there is a public interest must believe that there is one if their theory is to be compelling. Otherwise said, the presumed difference between theorists who affirm or deny that deliberative lawmaking ought to serve the public interest collapses once we understand what is required for such lawmaking to work.

[13] Arthur Maass, *Congress and the Common Good* (New York: Basic Books, 1983), 18.

[14] Cf. Karol Edward Soltan, "What Is the New Constitutionalism?" and "Generic Constitutionalism," in Elkin and Soltan, eds., *A New Constitutionalism*.

[15] Steven Kelman, *Making Public Policy* (New York: Basic Books, 1987), 208.

[16] William Galston, "Liberal Virtues," *American Political Science Review* 82, no. 4 (1988): 1284.

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In deliberative ways of lawmaking, lawmakers understand that their views of the public interest and any interpretations of it that they have offered to voters are their initial positions. These are partial viewpoints that will be subject to expansion and revision, especially as lawmakers attempt to reconcile their positions with those of other members of the legislative body. Their policy positions are not to be considered mere counters in a trading game, but partial, tentative answers to the question, What is in the public interest? Thus, lawmakers who stand in relation to one another as deliberators will have a disposition to reach beyond their initial positions and to revise them in light of argument and evidence. Deliberative lawmakers will offer *reasons* for their positions, but lawmaking is not analogous to a debating society where great speeches are delivered by one modern-day Pericles after another. Because widespread agreement on important legislative measures is not likely to emerge quickly or easily, but must be built up from diverse initial positions, the premium for deliberatively minded lawmakers will be less on oratory and more on drawing out, making concrete, and reconciling various interpretations of the public interest.

Obvious questions follow. Will the institutions that make possible the kind of deliberation just described work over time in the necessary ways, without any special attention given to maintaining them? Will they be relatively free of corruption, as political actors who would gain from preventing deliberative lawmaking attempt to undercut them? And, in the face of strong incentives to focus on short-term interests and concerns, will many people be willing to invest the resources needed to maintain these institutions? The answer to all these questions is almost certainly no. This, in turn, means that if lawmakers are to engage in deliberation, then a number of conditions must be met. First, they must be free to deliberate about these matters, and not be prevented by various political pressures from considering the public interest. But being free to consider the public interest is one thing, being motivated to consider it is another. Thus, a second requirement is that the legislature be so organized that lawmakers not only find it possible to turn to the public interest but also have some incentive to do so. Third, and similarly, lawmakers will need to believe that there are political rewards for concerning themselves with the public interest, that is, there must be a citizenry with the ability and the inclination to reward lawmakers whose legislative activity is directed at serving the public interest. If we assume that Americans aspire to realize a political regime in which deliberative lawmaking plays a central role,[17] then we can explore how these three conditions might be met in the American context. On the basis of what we discover, we can also say

[17] For evidence and argument that this is so, see Elkin, *Constituting the American Republic*, chap. 1.

something about the value of deliberative lawmaking generally, and what is at stake in efforts to create it. I shall discuss the first condition in subsection A below and the related conditions two and three in subsections B and C.

A. Preventing faction: The first condition

A useful way to understand the problem of preventing lawmakers from being captured by forces that would turn them away from a deliberative inquiry into the meaning of the public interest is provided by James Madison. For Madison, this is the problem of 'faction', and preventing faction is the key to republican, that is, to limited, popular government. If lawmakers are not free of factional influence, they will be unable to concern themselves with securing the public interest. By 'faction', Madison means "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[18] Factional government is unlimited government, since factions recognize no legitimate barrier to serving their own interests. In Madison's language, factions lead to disregarding "the public good" and to matters being decided "not according to . . . the rights of the minor party, but by the superior force of an interested and overbearing majority."[19]

Madison extends the traditional worry that government itself endangers individual liberty to include the idea that the people, when wielding political power, also present a danger. As Madison observes, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[20] The problem of majority faction is particularly difficult, Madison argues. A popular regime is especially vulnerable to the passions of majorities since, in significant ways, such a regime must work according to majoritarian principles if it is indeed to be the rule of the people. Majority factions, that is, can claim the cover of law for their actions. Conversely, minority factions pose less of a problem since ma-

[18] *Federalist No. 10* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 78.
[19] Ibid., 77.
[20] *Federalist No. 55* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 342. Jack Rakove, a careful student of Madison's thought, writes:

> For most 18th century liberals, the problem of rights was to protect the whole people against the coercive power of monarchy. Madison was the first to realize that this formula was irrelevant to the American republic, where real power lay with popular majorities, who would use legislative power to burden whichever minorities they disliked.

Jack Rakove, "A Nation Still Learning What Madison Knew," *New York Times*, March 11, 2001, sec. 4, p. 15, col. 1.

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jorities can "defeat [their] sinister views by regular vote." The "republican principle" is enough to prevent factional rule by a minority.[21]

Madison is clear that faction cannot be eliminated on any grounds consistent with republican government. Factions could be prevented from forming by destroying liberty, but this remedy is "worse than the disease." To save republican government by subverting its very purpose does not commend itself.[22] Alternatively, an attempt might be made to give every citizen "the same opinions." But this, writes Madison, is "as impracticable as the first [approach] would be unwise." For faction is "sown in the nature of man."[23] It is also possible, supposes Madison, that every citizen might simply *have* the same opinion, thus eliminating factional disputes, but this is only likely in a small republic where people live much the same way, and where those who have heterodox opinions would find it expedient to move to a more congenial place. Here Madison shares Alexander Hamilton's view that a multiplicity of small republics on American soil would be a recipe for weakness and conflict, an environment in which republican government would be unlikely to flourish.

In general, Madison argues that instead of trying to eliminate faction, it is better to work to control its effects. And, indeed, if factional interests could be multiplied, faction would actually indirectly help to create and maintain a well-ordered republican government. Thus, Madison argues that the way to limit factional strife and to prevent factional government—to control the effects of faction—is (1) to create a system of representation; (2) to divide power and tie this division to ambition so that ambition could be made to counter ambition; (3) to extend the sphere of the republic to encompass multiple interests; and (4) to stimulate commerce, which would create the multiplication of interests.[24]

First, representation would cool passion by placing an agent between a people given to faction and the content of the laws. Representatives would "refine and enlarge the public views," leading to laws "more consonant to the public good." However, representation is no cure-all. It could, and more than likely would, produce as representatives some men of "factious tempers" given to "local prejudices."[25]

Madison also argues that, while a "dependence on the people is, no doubt, the primary control on government," and thus the system of representation is crucial for securing republican government, there must also be "auxiliary precautions."[26] One such precaution, the second way to control faction, is to divide the powers of government, thus reducing the

[21] *Federalist No. 10* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 80.
[22] Ibid., 78.
[23] Ibid., 78 and 79.
[24] Ibid., 82–84.
[25] Ibid., 82.
[26] *Federalist No. 51* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 322.

chances that a majority faction could gain control. The likelihood of this occurring would be reduced simply because of the division itself: a faction might, for example, gain a majority in one house of the legislature, but not control the presidency. The difficulties for a faction would be multiplied by requiring that each branch of government—and within Congress, each house—be elected or selected in a different fashion and for a different period of time.

Perhaps even more important, the separation of powers would be strengthened—indeed, would only work—through the harnessing of ambition. As Madison explains, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[27] The problem is how to motivate each branch of government to resist the incursions of the others. It is important that each branch have the inclination and the capacity to resist what it understands to be incursions by the others. What will provide the motivation? Madison answers: ambition. What will provide the capacity? Madison answers: "the constitutional rights of the place." Thus, Madison supposes that members of each branch, or at least many of them, will not wish to become the lackeys of another branch, doing the president's bidding, for example, simply because it is his bidding, or the Supreme Court's bidding, simply because it has decided some matter in a particular way. No one, Madison thinks, will welcome serving in a branch of government that is widely perceived to be subordinate and puny. Ambition and the desire for recognition will lead members of the various branches to employ the powers that the Constitution awards their branch. The results will be a separation of powers that is not a mere "parchment barrier"[28] and a decrease in the likelihood that any faction can gain control of the full powers of government.

Third, an extended republic is also an advantage in controlling faction, Madison argues. In contrast to the older view popularized by Montesquieu that republican government could only succeed in a relatively small and homogeneous country where there is a commonality of interests, it is precisely the multiplicity of interests that would emerge in a large country that is useful for republican government because this multiplicity would make it less likely for a single large faction to form. An extensive republic would also make it harder for a large faction to form, given that communication would be costly and the resources required would be substantial. Moreover, Madison explains, majorities would "seldom take place on any other principles than those of justice and the general good."[29] Further, a large republic would also mean large constituencies if the number of representatives were to be small enough to prevent "the confusion

[27] Ibid.
[28] *Federalist No 48* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 308.
[29] *Federalist No. 51*, p. 325.

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of a multitude."[30] Large districts would reduce the likelihood that the practice of "vicious arts" would decide elections and would favor the election of men of "the most diffusive and established characters."[31]

Fourth and finally, as Martin Diamond has argued,[32] Madison believed that multiplication in the number of economic interests would make it less likely that there would be only one major economic fault line, between property-owners and the propertyless, around which political conflict would organize. The principal vehicle for multiplying interests would be a vibrant commercial society in which those who pursue their livelihood in shipping, for example, would have different interests than those who work in finance.[33] The size of the country would also increase economic diversity. As important, those involved in these various economic pursuits who are not property-holders but are recipients of wages might be expected to see their interests tied as much to the flourishing of the shipping or banking trade as to the fact that they hold little or no property. One way to understand Madison here is to contrast a commercial society to an agrarian society in which there is a small landholding class and a mass of agricultural laborers who are dependent on the landed class for work. The latter society is an inhospitable environment for popular self-government because the interests of the two classes conflict and define all other relationships, and because the laborers are too economically dependent to be the kind of independent citizens that republican government requires.

Madison's overall view, then, is that auxiliary precautions would (1) increase the number of interests, making it less likely that two great opposing factions would emerge; (2) divide governmental power, lessening the possibility that any faction could control the entire government; and (3) create through representation a class of political leaders of independent character and outlook, who would be accountable to the citizenry but sufficiently removed by distance—and in the case of the Senate, by indirect election—that they will be relatively insulated from the passions that will inevitably roil the citizenry from time to time. These leaders would then be in a position to consider the public interest. The regime would be popular, but so arranged that any passionate majority would need to persist over long periods if it were to hold sway, and perhaps in the process it would become cooler in outlook.

[30] *Federalist No. 10*, p. 82.

[31] Ibid., 82–83.

[32] Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framers' Intent," in William Schramba, ed., *As Far As Republican Principles Will Admit: Essays by Martin Diamond* (Washington, DC: AEI Press, 1992).

[33] Cf. Judith Best's comment that the "promotion of commerce will foster heterogeneity. This axiom is implicit in Madison's recognition that this protection [of diverse talents] results in 'different degrees and kinds of property.' " Here Best is quoting *Federalist No. 10*, p. 78. Judith Best, "Fundamental Rights and the Structure of Government," in Robert A. Licht, ed., *The Framers and Fundamental Rights* (Washington, DC: AEI Press, 1991), 43.

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It is worth emphasizing here that in recommending the harnessing of interest and ambition, Madison is not suggesting that these are the only motives of humankind. He is clear that human beings are also capable of concern with a larger good. The problem is that this sort of motive is neither strong nor widespread enough to be used as the only building block for republican government. Something more reliable is called for, and Madison believed he had found it in the related motives of self-interest and ambition.[34]

B. Organizing the legislature: The second condition

Will lawmakers who are free to deliberate in fact concern themselves with the public interest? Many will show that modicum of attachment to the public interest that is characteristic of all decent people in not completely wretched regimes. But for these lawmakers, such attachment to the public interest is unlikely to be sufficient to generate a consistent and ample disposition to engage in deliberative ways of lawmaking. These lawmakers are not, after all, likely to be Solons. More inducement to serve the public interest will be needed. Some of the incentives to legislate in the public interest can come from the organization and leadership of the legislature itself. Additional, and crucial, incentives for deliberative ways of lawmaking must come from the citizenry. Its members must reward through reelection those who evidence a disposition to deliberate. The citizens of a commercial republic must be, in their way, as capable as its lawmakers. They must have qualities of judgment that allow them to discern which prospective lawmakers understand lawmaking to be, in significant part, a deliberative process, and have either the skills necessary to participate in the process or the inclination to develop such skills. The hope for deliberative lawmaking in a republic lies in the combination of what might be termed the 'legislature as school' and the capacities for judgment by the citizenry.

At present in the United States, noted legislative careers do not require any great talent for legislation, that is, for the arts of hammering out how the public interest is to be brought to bear in particular policy decisions. That a keystone of republican government is a legislature adept at deliberating about the public interest seems to be remote from the concerns of most present members of Congress. The possibility and importance of such a great

[34] See *Federalist No. 55*. See also Alexander Hamilton's comment (*Federalist No.* 76, p. 458):

> The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence.

Cf. Samuel Johnson's comment: "I know, Madam, how unwillingly conviction is admitted when interest opposes it" (quoted in James Boswell, *Everybody's Boswell: Being the Life of Samuel Johnson*, ed. Frank Morley [London: Bell & Hyman, 1980], 74).

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role for the legislature seems to be lost on those who think of themselves as servants of the interests of their home districts. Moreover, many members of Congress appear drawn to the idea of a political career that is graced by regular appearances on television, enjoyment of the perks of office, and indulgence in the pleasures supplied by those who finance campaigns. More wholesomely, but of not much greater assistance to the public interest, legislators also pursue happy careers attending to the concerns of private and public interest groups focused on single policy issues.

If there are few lawmakers whose ambitions are to be great legislators, paladins of the public interest, then the separation of powers cannot do its work as the vehicle for giving concrete meaning to the public interest. For the separation of powers is designed not only to prevent faction; it is also meant to promote wide-ranging and broad discussion of the appropriate content of the laws. It may not be the case that the greater the number of voices the better, but it almost surely is the case that to have all the voices coming from a single institution with a concomitantly limited set of concerns, history, and tradition is not a good bet for those who want the public interest served. The separation of powers widens the discussion because each branch of government needs the cooperation of others to make laws: the branches *share* power as well as have separate powers. There is then a push toward cooperation among the branches. For a republican government to flourish, we might say, it must have a deliberative core, and for present purposes it is important to see that essential to there being such a core is a legislature that can act as a deliberatively minded interlocutor. Such a body will draw the other branches into deliberative argument: deliberation within the legislature will promote deliberation among the branches.

What will make the legislature work in the ways necessary? Part of the answer is a legislature with a certain kind of leadership. The overwhelming number of lawmakers are not likely to be great statesmen but ordinary people who in the end will act in deliberative ways, if at all, for the same reasons that most people do—because it will be personally rewarding to do so. These lawmakers will, in significant part, be self-interested. But, for many, their self-interest is unlikely to be narrowly understood, and will thus probably include a desire to be held in esteem by their colleagues for exhibiting knowledge of public matters and a concern for the public interest. In addition, lawmakers will likely be motivated by fear of being exposed by their legislative adversaries as ignorant and in the pocket of special interests. Lawmakers will find satisfaction in the prospect of political advancement that comes with a reputation for being devoted to the public interest and knowledgeable about public affairs.[35] Moreover, some lawmakers will harbor a deep and abiding desire to be

[35] Cf. John Locke's comment that "Esteem and Disgrace are, of all others, the most powerful Incentives of Mind, when once it is brought to Relish them." John Locke, *Some Thoughts Concerning Education*, 1693, ed. John W. Yolton and Jean S. Yolton (Oxford: Clarendon Press, 1989), sec. 56.

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famous, to go down in the history of the country as a lawmaker of great distinction who was devoted to the well-being of its citizenry.[36] As Gouvernour Morris, a signer of the U.S. Constitution, put it, "The love of fame is the great spring to noble and illustrious actions."[37] It is in the motives just canvassed that part of the hope for deliberative ways of lawmaking lies. For these motives can be built upon and extended in ways that bring lawmakers to a regular concern for the public interest. The legislature as an institution can teach. The motives of the pupils can be harnessed, and the legislature can become a school for learning the arts of deliberative lawmaking.[38]

To be sure, as I will argue below, something more must be present than pupils who come to the legislative school with motives of self-interest and ambition if the legislature as school is to succeed. Surely, if the legislature does not have the right pupils, it will ultimately fail in its teaching. But just as important, it cannot be the proper sort of school without the right teachers—both to build on the motives just described and to foster inclinations toward public-spiritedness on the part of lawmakers, if they are elected by a citizenry similarly inclined. Who then might the teachers be? Not surprisingly, they will be legislative leaders who are willing to organize a legislature that encourages a deliberative concern with the public interest. These leaders will include, most notably, those who hold its formal positions of leadership, such as majority leader and committee chairs. But informal leaders who have reputations for knowing how the business of legislation works and should work will also be important. A legislature that is more or less entirely composed of abject mediocrities, that is, one lacking such leadership, cannot by some hidden hand miraculously turn itself into a lawmaking body of great distinction. John Stuart Mill tartly remarked in this regard that

> a school of legislative capacity is worthless, and a school for evil, instead of good, if through want . . . of the presence within itself of a higher order of character, the action of the body is allowed, as it so often is, to degenerate into an equally unscrupulous and stupid pursuit of self-interest of its members.[39]

What will attract persons of great ambition and competence to pursue their ambitions through a political life anchored in leading the legisla-

[36] For a classic account of such motives as they applied to the framers of the Constitution, see Douglass Adair, "Fame and the Founding Fathers," in Douglass Adair, *Fame and the Founding Fathers*, ed. Trevor Colburn (Indianapolis, IN: Liberty Fund, 1998).

[37] As quoted in James Madison, *Notes of Debates in the Federal Convention of 1787* (1840; reprint, with an introduction by Adrienne Koch, Athens, OH: 1966), 323.

[38] See the marvelous discussion by William K. Muir, Jr., in his *Legislature: California's School for Politics* (Chicago, IL: University of Chicago Press, 1982).

[39] John Stuart Mill, *Considerations on Representative Government* (1861), in John Gray, ed., *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 417.

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ture? What will dispose them to see politics as a place where things can be done that will win them lasting acclaim? Why will they give up a quiet life of large offices and staffs, modest prestige, and modest power for the rigors of leadership? The work of a leader in a deliberatively minded legislature will bring with it fame, but not necessarily in a day-to-day way, and probably not of a kind that will make the leader an attractive companion for movie stars and pop singers. Otherwise said, legislative leaders in a republican regime must see the connection between their own ambitions and a great and powerful role for the legislature in carrying on the business of republican government. Lackeys of presidents are comparatively easy to come by.

Again, what might prompt the ambitious and the competent to undertake the burdens of leadership? The answer—leaving aside for the moment any inclination of the citizenry to elect public-spirited lawmakers—is likely to be a heightened form of what motivates ordinary lawmakers to consider moving beyond the narrow interests of their constituents and their own self-regarding desires. A prospective leader wishes for the fame that goes along with having a reputation for being a great lawmaker. Therefore, if there are to be leaders who will work to create a legislative school, then it must at least be possible for persons of high ambition to realize their desire for widespread public esteem through a career running the legislature. If the organization of the legislature and the manner of choosing its members is such that even those with the greatest concern for the public interest cannot expect to shape the legislature into a mighty engine of the public interest, then persons with the requisite appetite for fame will look elsewhere—and the legislature will be dominated by nonentities and by those whose appetite for fame requires no more than holding public office. The ambitious and the talented are no different from their more ordinary counterparts. They are more or less rational and are unlikely to waste their energies in fruitless pursuits. To realize their ambitions, therefore, those who wish to be great legislative leaders will need the help of a substantial proportion of their colleagues—and it must be possible to gain this help without enormous cost. This will depend, in significant part, on what kind of people are elected to the legislature, a matter I will turn to in a moment. But first, something must be said about what legislative leaders who wish to promote deliberative lawmaking must do in order to make the legislature work as a school that teaches and reinforces the arts of legislating by deliberating.

As I suggested at the outset of Section II, a deliberatively minded legislature is not a big debating society in which legislators assemble in a large room, and those who wish to persuade the body of lawmakers of the rightness of their views employ rhetorical devices to carry the day. If the legislature is to do the work of deliberating about the public interest, it must be able to build on a good deal of careful argument and analysis of information. A debating society is one of the least likely forms of

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organization to accomplish much of anything, except to hone the skills of debaters and to provide either delight or boredom for their audience.[40] How, then, shall the legislature be organized?

Of fundamental importance, leaders must devise ways for those with the inclination to enlarge their purview and that of their constituents to do so without being punished at election-time or in public opinion polls. Leaders must also find ways to reward such lawmakers both inside and outside the legislature. Their rewards inside will include positions of influence in the legislative organization and attention to the projects that are closest to the hearts of these lawmakers' constituents. Outside of the legislature, leaders must look for ways to emphasize that these lawmakers are persons of integrity and acumen who deserve seats at the tables of the momentarily mighty. Meaningful opportunities to appear in the public eye in ways that will please the folks back home are also important. Lawmakers must be given the opportunity to be *seen* to deliberate. To some degree, however, this is in tension with actual deliberation, since deliberation cannot usefully be done through the whole chamber meeting in floor debate. Thus, the real task of leaders is to ensure that deliberation occurs in committees, where it will be both easier to prompt and more fruitful in result, and to make the course and outcome of such deliberation widely available to anyone who is willing to pay modest attention. The organization of the legislature must be such as to allow publicity, so that voters may judge the deliberative qualities of their lawmakers and thus reward those who make the effort. But this must be accomplished without making it impossible for lawmakers to move beyond their initial commitments to their constituents insofar as these reflect relatively narrow and particular interests.

How might all this be done? Among other things, a leader must be adept at sounding out the views of members of the legislative body. This means listening carefully, trying to see where each lawmaker feels strongly, particularly where his or her views are based on a strong grasp of the matter at hand. Where they are not—perhaps the lawmaker does not care very much, or he or she does care but the opinion is rooted in very little information—the leader may present arguments and data. Or, more likely, the leader will facilitate contact with someone who may convince the lawmaker of the error of his or her ways. ("See Jones, she's a genius at this stuff and she will set you straight.") The leader may also give the member a reading of support for his or her position as an exercise in backbone-strengthening if the legislator is fearful of being too far out in front of popular opinion. Probably most important of all, the leader will convene those who seem to be the most articulate and persuasive advocates of a viewpoint, and who also show some affinity for one another, and get

[40] Consider here the British House of Commons: its debates are fun to watch, but no one supposes that much in the way of lawmaking is actually going on.

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them to argue out a common position.[41] The leader will then dispatch these advocates to other legislators to teach them the merits of the proposed legislation.

The leaders—now with the help of friends of the bill—will also spend a good deal of time arguing to the faint of heart that they need to show courage, that they will be widely admired for taking a stand, that they will go down in history, and, if necessary, their pet projects will be given loving attention. Making good law requires patience and hard work. The heart of it is a process by which those with broad vision talk to one another and find ways to bring along enough of their colleagues of fainter heart, more limited purview, and tight political situations at home in order to push the legislation through its various stages. The crucial thing in all of this is that the leadership and its helpers run the legislature in such a manner that there are incentives for doing the hard work of making good law, including listening to arguments, offering concrete suggestions for amendments to those who are worried about a bill, and so forth. In short, the legislature must be an elaborate system for rewarding those who work at lawmaking—as compared to those who work at getting on television, doing the bidding of powerful constituents and campaign contributors, or sitting in their offices admiring the look of the pictures on the walls.

Leaders who can manage all of this over time—and who have built up a stable of lawmakers who are willing and able to take the lead on specific pieces of legislation—will develop an aura about them. They can be trusted; they should not be double-crossed; they should be fought with only when something of great moment is at stake and there is no way out; and they should be applauded in public as great lawmakers on whose shoulders others are willing to stand.

Can we expect such leaders to be in evidence? If what is required is a deep and sophisticated grasp of the public interest—call people who have such a talent 'statesmen'—then Madison gave the answer long ago. We probably cannot do without them, but we cannot build a regime around their regular and continuing presence either.[42] But lesser mortals may well be enough, since all that leaders will probably need beyond the kind of ambition that I have sketched, which is unlikely to be rare, is some sense that there *is* a public interest and some interest in discerning its contours. This they can have, if what they learn in school, imbibe from the common culture, and read in the newspaper does not regularly convince

[41] The bill "will be amended by its friends," as Jefferson said. See Edwin Haefele, "Toward a New Civic Calculus," in Lowdon Wingo and Alan Evans, eds., *Public Economics and the Quality of Life* (Baltimore, MD: Johns Hopkins University Press, 1977). Haefele is quoting Thomas Jefferson, *A Manual of Parliamentary Practice*, in Wilbur Samuel Howell, ed., *Jefferson's Parliamentary Writings*, 2d ser. (Princeton, NJ: Princeton University Press, 1988), 353 *ad passim*.

[42] See *Federalist No. 10* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 80.

them that they are chumps to believe in any such thing. It would, of course, be even better if all leaders were statesmen, but, again, fortune is unlikely to be so bountiful. Still, if there are to be regular displays of deliberative lawmaking, the odds need to be high for the emergence of leaders of the kind that I have just described. What forces must be at work for this to happen? Similarly, if the leaders of the legislature are to succeed, they will need, as I have suggested, a significant number of lawmakers who share their inclinations, colleagues who will take on a part of the burden of crafting legislation. What will increase the odds that there will be many of this sort of lawmaker? Of critical importance is a citizenry attentive to whether there is deliberative lawmaking in the public interest.

C. A public-spirited citizenry: The third condition

However unsettling the thought, the citizens of a commercial republic must be, in their own way, as capable as its lawmakers. A republic will stand or fall on the qualities of its citizens. They must have a significant measure of public-spiritedness. Even the best legislative school cannot overcome the problems presented by a large contingent of legislators who are without talent and without concern for broad interests. No amount of institutional contrivance can overcome a citizenry that regularly chooses for office time-serving, self-interested mediocrities who lack "due acquaintance with the objects and principles of legislation."[43] If there is to be deliberative lawmaking, then there must be processes at work that foster a citizenry with the ability to judge which legislators will be up to republican lawmaking. The citizens of a republican regime must have the experience of deliberating and struggling over the content of the public interest themselves if they are to judge the inclinations and capacities of their lawmakers. There is, however, good reason to suppose that the ability to make the necessary judgments about lawmakers is not to be found widely distributed among citizens in the absence of experiences that promote it.

Public-spiritedness is a disposition to give significant weight to the public interest. It consists of the not very demanding belief that there is a public interest and that political life should at least partly revolve around an effort to give it concrete meaning. A principal expression of public-spiritedness is the inclination to judge lawmakers by whether they show both a concern for the public interest and its necessary corollary, deliberative ways of lawmaking. If voters cannot make such judgments, then lawmakers will easily recognize that as long as they *say* they are concerned with the public interest, despite providing little evidence of wanting to reason about its content, the avowal alone will do the trick: voters will not be able to tell a huckster from a good lawmaker.

[43] *Federalist No. 62* (J. Madison), 379.

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The citizenry of a republican regime will likely have some measure of public-spiritedness as a result of living in a free society with free political institutions. But this measure is likely to be insufficient. Where shall we look to foster this spirit? John Stuart Mill provides one important answer, namely, that "free and popular local and municipal institutions" are part of "the peculiar training of a citizen, the practical part of the political education of a free people."[44] Mill's formulation suggests that local politics affords an opportunity for citizens to consider a wide range of public matters, and thus to develop the skills and outlook necessary to be effective participants in the larger political life of the regime. We may say that local political life can help to form the character of the citizenry. Again, it is in the combination of the legislature as school and the capacities for judgment by the citizenry that the hope for deliberative lawmaking lies. To this we can now add that these capacities can be developed in local political life.

Properly structured, local government makes plain that there is no easy escape from our fellow citizens. They are in close enough proximity so that their travails and successes become ours to some degree. If even the most powerful and lucky among us cannot insulate themselves by creating through legal walls their own enclaves, then the message that we are all in this together—that there is something more than the interests of me and mine, that there is a common or public interest—becomes not an abstraction, but a fact of everyday life. A nation, or even a state or region within it, is too big to make this point in any concrete and regular way. And when the point is made in these larger contexts, the ability to respond to it is impeded by the sheer size and complexity of the larger political system. Local government is also the only context in which (1) matters of direct and compelling interest to the mass of citizens are decided and the interconnections among them not easily dismissed, (2) the skills can be honed for weighing up the claims of various interests in light of the larger interests of the local community, and (3) the citizens' ability to judge those who claim that they are speaking in the public interest can be sharpened.

If citizens of a republican regime are to make such judgments of the inclinations and capacities of their lawmakers, then an essential feature of local government must be that it affords citizens the experience of deliberating and struggling over the content of the public interest. They must have some firsthand experience of trying to answer the question, What is the public interest in this case? Since this is always a complicated matter to assess, and the incentive on the part of present and aspiring lawmakers to dissimulate will be great, without experience the citizenry will be easily misled. As V. S. Naipul says, "When men cannot observe they don't

[44] John Stuart Mill, *On Liberty*, ed. Gertrude Himmelfarb (1859; reprint, London: Penguin Books, 1982), 181.

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have ideas: they have obsessions."[45] If we substitute "participate in deliberative processes" for "observe," the possibility for mischief and worse is apparent. Walter Lippmann simply said that "the kind of self-education which a self-governing people must obtain can only be had through its daily experience."[46]

Tocqueville summed up the crucial point about the relation between local political life and republican government when he argued that the most powerful way, and perhaps the only way, in which to interest men in their country's fate is to make them take a share in its government.[47] We may extend the thought by saying that for citizens to have any concern for the public interest of the regime, they must have the experience of grappling with its elements. For any significant number of citizens this can only happen through local political life.

What must local political institutions look like? I have suggested that, first and foremost, local political institutions must place citizens in relation to one another as deliberators, as people who think that a crucial feature in decisions about public choices is the giving of reasons. Where possible, the making of public choices should elicit arguments about what is beneficial to the members of the community, and not just reflect the summation of wants and interests. It follows that local political institutions must be relatively open in their operations and participative, because each citizen must be a prospective deliberator. In a word, local political institutions must be heavily legislative in form.

However, it is one thing to say that institutions must emphasize deliberation and reason-giving, but quite another to get them actually to work in this way. They are, after all, not bits of machinery but forms of human interaction, and so we must consider what kinds of motives need to be at work if these institutions are to function in the desired ways. In the context of a commercial republic, we must look to the harnessing of powerful private motives, as against some abstract concern for the public good. Thus, for ordinary citizens, political argument about the public interest must concern things such as neighborhood matters, schools, the land use patterns of their localities, and public safety. Most citizens are

[45] Quoted in Roger Shattuck, "The Reddening of America," *New York Review of Books*, March 30, 1989, 5.

[46] Walter Lippmann, *The Good Society* (Boston, MA: Little, Brown, 1943), 263.

[47] See Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence (Garden City, NY: Anchor Books, 1969), vol. 1, chap. 5. See also Stephen Elkin, *City and Regime in the American Republic* (Chicago, IL: University of Chicago Press, 1987), especially chap. 6. Mill says that without the habits of mind learned through participation in local political life—specifically the inclination to act from "public or semi-public motives"—a "free constitution can neither be worked or preserved." Mill, *On Liberty*, 181. Tocqueville also said that "municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science: they bring it within the people's reach, they teach men how to use and enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty." Tocqueville, *Democracy in America*, vol. 1, chap. 5.

unlikely to accept that something is in the public interest unless it is connected to their private interest. Under free, popular government, there probably cannot be any other starting point in public matters than my interest in my own safety and well-being and that of those dearest to me. What would make a free citizen start from any other place, at least in noncalamitous times? It is from such natural concerns that a conception of the public interest must grow, and it is from such motives that citizens participate in local politics. Anything else is very likely cant and will be widely seen to be so. As J. A. W. Gunn writes, "[T]he raw materials for discovering the public interests are the concerns of private men as understood by those men themselves."[48]

If they are to be public-spirited, citizens must find it a reasonable use of their time to engage in a politics that broadens their concerns by fostering deliberation. The arena must be one that deals with some of their most important day-to-day concerns and that is not so large as to be, on its face, irrational for most people to participate in—hence the importance of local political life. Nor should this be surprising since it is in localities that most of us carry on much of the activity that is central to our lives. Some people may be able to live with little or no concern about what happens in their local communities. Their children go to private school someplace else; their work takes place in cyberspace; and their homes are protected by private security measures. They in effect wall themselves off from their neighbors. But most of us still live without such walls, in the old-fashioned way. What rolls up to our door, what happens around the corner, and what occurs in other parts of the community all have direct effects on us that we cannot easily escape. Local community life is still sufficiently important to most people so that it can provide the foundation for a public-spirited citizenship.

One key to the design of republican local politics, then, is a set of institutional arrangements that can harness the citizens' concern for promoting their own good and for securing their own interests in matters that concern their neighborhoods and schools.[49] Private interests will be used to draw citizens into local decision-making, and these interests can be stretched through a deliberative politics that has as its principal concern the attempt to answer the broad questions of the public interest. Citizens will be drawn into a process in which they will have to do more than argue that some proposal is beneficial to them or to people like them. They will have to give reasons.

[48] J. A. W. Gunn, *Politics and the Public Interest in the Seventeenth Century* (Toronto: Routledge & K. Paul/University of Toronto Press, 1969), 139–40.

[49] William James once commented that one of the secrets of popular government was to ensure that "common habits [are] carried into public life." Cf. Shelly Burtt's comment that in commercial republican regimes citizens will not "engage in politics for abstractly public reasons." Shelly Burtt, "Virtue Transformed: Republican Argument in Eighteenth Century England," unpublished ms, 1992, chap. 7, p. 21. See also Shelly Burtt, "The Politics of Virtue Today: A Critique and a Proposal," *American Political Science Review* 87, no. 2 (1993): 360–68.

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The story of private interest and its relation to deliberation and the public interest cannot, however, stop here. The collective choice literature teaches that purposes or goals by themselves are unlikely to be sufficient motivation, even if they have some direct connection to self-interest.[50] This means that additional motives are necessary to get republican citizens involved in giving content to the public interest. Once again, these motives must be private-regarding. For example, citizens can be drawn to reason-giving and deliberation out of their desire to enjoy the esteem of others. Concern for the esteem of others, as Tocqueville pointed out, is a powerful motive in all popular regimes.[51]

Concern for the esteem of others and a connection to vital day-to-day interests thus are motives that can be harnessed to promote deliberative participation in local political life. Indeed, this is probably the only context in which such private-regarding motives can be systematically employed in ways that will lead citizens to engage in a deliberative politics that will, in turn, make them able to judge the deliberative inclinations of their national lawmakers. If this can be done, then a significant number of citizens will be able to judge how prospective lawmakers talk about public matters. Does the aspiring lawmaker try to make it appear that there are no costs other than monetary ones to major policy proposals, that there is, in short, no conflict among our values such that securing more of one means having less of others? Conversely, does the candidate speak of the public interest as real, thus requiring choices and sacrifices? Candidates who speak about public questions without attending to conflicts among values or the need for sacrifices are likely to be either fools or demagogues, or both. In any case, citizens with experience of a properly constituted local political life will likely know them for what they are. Citizens who have themselves participated in deliberative ways of lawmaking not only will expect to see lawmakers struggling to give concrete definition to the public interest at the local level but will also expect it in national lawmaking. They will expect of their lawmakers what they expect of themselves. Not only will they expect reasoned arguments, but they will be in a position to judge whether they are hearing such arguments. They will act on the first law of social science: it takes one to know one.

III. An Institutional Conception of the Public Interest

We are now in a position to answer one of my opening questions: Does the substance of deliberation matter in a regime of popular self-government? Or is it enough that the heart of such government is simply

[50] Mancur Olson, *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, 1965).

[51] Tocqueville, *Democracy in America*, 1:69.

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deliberation, the substance of it being of little importance? My answer should now be apparent. If there is going to be deliberative lawmaking, it must and should concern itself with such substantive matters as controlling faction, keeping open opportunities for ambitious legislative leadership, and encouraging forms of local political life that will foster a public-spirited citizenry. Deliberative lawmaking must have a substantive focus of this kind if it is to survive and flourish. Lawmaking must be reflexive, taking as its subject its own processes and what makes them possible. A political regime that revolves around deliberation must first reason about how to secure and maintain the institutions that make that reasoning possible.[52]

This effort by deliberatively inclined lawmakers to secure deliberative institutions can best be understood as an attempt to serve the public interest. It is an effort to secure an important element in an institutional conception of the public interest. Such lawmaking is aimed at securing and maintaining the deliberative institutions that help to constitute the political order and give it its characteristic manner of working. Deliberative lawmaking, then, must have as its central concern a substantive public interest. Thus, to say that deliberative lawmaking should concern itself with the public interest is not an empty phrase—as it often is in discussions of deliberative lawmaking where it is meant only to reinforce the idea that lawmaking should not concern itself with group interests or simply be an exercise of political power. Instead, my point, again, is the reflexive one. For deliberative lawmaking to exist, it must concern itself with particular substantive matters, namely, those things that help to secure and maintain deliberative lawmaking itself. There is a public interest, and lawmaking must concern itself with it.

An important advantage of this kind of institutional conception of the public interest 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 others wherever we are going. Many political observers sense that defining particular destinations for a whole society is difficult to do: 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 people living in liberal societies that too much insistence that we must seek to secure shared social purposes undercuts liberty: individuals should be the principal holders of purposes. An institutional focus also draws upon the sense that society-wide planning has been shown to be very unattractive and unmanageable: after all,

[52] Since by definition this is a bootstrap operation, there is the question of how things get started in the first place and how each step reinforces the preceding one, that is, how increasing attention being given to securing deliberative institutions increases the ability of the legislative process to think about these same matters. For a discussion of this and related questions, see Elkin, *Constituting the American Republic*, chaps. 8 and 9.

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if there really is a public interest composed of a comprehensive set of particular social ends, then our politics should be an exercise in planning to serve those ends. But it is precisely this we cannot do and should not attempt.[53]

In similar fashion, an institutional conception of the public interest does not carry the divisive freight of a morally insistent conception of the ends of politics and their relation to the good life. As many have argued, we are unlikely to agree much about such matters, given our ethnic, religious, and racial lines of division. The "substance" of the public interest as I have set it out is, in fact, largely procedural, focused as it is on securing institutional forms through which a variety of purposes may be sought. Being procedural in this sense, the public interest is more likely to be widely accepted.[54]

Finally, an institutional view of the public interest makes sense of the idea that, if we desire a certain political way of life, then we must put a good deal of effort into creating and maintaining the institutions at its core. Something as complex as a political way of life is unlikely to come into being by itself, and it is not very likely that it will maintain itself through its ordinary, nonlegislative institutional workings. If we value a regime, we must value the efforts of lawmakers to secure its crucial institutions, 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 foolish and feckless.

A similar institutional conception of the public interest has been offered by Samuel Huntington, Bernard Crick, and John Finnis. Huntington comments that "the capacity to create political institutions is the capacity to create public interests."[55] Crick says that the public interest is simply a way of "describing the common interest in preserving the means of making public decisions politically."[56] Finnis, more cumbersomely, defines the public interest (which he terms "the common good") as a set of conditions that "enables the members of a community to attain for them-

[53] See, most notably, David Braybrooke and Charles E. Lindblom, *A Strategy of Decision: Policy Evaluation As a Social Process* (New York: Free Press of Glencoe, 1963); Charles E. Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977); Friedrich A. Hayek, *The Road to Serfdom* (London: G. Routledge & Sons, 1944); and Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1978), 1–100.

[54] See Bruce Ackerman, *We the People* (Cambridge, MA: Harvard University Press, 1991), esp. chaps. 1 and 2; and John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[55] Samuel P. Huntington, *Political Order in Changing Societies* (New Haven, CT: Yale University Press, 1968), 24.

[56] Bernard Crick, *In Defense of Politics* (New York: Penguin, 1964), 177. By making decisions "politically" Crick means employing a form of nonviolent political rule in societies where a large variety of wills must be concerted. The concerting of those wills in a nonviolent fashion is the essential political act. See also Robert Dahl's discussion of the public interest in *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1991), chap. 21.

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selves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other . . . in a community."[57]

It would be odd indeed if something very much like what has just been described were not the public interest of a good political regime. If the regime is good, so must be the institutions that give it its character. To wish for one is to wish for the other. It would be equally odd if regimes did not have any public interest: what it takes to realize a good regime is surely its public interest, and thus all good regimes must have one.

Deliberative lawmaking is essential, then, not in and of itself, but because it provides the possibility of giving concrete meaning to the public interest—which is to say, of working out how to secure and maintain the constitutive institutions that make the regime what it is. Deliberation is not intrinsically valuable in a design for republican government. It is instead necessary to republican government because it is the best way to do something, namely, to give concrete meaning to the public interest. The test of republican government, then, is not whether there is deliberation, but whether the public interest is served.

Given that deliberative lawmaking must concern itself with serving an institutionally defined public interest, what will increase the odds that deliberation will occur? After all, deliberating about such complex matters is costly, while the benefits of deliberative lawmaking in the form of a flourishing regime of popular self-government are long term and diffuse. To this we may add that deliberative lawmaking makes it more difficult for powerful groups to serve their interests. Public discussion characterized by extensive reasoning is likely to expose the self-interest that powerful actors are anxious to hide and, given their power, would plausibly be able to serve if there were no deliberative lawmaking. Thus, if there is to be deliberative lawmaking concerned with securing deliberative institutions, lawmakers will need political support to resist pressures from self-interested actors.

I have already identified some likely sources of support. Public-spirited citizens will not only wish for deliberative lawmaking, but also likely judge their lawmakers on whether they make any effort to strengthen its foundations. Such citizens, in short, will wish for deliberation in the public interest to have a clear purpose, namely, to help constitute a regime where deliberative lawmaking institutions play a central role. We may doubt whether this will be sufficient, but rather than pursuing this question further, it will be more useful to consider what else deliberative lawmaking must focus on, and from where political support for such a focus might come.

[57] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 155.

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IV. The Social Basis of the Regime

If there is to be deliberative lawmaking, it must not only be concerned with strengthening the "political" foundations of public deliberation—preventing faction, making it possible for legislative leaders to promote deliberation, fostering a public-spirited citizenry, and so forth. It must also have "economic" concerns: in particular, whether the citizens have sufficient economic independence and security, as well as that measure of economic equality that is necessary if they are to be public-spirited. People who are seriously worried about surviving economically and who, because of gross economic inequality, think of themselves as subordinates in some kind of hierarchy are unlikely to take a great interest in public affairs. Nor are such people likely to think that they have a right to do so. They are also unlikely to feel confident that they can hold lawmakers accountable to any standard, including that of a deliberative engagement with the public interest.

Some proponents of democratic deliberation have looked to a form of socialized ownership of property as the best and, perhaps, the only way to provide the economic foundations for deliberation.[58] This is not the place to settle the debate over what kind of system of ownership of capital would best serve deliberative lawmaking. Since we are discussing the United States, I will simply stipulate that Americans aspire to realize a *commercial* republic, that is, one whose economic base consists of a significant measure of private ownership of large-scale productive assets.[59] If I am wrong here, and Americans aspire or ought to aspire to some socialized form of ownership, the character of the problem for deliberative theorists remains the same: lawmaking will still have to maintain a set of economic institutions that help make deliberative lawmaking possible, in this case institutions of socialized ownership.

With this stipulation in mind, we can say that deliberative lawmaking, in its concern for the public interest—that is, in its aim to maintain institutions that give life to deliberation itself—must look at the organization and results of productive life. How successfully it does so will substantially affect the possibility of deliberative lawmaking. What will make this focus probable in light of the likelihood that pressure from a public-spirited citizenry to attend to these matters will not be sufficient?

Again, Madison is helpful. While he gives a good deal of weight to institutional contrivances—valuing them over the "parchment barriers" of a written constitution—Madison also holds that the regime must have a foundation in self-interest. This means, for Madison, to begin with, that self-interest is to be checked by self-interest as multiple and competing interests would be drawn into the complex and divided machinery of

[58] David Miller, *Market, State, and Community: Theoretical Foundations of Market Socialism* (Oxford: Oxford University Press, 1990).

[59] See Elkin, *Constituting the American Republic*, chap. 1.

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government in such a fashion that each would check the other. In addition, Madison understands that a regime is a set of institutions harnessed to the realization of a certain conception of justice, and that this conception must at least be consistent with the one held by the most powerful social strata of the regime.[60]

Madison himself looks to the self-interest of the propertied class to provide the foundation for the regime's operation. The political activities of this class would increase the odds that what he calls the permanent interests of the regime would be given due attention.[61] The design of government is meant not only to protect property rights, but also to have institutions so arranged that men of property will have political advantages in the struggle to define the content of the laws. Moreover, the design will provide incentives for the propertied to broaden their conception of their own interests so that there will be an overlap between their interests and the permanent or public interest. Thus, there will be two principal sources of energy in this new government: nonfactional majorities and a propertied class with broad interests.

Madison therefore believes that the propertied class can be relied upon to play a crucial role in giving concrete meaning to the public interest. Perhaps not all men of property will be equally disposed to have their self-interest broadened; still, many might, including, most notably, those of landed property. He thinks that public-spirited majorities will give government some of the needed energy, but doubts that the concerns of temporary majorities would be sufficient to keep lawmaking on the path of securing all rights and the permanent interests of the community. To shape lawmaking in this fashion, Madison relies heavily on the possibility that through a combination of the private interests of the propertied in seeing that property is secure and their holdings increased, and through institutional design, the propertied might be induced to look further than the narrowest conception of their interests, and in doing so be instrumental in giving direction to government.

However, it is unlikely, certainly at present, that the propertied have any deep and abiding interest in promoting through legislation the economic security, economic independence, and (a modest degree of) equality of the less well off. Each policy would undercut the material interests of the propertied: economic security would drive up wages as labor mobility decreased; economically independent workers could more easily

[60] For more discussion of this point, see Elkin, *Constituting the American Republic*, chap. 6.

[61] For a very useful discussion on this point—a discussion I have learned much from—see Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago, IL: University of Chicago Press, 1990), esp. chaps. 2 and 5. See also Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, NY: Cornell University Press, 1995), 83–84. Hamilton said (in *Federalist No. 35*, p. 216) that "the representative body, with too few exceptions to have any influence on the spirit of the government, will be composed of landholders, merchants, and men of the learned professions."

organize to gain various perquisites from owners, not least of which would be higher wages; and a measure of equality would likely mean a more politically active citizenry, thus reducing the political influence of the propertied. In short, the propertied are unlikely to be a reliable source of support for the economic foundations of deliberative lawmaking. Indeed, the political advantages that the Madisonian constitution gives to the propertied make it likely that they will be regularly successful in defending their interests. We need to look elsewhere for a major stratum or class whose self-interest would lead it to support efforts aimed at strengthening the economic foundations of deliberative lawmaking. There is reason to suppose that a secure and confident middle class might do the job,[62] but enough has been said to indicate the importance of the whole problem. It is unlikely that public deliberation can flourish without an overlap between the self-interest of a class or stratum and the economic underpinnings needed for deliberative lawmaking. Thus, we must look to divisions within society, even if on other grounds they might be objectionable. Class and social stratification generally are perhaps not desirable for their own sake, but they probably are ineluctable, and, it would seem, highly useful in creating a self-governing, deliberative regime.

V. The State of Deliberative Theory

Where does all this leave us with regard to deliberative theory? Two conclusions stand out, each pointing to a significant weakness in much deliberative theory.

First, while there is possibly a case to be made for deliberation as such, it must be part of a larger argument that distinguishes between deliberation focused on securing the constitutive institutional foundations of a regime of popular self-government—its public interest—and deliberation concerned with other matters. The first is preeminent: any case for deliberation as such must be subordinated to the one concerning the need for deliberation to secure and maintain constitutive institutions. There cannot be general deliberation without there also being deliberation reflexively aimed at strengthening deliberative institutions. This, in turn, means that lawmaking must concern itself with such matters as how to foster a public-spirited citizenry and how to make a citizenry economically secure.

Second, we can now see the importance of morally ambiguous or worse motives—and the political processes built on them—for sustaining a regime of popular self-government built around deliberation. Harnessing self-interest, political ambition, and the desire to exercise political power, as well as political processes resting on these motives, is crucial to realizing a regime of deliberative lawmaking. Accordingly, a case can be

[62] See Elkin, *Constituting the American Republic*, chap. 11.

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made that motives such as self-interest, ambition, and the desire to wield power over others are "good." Or, stated differently, a good regime must rest in no small part on morally ambiguous or even bad motives. One task of a political theory concerned with strengthening a deliberative democracy is thus to praise these morally ambiguous or worse motives, to show why they must be cultivated, and to explain how this might be done. We are a long way from much contemporary deliberative theory here—especially the more radical kind that aims at building a whole regime around deliberative lawmaking and keeping to a minimum, or eliminating, other processes and the motives on which they rest. If my argument here is correct, then the road to deliberative lawmaking looks rather different from how it is pictured in much deliberative theory. It is a road by which we attempt to foster much that is at variance with deliberation, with regard both to motives and to political processes. If the American case is indicative, then the multiplication of interests, the ensuing bargaining that makes factional rule less likely, the play of ambition among officeholders, and the exercise of political power by a major social class, are all necessary to achieving a significant measure of deliberative democracy. Certainly, the road does not seem to be the straight and simple one contemplated in many deliberative theories, where all we need is to pile good motives and political processes on top of one another in a kind of orgy of goodness.

Some will accept what I have been arguing here but still insist that instead of making use of such motives as self-interest and ambition, indeed praising and fostering them, we would be better off if we minimized them. Even assuming that it would be wise to attempt to reduce significantly the importance of such motives, what likely would be required to do so? Wouldn't we need to eviscerate the liberty that is one of the foundations of deliberation and one of its fundamental purposes? This would be worse than the problems such motives present for a regime of deliberative democracy; the cure will be worse than the disease.[63]

We may go further. It is now possible to see that a regime built around deliberative lawmaking not only has deep roots in morally ambiguous or worse motives. In addition, it will almost certainly be held together and be widely felt to be legitimate, not only because its laws are the product of reasoning and have a claim to reasonableness, but also because of self-interest and the exercise of power—not least because it is anchored in a particular class.[64] This last point suggests, once again, that the justice at which the regime aims in its efforts to serve the public interest can only be a partial justice, not the full justice that much deliberative theory assumes.

[63] Cf. Madison in *Federalist No. 10*, p. 78.

[64] See the discussion below in the text on the problem of stability in Rawls's theory of justice.

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It seems clear, then, that if we wish for a deliberative democracy, we should be suspicious of advice to focus our political practice on the cultivation of only good motives and the political processes built on them. The point can be made in a different manner. We will better understand the role of deliberation in popular self-government and how to secure it if we start our theorizing with what might be called the 'circumstances of politics'.[65] The circumstances of politics may be defined as a state of affairs in which there is a large aggregation of people who have conflicting purposes that engender more or less serious conflict, who are given to attempts to use political power to further their own purposes and those of people with whom they identify, who are inclined to use political power to subordinate others unlike themselves, and who are sometimes given to words and actions that suggest that they value limiting the use of political power by law and harnessing it to public purposes. We would be better off starting from what might be termed the 'political whole'—to give these circumstances a different name—rather than focusing on the parts of political life that we find attractive, and then implicitly or explicitly arguing that the key to a good regime of popular self-government lies in expanding these elements as much as possible.

We should start from the circumstances of politics because they define the problem of how we can secure a good political order. We must first prevent the worst before we can achieve the good enough, let alone the best. Any plausible account of human motives will posit that human beings are capable of the grossest cruelty, of a desire to tyrannize over their fellows, and of a whole host of lesser evils. If we do not prevent these motives from being acted upon, then there is little reason to suppose that citizens and those who speak for them will have leeway to pursue even the good enough. This is not only Madison's point, but also the fundamental premise of all liberal theory, and it means that, contrary to Rawls's claim,[66] we do not best grasp the nub of partial compliance theory by focusing on ideal theory. I will turn in a moment to this issue in a more complete way, but here I want to insist that we can best understand partial compliance when we grasp that there can only *be* partial compliance, and that what we need to do to achieve even this modest state of affairs is daunting. Thus, Madison teaches that we cannot have republican government if it is necessary that men act like angels.[67] The circumstances of politics are, to an important degree, irremediable, and

[65] Quite independently, Jeremy Waldron has arrived at much the same conclusion, even to the use of the term the 'circumstances of politics'. See Jeremy Waldron, *The Dignity of Legislation* (New York: Cambridge University Press, 1999), 49 and 154.

[66] I do not mean to say here that Rawls was not a liberal. He was and certainly thought of himself as one, not least because his first principle of justice concerns the securing of rights. But his attachment to ideal theory made it difficult for him, and for those who follow his lead, to see the way in which starting from preventing the worst calls into question his theory of justice. I will say more about this in the next section, where I discuss the costs of doing ideal theory.

[67] *Federalist No. 51* (J. Madison), in Rossiter, ed., *The Federalist Papers*, 322.

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our account of good political regimes should be tempered by this knowledge. We either build our institutions upon reliable and plausible motives or they will fail—and with them, our hopes for realizing an attractive political order.

More generally, we can say that the road to the good regime probably does not coincide with the road to the ideal regime, as a kind of stop along the way. This is, in fact, the point behind the theory of the second best,[68] and behind the phrase "the best is the enemy of the good." Thus, the pursuit of the ideal, which is by definition beyond us, may bring out the worst in us: consider the political consequences of some of humankind's efforts to find unity with God. Moreover, effort expended on the ideal is effort lost to seeking the good enough. Additionally, pursuit of the ideal, which *must* fail, is also likely to be dispiriting.

Finally, and most important for the present discussion, if we shape institutions with an eye to moving toward the ideal, then there is little reason to suppose that these institutions will be of much use in securing a good regime, which is, in fact, all we can hope to achieve. With a little exaggeration, we can say that the ideal is something best avoided in attempting to constitute an attractive political life.[69] The task of a political constitution is to take what cannot be changed—or changed only at prohibitive cost—and make the best of it. We need ideals to help us identify the various kinds of good regimes, but we also need to have our political constructions informed by a clear-eyed understanding of the circumstances in which we are going to carve out our constitution. Getting our ideals clear will not solve the political problem.[70]

VI. Ideal Theory

Insofar as deliberative theorists work by laying aside morally ambiguous motives and processes, they are engaged in ideal theory. If ideal theory has significant weaknesses, then this is important in its own right,

[68] R. Lipsey and K. Lancaster, "The General Theory of the Second Best," *Review of Economic Studies* 24, no. 1 (1956): 11–32.

[69] Cf. David Hume's comment:

> Here, I would frankly declare, that though liberty be preferable to slavery, in almost every case; yet I should rather wish to see an absolute monarch than a republic in this island. For let us consider what kind of republic we have reason to expect. The question is not concerning any fine imaginary republic of which a man forms a plan in his closet. There is no doubt but a popular government may be imagined more perfect than an absolute monarchy, or even than our present constitution. But what reason have we to expect that any such government will ever be established in Great Britain, upon the dissolution of our monarchy?

David Hume, *Essays Moral and Political*, ed. Eugene F. Miller (Indianapolis, IN: Liberty Fund, 1987), 66. I owe this citation to Peter Levine.

[70] Cf. David Schaefer's comment: "One can say that Rawls's conception of political philosophy is the mirror image of modern positivistic social science: whereas the latter aspires to be value-free, the former is fact-free." David Schaefer, *Justice or Tyranny?: A Critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979), 85.

but it also points to deep difficulties for deliberative theorists who look to ideal theory as the prototype of the kind of political theory that they are doing.

As is well known, Rawls, the principal proponent of ideal theory, offers a theory of justice anchored in an account of the organizing principles for a whole society that rational people would choose if they made their choices behind what he calls the "veil of ignorance." Behind this veil, people do not know what their position will be in a society designed to serve these principles. The rest of the theory is devoted to developing the implications of what Rawls calls these principles of justice for the organization of various important elements of a society. Rawls sees this effort as an exercise in ideal theory; that is, his concern is with "the form a just society would take in a world in which, for theoretical purposes, everyone is presumed to act justly."[71] As Rawls puts it, ideal theory assumes

> that (nearly) everyone strictly complies with . . . the principles of justice. We ask in effect what a perfectly just . . . constitutional regime might be like, and whether it may come about and be made stable . . . under realistic, though reasonably favorable, conditions. . . . [J]ustice as fairness is realistically utopian . . . [that is, it concerns] how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values.[72]

These reasonably favorable conditions are what Rawls terms "the circumstances of justice." These are features of the social world that those choosing the principles of justice behind the veil of ignorance will know. These features include the following: that this world makes cooperation possible and necessary, that individuals are roughly similar in physical and mental powers, that they have conflicting claims on the resources available, and that there is moderate scarcity. In the circumstances of justice there is a veil of ignorance and no problem of compliance once the con-

[71] Ian Carter, "A Critique of Freedom as Non-Domination," *The Good Society* 9, no. 3 (1999): 43–46. Cf. Jeremy Waldron's view, as quoted by Ferdinand Mount, that the question Rawls poses is, "[W]hat would institutions look like if they were designed by people who were already agreed on a set of principles of justice?" Mount goes on to say that Waldron "argues fiercely . . . that this isn't an interesting question. If such an agreement existed already or could come after exhaustive deliberation, then political institutions would soon become fairly unimportant 'dealing as they would with only minor or technical matters'." Ferdinand Mount, "Against Smoothness," *Times Literary Supplement*, September 24, 1999; reviewing Waldron, *The Dignity of Legislation*. For Waldron's criticism of Rawls in this book, see especially 70–73. Waldron notes that he has "found it extremely difficult to persuade colleagues to reproduce, or at least recognize, *within* their philosophical theories of politics, law and constitutionalism, the existence and significance" of controversies about fundamental political matters (49). Cf. Michael Zuckert's comment that Locke saw that "the conditions for the existence of rights . . . and the conditions for effectual securing of rights are not the same." Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002), 328.

[72] John Rawls, *Justice As Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, Belknap Press, 2001), 13.

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tent of justice is known. What is 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 this conception of justice and the structure of politics and society that is consistent with it.

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 that Rawls shares, as the quotation above indicates. Moreover, Rawls is clear[73] that he is concerned not only 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."[74] Indeed, he 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."[75]

In short, Rawls lays aside morally ambiguous or worse motives and processes and argues that, in doing so, there is no loss in understanding of how to construct a just and stable form of popular self-government. Indeed, there is a possible gain (namely, "a deeper understanding"). My preceding section suggests reasons to doubt this, but we can go further. If we lay aside how deliberative lawmaking is to be brought about, then we also put to one side morally ambiguous motives and processes. In doing so, we are led to misunderstand the role of deliberation in an actual regime of popular self-government, even one of a broadly Rawlsian kind. Similarly, we are unlikely to understand the role that morally ambiguous

[73] Rawls, *A Theory of Justice*, 9.

[74] Ibid., 8.

[75] Ibid., 8–9. Whether this can be "assumed" is, in effect, the subject under discussion here. It is worth emphasizing that in *Political Liberalism*, the book that followed *A Theory of Justice*, Rawls still pursues ideal theory. It is easy to mistake Rawls's intention in *Political Liberalism* (see, e.g., his comment on page xvii that the theory of justice in the earlier book is unrealistic), since one of his starting points is that people in a society like the United States will not share a comprehensive philosophical doctrine that leads to a particular conception of justice. A society like the U.S. will be pluralistic, with a variety of comprehensive but reasonable religious, philosophical, and moral doctrines. Rawls's discussion in *Political Liberalism* is not meant to be empirical, however, in the sense of considering, in light of what we know about political behavior, what conception of justice will prove workable. Rather, he is engaged in the same exercise as he was in *A Theory of Justice*, namely, what should a society look like if all its citizens are committed to a particular conception of justice. In *Political Liberalism* Rawls complicates the problem by stipulating the fact of moral and philosophical pluralism. If it can be shown that it is possible that a conception of justice much like "justice as fairness" can emerge in "the best of foreseeable circumstances" (xvii), then we can still go on to ask what the institutions of the society would look like if they were designed by people committed to this conception of justice. Rawls's realism is not the realism of someone wondering whether and how it is possible to create a just society, given people as they are or might plausibly become. The realism, if that is what it is, consists of demonstrating that it is, in principle, possible for a certain conception of justice to be held, given one ineluctable and thus realistic feature of modern democratic societies—their pluralism. There is no claim that people will behave in the stipulated way. Indeed, it is far from clear that they will, or, in fact, even can do so.

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and worse motives and processes must play if we are to have such a regime. Thus, we may ask whether Rawls's mode of theorizing makes it more difficult to understand the broadly empirical question of how to make stable a just regime of popular self-government. It is clear that the problem worries him, and is, in fact, a principal reason why he wrote *Political Liberalism*.[76] However, if my argument is correct, then a strong attachment to justice and an overlap of the political principles of the various groups that compose a pluralistic, democratic society—the conditions to which Rawls looks—are not sufficient to create a stable regime (something Rawls would likely agree with). Not only that, but we are traveling the wrong path if our focus is on these factors. Much more likely, it is the morally ambiguous motives and processes, and deliberative lawmaking that attempts to secure its own foundations, that must carry the principal burden of creating a stable and reasonably just regime. Ideal theory makes it less likely that we will see this and more likely that we will not take the full measure of how self-interest, ambition, and the like do their work in a good democratic regime.[77]

This in itself should make us uneasy about ideal theory, but there is more to say about the way in which it is flawed. It is worth going further, moreover, to deepen our critique, because a whole generation of political theorists has been influenced by ideal theory. And, of course, any additional criticism of it weakens the claims of the kind of deliberative theory that I have been criticizing. To see what is at issue, I need to extend what I have already said about how ideal theory works.

In its efforts to develop a theory of how to constitute a good political regime, ideal theory proceeds by defining an ideal and spelling out how such an ideal might work. Only afterward does it consider—if they cannot be eliminated—less attractive motives and processes. This means that the destination we aim for in our political practice and the road to get there are defined by ideal theory. The destination to which political activity is to bring us is understood as being as close as possible to the ideal; the road to reach it is defined as putting as much effort as possible into fostering the motives and processes defined by ideal theory. The assumption here seems to be that the more effort that is exerted, the closer we will get to the regime envisaged by ideal theory. Insofar as other motives and processes emerge that threaten to block progress down the road, we

[76] See the introduction to that volume.

[77] One is tempted here to say that Rawls, having looked at the world and having noted the existence of value pluralism, should have looked at it more comprehensively. Similarly, why stop at "accept[ing] the facts of commonsense political sociology" (*Political Liberalism*, 193) as they bear on whether liberal regimes can be neutral with regard to conceptions of the good? Why *those* facts, and not the "facts of political sociology" as they bear on what is necessary to actually secure a regime in which the exercise of public reason is a crucial component of its workings? Indeed, why not the facts of commonsense political sociology all across the board? Of course, to take these into account would call into question whether ideal theory is really useful, or whether we must have some sort of mix of normative and empirical analysis, which is, in effect, what I am arguing here.

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should deal with them as necessary. Otherwise said, ideal theory defines the destination that political action is to aim at in terms of strict compliance, as a state where only morally attractive motives and processes are at work. It thus defines the road to this destination in terms of devoting all of our effort to strengthening these motives and processes except as problems of partial compliance emerge. By contrast, the kind of analysis that I have engaged in here, concerning how to secure deliberative lawmaking and what its content should be—call it 'constitutional thinking' or 'constitutional theory'—defines our destination from the beginning as one in which there is at work a mixture of good, morally ambiguous, and even bad motives and processes. The road to reach our destination then is, accordingly, also different from that in ideal theory. From the viewpoint of constitutional theory, we must put as much or nearly as much effort into nonideal, morally ambiguous, and worse motives and processes as ideal ones in order to reach our destination.[78]

The fundamental question is, which manner of proceeding is more likely to bring into being an attractive and stable regime of popular self-government? That is, should we conceive of the ideal as less than the ideal? This is partly an argument about political practice—how best to act[79]—but this argument is linked inextricably to different understandings of what the essential problems of political life are and of how we are to face them in our efforts to create attractive political regimes. The difference may be put as whether we should view morally ambiguous motives and processes as ancillary to our essential political task or as integral to it. Repeating a term that I used above, should we start from the 'political whole', from the full array of motives and processes at work in political life; or should we take as central to the theoretical task an intellectual division of labor in which some of us are specialists in the good, some in the bad, and some in the ugly mix of good and bad that I have termed morally ambiguous? On the basis of the discussion of deliberation, we can be more or less certain that which way we start has a significant effect on how we understand deliberation itself. More generally, which we choose will have a profound effect on our understanding of the full array of practical problems that politics poses, including those having to do with deliberative ways of lawmaking.

There is good reason to think, then, that the differences between ideal and constitutional theory are not academic, not least because how we understand political processes and motives will surely affect how we act. This, in turn, will affect how likely we are to succeed in constructing

[78] Cf. Allan Bloom's remark, made in a critique of Rawls's *A Theory of Justice*, that the latter's discussion is "redolent of that hope and expectation for the future of democracy" that is "forgetful of the harsh deeds that preceded it and made it possible, without anticipation of the barbarism" that can and has followed it. Allan Bloom, "Justice: John Rawls Vs. The Tradition of Political Philosophy," *American Political Science Review* 69, no. 2 (1975): 648.

[79] Consider here Edmund Burke's comment that "the circumstances are what render every civil and political scheme beneficial or noxious to mankind." Edmund Burke, *Reflections on the Revolution in France* (1790; reprint, London: Bohn, 1855), 2:283.

political ways of life that are worthy of our affections. There are costs to the intellectual division of labor on which ideal theory rests. At bottom, the essential problem with ideal theory is that, if we take seriously that political theory must start from the full array of political motives and processes at work in the world, by design ideal theory does not do this.

So far, most of what has been said about ideal theory reinforces what has been strongly implied by the discussion of deliberative theory. There is, however, more to say. Ideal theory reinforces an already strong inclination in us to avert our eyes from the possibility that the categories of "good" and "bad" in describing political motives and processes are themselves inadequate. This is, of course, one of the great questions of political theory: Is the morality of good and bad as it applies to individuals appropriate for the evaluation of political life? Nothing said so far indicates that such a vocabulary is completely inadequate. It is unlikely that we can or should do without the vocabulary of moral judgment when it comes to governments that engage in the wholesale murder and torture of their citizens. Whatever else we might want to say in this regard, we surely want to say that such behavior is bad, indeed evil, and our sense of transgression is much the same as when we condemn an individual who tortures or murders someone.

Still, my discussion of deliberation has indicated that, for a significant portion of political life, the vocabulary of good and bad is much less useful, indeed misleading. This discussion suggests that were we to think constitutionally and give a full account of the institutional design of a self-governing republic, we would see that we must rely upon self-interest, ambition, and the like. Additionally, we would see that motives such as pride, greed, fear, and ignorance—and the political processes through which they are expressed and that build upon them—turn out to be necessary for a full realization of a self-governing republic. If good political regimes must rely on morally ambiguous or worse motives, then in what sense, we may ask, are such motives to be characterized as bad? Machiavelli is the great teacher of the ambiguity of good and bad in political life.[80] He makes us ask whether morally unattractive motives are an inevitable feature of political life, part of the necessity that political action must take account of, both constraining and relying on them if it is to succeed.[81] A deeper concern in Machiavelli's thought is whether po-

[80] See Niccolò Machiavelli, *The Prince*, ed. [trans] Harvey C. Mansfield (Chicago, IL: University of Chicago Press, 1985); and Niccolò Machiavelli, *Discourses on Livy*, trans. Harvey C. Mansfield and Nathan Tarcov (Chicago, IL: University of Chicago Press, 1996). For extraordinarily helpful accounts of Machiavelli's thought, see Mansfield, *Machiavelli's Virtue*; Harvey C. Mansfield, *Taming the Prince* (New York: Free Press, 1989), chap. 6; and Harvey C. Mansfield, *Machiavelli's New Modes and Orders: A Study of the Discourses of Livy* (Ithaca, NY: Cornell University Press, 1979). See also Judith N. Shklar, "Bad Characters for Good Liberals," in Shklar, *Ordinary Vices* (Cambridge, MA: Harvard University Press, 1984).

[81] Mansfield writes that according to Machiavelli, "men may choose, but the only prudent choice is anticipation of necessity." Mansfield, *Taming the Prince*, 277.

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litical good can be produced without what are normally considered to be morally unattractive actions, and thus whether it is right to think of these actions as immoral. Deeper still, Machiavelli's writings present the problem of whether the language of morality is misplaced, or worse, when we seek to understand and evaluate political life. Pierre Manent suggests one possibility when he comments that "Machiavelli did not erase the distinction between good and evil. On the contrary, he preserved it—and he had to, if he wanted to establish the scandalous proposition that 'good' is founded by 'evil'." Manent says that, according to Machiavelli, "the 'good' happens and is maintained only through the 'bad'."[82]

VII. Conclusion

Machiavelli may be too harsh. Indeed, after the twentieth century we may suspect that he has gone too far, but he does teach us that we must look at the political whole if we wish to understand and act with effect in politics. To look at this whole is to take account of the full range of human motives at work in politics. It is to see how these motives need to and can be harnessed to effective political action, to the creation of political institutions that can be fitted together to constitute the same whole but in another form—namely, in the form of a political regime, which is a coming together in a regularized fashion of these motives. To think about the political whole is to think about the human whole. Machiavelli tries to strengthen us, to get us to cease averting our eyes from examining the bad, and to see that some portion of it is essential to achieving the good. What looks to be bad from the standpoint of morality can be good from the point of view of political theory and action if it helps humankind to live freely. If we cannot face the bad and make use of it, then we risk allowing it to do its work, thereby making good regimes impossible to create and destroying those in existence.[83]

That we seemingly must rely on, at best, morally ambiguous motives to serve the justice promised by a republican regime—and presumably by all good regimes—suggests, once more, that justice can only be partial, not ideal. As Harvey Mansfield writes in commenting on Machiavelli, "Every regime has a self-definition that is partisan." A regime is "the organizing form that gives the virtues a partisan bent as they appear in

[82] Pierre Manent, *An Intellectual History of Liberalism*, trans. Rebecca Balinski (Princeton, NJ: Princeton University Press, 1994), 14. Cf. Leo Strauss's comment that for Machiavelli "the foundation of justice is injustice." Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy*, 3rd ed. (Chicago, IL: University of Chicago Press, 1987). If we were to replace the language of morality as applied to politics, what would we replace it with? The language of prudence? Of virtue?

[83] Consider here Machiavelli's comment that it is "more fitting to go directly to the effectual truth of the thing than to the imagination of it." He goes on to say that "many have imagined republics and principalities that have never been seen or known to exist in truth," with the result that they come to ruin. Machiavelli, *The Prince*, 61.

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politics." The rulers of a regime are "partisan creatures."[84] As we must have political regimes to achieve any measure of justice or good, all of our efforts to do so will be partisan, unless, stretching credulity, we are somehow able to create a universal, that is, an ideal, regime. The subject of political theory is humankind in motion, men and women propelled by self-interest, eros, rationality, spiritedness, etc. As Machiavelli argues, the things of men cannot stay steady.[85] We may surmise that he means that political theory must be practical, and that we should follow Aristotle in avoiding "the philosopher's mistake of despising what is practical."[86]

We are left with a question. Are these morally ambiguous motives a fixed point of human nature, part of that which must be taken into account if political action in the service of good politics is to succeed? Machiavelli and Hobbes and those influenced by them apparently think so. If such motives are an inextricable feature of humankind in society, then politics—the effort to constrain the reach of such motives while also relying on and fostering them—is as well. There is a sense in which politics is precisely what ideal theory seeks to avoid, or at least to put off to another day. The comment has been made that "the secret dream of liberalism [is] to do away with politics altogether."[87] To which we might add, not all liberals wish to do so, but Rawlsian ones certainly appear to. At its worst, ideal theory reads like nothing so much as the comment of one of the protagonists from William Morris's imaginary society in *News From Nowhere* who, when asked "[H]ow do you manage with politics?" replies "that we are very well off as to politics—because we have none."[88] Ideal theory is the vehicle by which many contemporary philosophers seek to preserve a central role for moral philosophy in talking about political life, without having to face politics. We might say that while ideal theorists such as Rawls take as central "the manyness of minds" and concern themselves with the relation in which persons stand to others,[89] practitioners of ideal theory want these persons to engage in as little politics as possible, to be "ideal" persons. This makes the resulting theory

[84] Mansfield, "Machiavelli and the Idea of Progress," in Mansfield, *Machiavelli's Virtue*, 112; and "Machiavelli's Virtue," *op. cit.*, 22.

[85] See, for example, Machiavelli, *Discourses on Livy*, bk. 2, sec. 19.

[86] Mansfield, *Taming the Prince*, 47.

[87] Harvey C. Mansfield, *The Spirit of Liberalism* (Cambridge, MA: Harvard University Press, 1978), 95.

[88] William Morris, *News From Nowhere* (London: Thomas Nelson, 1941), 117–18. I do not mean to claim here that ideal theory as a mode of doing political theory is without merit. I mean only to dispute its usefulness for understanding the kind of political practices that we will need to secure and maintain an attractive regime of popular self-government. Thus, ideal theory can teach us the danger of attempting too much in political life. The distance we would have to travel to create anything approximating an ideal would be great and the dangers of the journey large. Along the same line, ideal theory could be understood as a frankly utopian exercise designed to teach us what our actual condition as human beings is, e.g., by comparing a society where there is no politics to any society that human beings are ever likely to create.

[89] Charles Larmore, "Lifting the Veil," *The New Republic*, February 5, 2001, 32.

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ill suited to guiding action in political life, the defining characteristic of which is that its participants are not ideal. This escape from politics can also be found in much work done by economists and legal theorists interested in political life.[90] Many of the former wish to substitute for the pulling and hauling of politics (which they conceive of largely as the play of self-interest) the genuine article, namely, the market, which is revealed in their theorizing to be a giant social-calculating machine that is nonpareil in the aggregation of interests. Too much legal theory has as its underlying point that if only law could replace politics, then the arrival of the good regime would be imminent. The value of such legal theory is nicely captured by Grant Gilmore's comment that in hell there will only be law.[91]

It would be better to have a political theory that is less insouciant with regard to the central features of the world about which it theorizes.[92] Thinking constitutionally, trying to conceive of an attractive political whole out of the complex human whole, at least pays appropriate respect to unattractive features of human conduct in political life that, if we wish to understand politics, we cannot put aside. But even this is not enough if our political theories are to do more than restate our hopes. For, given that these unattractive features will not go away, we must also think about how they can be harnessed in the effort to constitute a good political regime.

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[90] See, for example, Gary S. Becker and Kevin M. Murphy, *Social Economics: Market Behavior in a Social Environment* (Cambridge, MA: Harvard University Press, Belknap Press, 2001); and Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73, no. 1 (1959).

[91] Grant Gilmore, *The Ages of American Law* (New Haven, CT: Yale University Press, 1979).

[92] Cf. Glen Newey's comment that we need "to reinstate politics itself in political philosophy." Glen Newey, "How Do We Find Out What It Means?" *Times Literary Supplement*, June 26, 1998, 29. Cf. also Colin McGinn's comments about a social contract argument that parallels Rawls's: "[W]hat is the point of unity with purely hypothetical others[?]" Colin McGinn, "Reasons and Unreasons," *The New Republic*, May 24, 1999, 37.

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