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Foreword to the Paperback Edition

A classic, it is said, is a work, whether art, literature, or scholarship, that can profitably be re-encountered throughout one’s life, with added appreciation when one places even a presumptively well-known work in the context of a later time. By any of these measures, Mark Tushnet’s *Red, White, and Blue: A Critical Analysis of Constitutional Law*, is a classic, and Jeff Tulis and I, as coeditors of the Constitutional Thinking series at the University Press of Kansas, are delighted to be the agents of its republication more than a quarter-century after its initial publication in 1988. It can be read as a “primary source” of what a gifted and influential scholar and leader of the Critical Legal Studies movement within American legal education was thinking toward the end of that decade about the ever-pressing topic of American constitutional law.

However there is yet more reason to revisit this book (or to visit it for the first time). Tushnet challenges as foolhardy the pursuit of a single path to interpreting the Constitution, thus offering a critical salvo in our wars over the Constitution that is as timely now as it was in 1988. Among other things, the decade prior to its original publication had brought to power a powerful new political coalition in American politics, for whom Ronald Reagan was the key figure. Far more than had been the case even with Richard Nixon or, certainly, Gerald Ford, “Reaganites” within the Department of Justice embarked on a highly self-conscious effort to appoint far more conservatives to the federal judiciary, including the Supreme Court. They were aided by members of the relatively new Federalist Society who filled a variety of important positions in the Department. The Reagan Justice Department, particularly when headed by Attorney General Edwin Meese, had made a project of not only criticizing particular cases that had earned its opposition, but, just as importantly, developing a general approach to constitutional interpretation that would
serve as a means of deciding future cases. In particular, then-dominant interpretive approaches that had generated what had become known as “the living Constitution” were challenged by a call to return to what was labeled the “original understanding” of that document.

Although Sandra Day O’Connor’s appointment to the Court in 1982 could be explained by Reagan’s desire to appoint the first woman to the Court—although there was no doubt she was generally conservative in her judicial politics—many of his appointments to the federal judiciary were far more based on the desire to promote the new, preferred, approach to constitutional understanding. This desire was signified after the promotion of Associate Justice William Rehnquist, by far the most conservative member of the Court, to succeed Warren Burger (who had, after all, voted to recognize a woman’s right to choose an abortion in the 1973 case of Roe v. Wade, as had two other Nixon appointees, Harry Blackmun and Lewis Powell). Rehnquist’s now-vacant seat as Associate Justice was filled by Antonin Scalia, who has become perhaps the most influential justice of his time with regard particularly to reshaping public understanding of American constitutionalism. Scalia, a longtime academic and appointee of Reagan’s to the Circuit Court for the District of Columbia, in effect had campaigned for his promotion by going around the country delivering speeches defending a rigorous textualism with regard to interpreting statutes and placing an equally vigorous emphasis on history when interpreting the Constitution. Then-Justice Rehnquist had attacked the theory of “the living Constitution” in a 1977 address at the University of Texas Law School. But it was Scalia, a brilliant and pugnacious rhetorician, who proudly proclaimed his allegiance to a “dead Constitution” and denounced his adversaries as the equivalent of what Woodrow Wilson had earlier branded the opponents of the Versailles Treaty, a “small group of willful men” (and before O’Connor’s 1982 appointment, the Court did consist only of men) who felt no hesitation about illegitimately writing their own visions of politics into the law of the land. And, of course, Reagan also nominated former Yale Professor, Solicitor General, and, like Scalia, judge on the D.C. Circuit Robert Bork to succeed Lewis Powell in 1987. Bork had notably proclaimed that original intent provided the “only” legitimate template by which to justify judicial renderings of constitutional meanings; he was denied confirmation by the Democratic-controlled Senate (with some Republicans joining in the opposition), but the controversy provoked by his nomination lives on to this day.

The heightened interpretive conflicts of the Reagan Era were not new. They built on debates that had been roiling the legal academy since at least the 1950s and the Court’s epochal decision in Brown v. Board of Education in 1954. Led by white, southern critics of the decision—one
should always remember that few African American southerners disapproved—the Court was castigated for engaging in “social engineering” instead of applying ostensibly well-settled precedent, going back to 1896, that had apparently given free license to the White South to engage in Jim Crow segregation. (That these earlier decisions had been substantially undercut by a number of more recent decisions was often ignored.) A “Southern Manifesto” was signed by dozens of southern representatives and senators objecting to *Brown* in 1957, and it almost ostentatiously refrained from making overtly racist arguments in favor of legalistic ones based on a certain version of the rule of law. Not surprisingly, there were also many articles and books defending *Brown*.

One of the most influential books of the 1960s was *The Least Dangerous Branch*, by Yale Law Professor Alexander M. Bickel, a former clerk to Justice Felix Frankfurter, the leading proponent of “judicial restraint” on the Court. Perhaps the most enduring theme of the book involved Bickel’s description of the Court as “countermajoritarian” when overriding the political preferences of presumptive majorities at the national or, more likely, state level. As the reader will see, Tushnet structures much of his own analysis in this book around the possibility that the Court will be insufficiently tethered to escape, becoming even “tyrannical” in imposing its own, highly controversial, readings of the Constitution on an unhappy majority. (A number of political scientists in the years after Tushnet’s book argued that Bickel was fundamentally mistaken and that he exaggerated greatly the “countermajoritarian” aspects of judicial review, though New York University Law Professor Richard Pildes has more recently suggested that Bickel’s critics may themselves have exaggerated the degree to which the Court simply reflects general public opinion.) Still, Bickel strongly defended *Brown* and the Court’s role in discerning what Bickel termed the fundamental value commitments of the American constitutional order and legitimately enforcing them even against majoritarian desire to behave otherwise. Bickel’s book provoked many other efforts to set out interpretive principles that would support, at the very least, *Brown*, and, more broadly, many of the other important decisions of the Warren Court. As it happened, Bickel himself turned decidedly more lukewarm toward the Court, especially as it moved in the 1960s, for example, to invalidate the existing structures of state politics across the land by invoking the “one-person/one-vote norm” to strike down state legislative districts that gave too much voting power to rural interests.

Almost certainly the most important of the post-Bickel books was John Hart Ely’s *Democracy and Distrust* (1980). Ely, a former law clerk to Chief Justice Warren, defended the reapportionment cases, and much else, in the name of the Court’s legitimate role in safeguarding (and even
creating) a more truly democratic political system. But Ely’s very commitment to democracy—and majoritarianism—made him decidedly skeptical of even the Court’s 1965 invalidation of a Connecticut anticontraception law in the name of an evanescent “right of privacy,” let alone the 1973 decision to strike down the abortion laws of almost all states in *Roe v. Wade*. It is against this background that the “originalism” identified with the Reagan administration and with Scalia in particular emerged. The legal academy and, increasingly, the judiciary, featured thrusts and counterthrusts as to the “one true way” of understanding the Constitution and, concomitantly, the role of the Supreme Court in enforcing the document.

Casual readers, noting the subtitle of *Red, White, and Blue* as *A Critical Analysis of Constitutional Law*, might have believed that Tushnet had written just one more book designed to separate the commendable sheep from the deplorable goats with regard both to interpretive methodology and the decisions issued by the justices. To put it mildly, they were disappointed if that is what they were looking for. Instead, readers were treated to a remarkable argument that systematically denied that one could come up with a single interpretation of the Constitution that was entitled to pride of place against all contenders. Rather, to use a buzzword of much writing during that period, especially by devotees of Critical Legal Studies, the Constitution was fundamentally “indeterminate” in its meaning. What this means, as a practical matter, is that persons committed to the enterprise of “taking the Constitution seriously,” to paraphrase Ronald Dworkin’s famous term with regard to rights, could easily, and almost inevitably, come up with quite opposite views that were equally legitimate in terms of their fidelity to the extant legal materials. Thus, with only one relatively minor exception found in a footnote, there is simply no indication that Tushnet prefers one reading of the Constitution over another in terms of what might be called its “purely legal” merits.

For him, law is inextricably interwoven with politics, especially with what Yale Law Professor Jack Balkin and I have called the “high politics” of fundamental visions of how America should be organized and governed. This is contrasted with “low politics,” where a judge might ask simply if a particular outcome will benefit his or her friends or political associates in the next election. In particular, a guiding motif for Tushnet is the ineluctable tension between “liberal” and “republican” understandings of political order—terms having relatively little to do, incidentally, with their use in ordinary political discourse.

Tushnet’s book may be best known, in some circles, for its dramatic, almost shocking, final sentence: “Critique is all there is.” He argued that
it is fundamentally a fool’s errand to pretend that there is indeed a single royal road by which professional lawyers, using their highly honed skills of “thinking like a lawyer,” could ever arrive at a definitive understanding of constitutional meaning. To pretend otherwise is to engage either in self-delusion or, probably even worse, an attempt to use one’s status as a legal academic (or judge) to claim that what are, at the end of the day, one’s deeply political preferences are in fact required by the Constitution itself. Neither admirers nor critics of Justices William J. Brennan or Antonin Scalia were offered any comforting messages by Tushnet, at least if their admiration or criticism was based on the justices’ purported skills (or deficiencies) as lawyers claiming some special insight into the true meaning of the document to which they had taken a public vow of fealty. Perhaps this helps to explain why the book sadly went out of print relatively soon after its publication (and never, for example, was published in a paperback edition that would have made it assignable in many courses for which it might certainly have been suitable).

One of the characteristics of at least some adherents of Critical Legal Studies, including Tushnet, was a relentless refusal to play the traditional role of the “legal reformer” who criticized one view of the law in the name of another, presumptively better, one providing happy endings. Instead, as already suggested, Tushnet in effect suggested that legal academics should stop playing that game, the bankruptcy of which was spelled out in Red, White, and Blue. Ironically or not, many of Tushnet’s arguments would in effect be taken up by University of Chicago Professor —and longtime federal judge on the Seventh Circuit Court of Appeals —Richard Posner, whose politics could scarcely be more different from Tushnet’s. But Posner could be absolutely withering in his analyses of traditional legal pieties; a self-conscious devotee of Oliver Wendell Holmes and his willingness to wash traditional legal notions in a corrosive “cynical acid,” Posner must certainly be unique among all sitting judges, perhaps anywhere in the world, in titling one of his many books Overcoming Law. Posner describes himself as a relentless “pragmatist,” which means, in context, that he disdains reliance particularly by Supreme Court Justices, who should know better, on traditional notions of legalism when rendering their decisions. Far more so than Tushnet, Posner has always been willing to praise or, more often, denounce Supreme Court decisions in terms of whether they truly serve the public interest; but, like Tushnet, the basic framework of his analysis involves political wisdom and not fealty to “one true path” of legal understanding. Posner is, for example, a longtime, increasingly caustic, critic of his former University of Chicago colleague Antonin Scalia because Scalia believes (or pretends to believe) that he is simply the faithful servant of impersonal law.
But in part, at least, it is precisely the bitter conflict between Posner and Scalia, not to mention the sometimes remarkably acrimonious tone of majority and dissenting opinions in 5–4 decisions of the Supreme Court, that explains why the republication of *Red, White, and Blue* is so welcome. Very near the beginning of his book, Tushnet refers to the fact that “Western society is currently experiencing a crisis of legitimacy” (p. 3). What this means, among other things, is that none of the various “grand theories” designed to explain and legitimate Western society seems to be working, in spite of the obvious brilliance of those enunciating them. Each is met with devastating ripostes. “If,” he writes, “the present versions of the theories are the best that are likely to be devised, and if they succumb to obvious attacks, grand theory may well be pointless” (p. 3, n. 6). Thus the conclusion, many pages later, after delineating all extant “grand theories” of the Constitution and demonstrating the “obvious attacks” that can be leveled at them, that “critique is all there is.”

Tushnet’s message was undoubtedly hard to accept. To take Tushnet truly seriously was to be forced to call into doubt the entire scaffolding of the legal enterprise as it had been defined in our finest law schools and on the bench. For many readers, the declaration that “critique is all there is” was the equivalent of Cordelia’s devastating death in *King Lear*, and, like many eighteenth- and nineteenth-century playgoers, they preferred a version in which Cordelia lived and Lear died a happy man. Or, to adopt a more contemporary analogy, it is like telling Wile E. Coyote that every scheme to foil the Road Runner will leave him up in the air without any support and with an inevitable unhappy ending. Far better to believe that with enough effort (and brilliance), the Road Runner of relentless critique can in fact be defeated next time.

So consider in this context the efforts of the brilliant Harvard Professor Laurence Tribe, beginning in 1979, to emulate an earlier member of the Harvard Law School faculty, Justice Joseph Story, by writing a “treatise” on the United States Constitution. In essence, it had the aim of providing an authoritative road map through all of the mysterious woods and deserts that some analysts saw when looking at the document and how it has been interpreted. The 1979 first edition was followed by a two-volume second edition in 1988, the same year, of course, as *Red, White, and Blue*. But in 2005, Professor Tribe suspended a proposed three-volume third edition, the first volume of which had come out in 2000. Why? According to a letter from Tribe to his friend and former colleague Supreme Court Justice Stephen Breyer, “I’ve suspended work on a revision because, in area after area, we find ourselves at a fork in the road—a point at which it’s fair to say things could go in any of several directions. . . . Conflict,” Tribe wrote, “over basic constitutional premises is today at a fever pitch.” This means that it is basically foolhardy
to attempt to ascertain answers to a variety of important questions given that all purported answers “are passionately contested, with little common ground from which to build agreement.”

It is not that traditional books in constitutional “grand theory” are no longer being written. I’m on record in stating that Jack Balkin’s *Living Originalism* (2012) is the best book of such grand theory I’ve ever read. But that is not the equivalent of stating either that I agree with Balkin’s views in every respect or, perhaps far more to the point, that I seriously expect to see his book establish such dominance that it will bring fundamental debate to an end. And one should have no doubt that the hope of almost every creator of “grand theory” or synthesis is precisely to end debate and establish intellectual dominance. We can, from an external perspective, speak of “great debates” that have extended over millennia, where fundamentally different views joust with one another. But the authors of the canonical works, whether Plato, Aristotle, Maimonides, Aquinas, Kant, Hegel, Bentham, or Marx, firmly believed that they had solved the extant challenges and that subsequent thinkers would have only to apply their own now-privileged methods of analysis to resolve future difficulties. Purveyors of grand theories may be honored for their brilliance and intellectual vitality, but this is sadly different from acknowledgment even by one’s colleagues that they have now seen the light and will become disciples.

Whether one accepts it as a philosophical proposition “critique is all there is” does not serve as a bad summation of our own time, at least with regard to “grand theories.” The contemporary crises of legitimacy throughout the world can easily be said to be far greater than in the almost-halcyon days of 1986 or 1987 when Tushnet was writing his book. No one would have predicted even in 1988 that the Soviet Union would disappear, that the various “settlements” of World War II (let alone World War I, in the Middle East) would unravel, or that 45 percent of those living in Scotland would vote to undo the 307-year-old Treaty of Union that basically created what we think of as the United Kingdom. At the more local level, within the ambit of the Supreme Court’s role in enforcing the Constitution, few serious scholars would have predicted the remarkable intervention in the 2000 election process that we call *Bush v. Gore*. Within the broader United States, not only do repeated polls demonstrate what can only be termed “contempt of Congress” and less-than-enthusiastic support for the president but, for the first time in the history of the Gallup Poll, less than a majority of the public—47 percent in July 2014—approves even of the Supreme Court (as against 46 percent who

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disapprove). For some, this may result from festering opposition to the Court’s decision in *Roe v. Wade*, which has never been accepted as a legitimate decision by millions of Americans or, over the past several decades, by the Republican Party. For others, the unhappiness may date back to *Bush v. Gore* or to more recent decisions like *Citizens United*, which seem to legitimate the inordinate influence of those with almost limitless funds to contribute to political campaigns, especially at the primary stage that involves choosing candidates in the first place.

But consider as well that following the Scottish referendum, Reuters published the results of a poll taken in the United States in August–September 2014 indicating that almost a quarter of all Americans suggest that the states in which they live should consider seceding from the United States. ² It is easy enough to note that this means, by definition, that slightly more than three-quarters are satisfied with the Union as it is and that most polls are worthless anyway. But one might still wonder if this poll, taken by a serious news organization, might be worth attending to; even if one dismisses its importance in 2015, might there come a time, sooner than we might think, when it would be a harbinger of the deeper fundamental crisis of governance facing the United States?

Political scientists can actively dispute both the theoretical meaning of “legitimacy” of institutions and the evidence that supports attributions of “legitimacy” or “illegitimacy.” It seems hard though to deny that Tushnet’s overall project may have even more intellectual force than was the case in 1988. Perhaps there will come a time when a future reader, perhaps in another quarter century, will pronounce *Red, White, and Blue* to be overdrawn in its bleakness and as evidence offer the presence of a constitutional road map that has garnered the kind of consensual support for which Tribe craved. For the sake of our children and grandchildren, one may hope that is the case. But it would be foolish to pretend that that time is now or even in the foreseeable future. What is most jarring, perhaps, is precisely the extent to which Tushnet’s book, even if necessarily limited to cases and other materials available by 1987 (save for his valuable new afterword to this edition), is a book for our own time and well deserving of a new set of readers trying to make sense of the acrimonious debates about constitutional law that are so pervasive into the twenty-first century.

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A generation ago the Supreme Court began to make decisions that altered the way we think about judicial review and democratic government. A number of observers thought that some of the most attractive decisions of the Warren Court, such as the desegregation decisions of 1954, were difficult to reconcile with prevailing theories of judicial review. Until 1970 those who were satisfied with the work of the Warren Court felt little urgency in defending it; from around 1963, after Arthur Goldberg had been appointed to the Court, a liberal majority was in relatively firm control and liberal decisions rolled forth with some regularity. Under those circumstances liberals felt no pressure to develop elaborate justifications for what the Court was doing.

The ease with which liberals could accept the Court’s actions changed in 1970 and, more dramatically, in 1972, with the appointment of four conservative Justices. The agenda for liberals who wrote about constitutional law changed accordingly. Now they had to provide justifications for the Warren Court, both to prevent erosions from positions already taken and to encourage extension to new positions, such as attacks on gender-based discrimination and on restrictive abortion laws. The result was an explosion of articles and books on the theory of judicial review, defending the work of the Warren Court and looking nervously at that of the Burger Court. Conservatives such as Attorney General Edwin Meese responded by asserting that their preferred theory of judicial review justified some retrenchment on Warren Court decisions.

This book examines the discussions of judicial review over the past generation. Part I takes up theories of judicial review, and Part II discusses the Court’s articulated doctrines and implicit views in a number of areas of constitutional law. Unlike the authors of the works and decisions I consider, I am not interested in offering an alternative normative theory of judicial review, nor do I argue that the Court ought to use the reasons I
provide as the basis for its decisions in particular cases. Instead I approach these materials in a way that blends the concerns of an intellectual historian with those of a cultural critic. I examine the structure of arguments to expose their sometimes unarticulated presuppositions about the nature of American society and to suggest why commentators and Justices have found those presuppositions congenial, even if they disagree on the implications of those presuppositions in particular cases.

My argument has two basic themes, pursued in various ways in the discussion of different topics. The first theme might be called a logical one. Judicial review and, perhaps more fundamentally, theories of judicial review play an integral role in an intellectual program that I call the liberal tradition. Even contemporary conservatives are committed to that program. Yet making judicial review and its theories intellectually coherent requires that the liberal tradition be supplemented by an alternative program from what I call the republican tradition. The difficulty is that, to the extent that we understand that republicanism is essential to the coherence of liberalism, we undermine the need for judicial review. In a sense, the liberal tradition makes judicial review necessary but at the same time makes it impossible.

The second theme of my argument is sociological. In general and over the medium to long run, courts are part of a society’s governing coalition. Understanding the work of the courts therefore requires that we give it a political analysis. But it is not enough to do what I have already done in referring to the “liberal” Warren Court and the “conservative” Burger Court. We must also examine the political implications of the structural presuppositions shared rather broadly across the American political spectrum.

The Introduction uses a discussion of federalism to describe the liberal and republican traditions. Part I contains five chapters. In Chapter 1 I discuss reliance on history and precedent as theories of judicial review, arguing that the openness with which we may fairly read history and prior cases makes it impossible to consider them as restraints on the power of judges. An appendix to this chapter discusses whether the text alone may ground a theory of judicial review. Chapter 2 examines a powerful theory, offered most recently by John Hart Ely, that requires courts to facilitate the operation of a system of pluralist politics that already works reasonably well. I argue that Ely’s theory is flawed by its inability to specify what really facilitates pluralist politics, and by its acceptance of the existing system as a reasonably well functioning one.

Chapter 3 turns to the use of moral philosophy as a ground for judicial review and argues that neither any presently available moral philosophy nor any likely candidate for development can provide sufficient guidance to the courts for it to constitute an acceptable theory of judicial review.
Chapter 4 deals with what I call antiformalist themes in constitutional theory and, in an appendix, with conservative constitutional theory and recent efforts by liberals to appropriate tradition as a basis for a theory of judicial review. Next is Chapter 5, an interlude that examines and rejects the strategy of making judicial review coherent by drawing eclectically from various theories.

The republican alternative to the liberal tradition lies in the background of the discussions in Part I. It moves closer to the foreground in Part II. Each chapter in this part gives an overview of prevailing doctrine and theoretical positions in the area it discusses and offers an alternative interpretation of the law in the area. The chapter titles indicate that my overall topic is the way in which constitutional doctrine constitutes—shapes and defends—important social institutions. Chapter 9, “The Constitution of the Market,” deals with commercial speech, campaign financing, and pornography.

The Conclusion cautiously describes what kind of politics—but not what kind of judicial review—might revive the republican tradition. The final paragraphs suggest that identifying such a political program may not constitute the proper conclusion to be drawn from the book’s critical inquiry.

This book has been gestating for a long time. During the course of its production, portions of it have appeared in various law reviews and have been commented on, both formally and informally, by too many colleagues for me to remember. To avoid omitting any from a list, I have decided to forgo specific mention. But three people must be acknowledged for the various forms of help they have given me. L. Michael Seidman, my sometime collaborator, has regularly commented on my work and in conversations has shaped and deepened my understanding of the issues with which he and I have been concerned. Two former students, Richard Martin and Jennifer Jaff, provided essential encouragement for me to try to work out the ideas in this book more systematically than I had done in class.

As mentioned, some portions of the book have been published as law review articles. But some of the articles have been broken into parts and are published here in separate chapters; all have been updated to take into account developments in the courts and commentary since the time of their original publication, and all have been revised in the light of colleagues’ comments and my own further thought on the problems they address. I believe that the product is a book that integrates my prior work in ways that will make the overall argument clearer even to those who have already come across some parts of it.
Introduction

The Revival of Grand Theory in Constitutional Law

The past few years have seen a remarkable revival of interest in comprehensive normative theories of constitutional law. These grand theories, as I will call them, attempt to provide justifications for the exercise of the power of judicial review in a democracy, that is, the power that courts whose judges are appointed for life have which allows them to displace decisions made by representatives of the people. Current interest in grand theory is striking for two reasons. First, despite the existence of competing grand theories, each one is in its essentials a revived and purified version of an earlier grand theory. The second characteristic of the current interest in grand theory that invites comment is its timing. An earlier era of grand theorizing occurred a generation ago, when Herbert Wechsler delivered his famous lectures, "Toward Neutral Principles of Constitutional Law," and when Alexander Bickel brought the best insights of contemporary political analysis to bear on judicial review of The Least Dangerous Branch. For a little more than a decade, constitutional theory worked within the confines of the tradition that Wechsler and Bickel had brought to its highest point. Then grand theory became attractive again.

1. For example, as Chapter 2 shows, John Hart Ely's theory of "representation-reinforcing review," in which the courts may intervene when they perceive that there are obstacles to the expression and aggregation of preferences in the normal political process, is the contemporary version of a theory articulated in a different context by Chief Justice John Marshall in the early nineteenth century and developed further by Harlan Fiske Stone in the 1930s and the 1940s. Recent use of moral philosophy to justify judicial review, as exemplified in the work of Ronald Dworkin, replicates the prior use of natural law concepts in the early part of this century.


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Interest in grand theory revived partly for political reasons. Ely and others explicitly desire to protect the legacy of the Warren Court at a time when its liberalism has become a beleaguered minority position on the Supreme Court as elsewhere in American society. The idea appears to be that the decisions of the Warren Court can be defended against erosion or overruling by demonstrating that they fit within some grand theory. Yet there is something distinctly odd about that idea. The major grand theories in the field probably provide inadequate defenses for the controversial decisions of the Warren Court. In addition, the grand theorists have not explained how their theorizing activity actually serves their apparent political goals. Theorizing would do so only if the fact that a decision fit into a grand theory implied that it would have greater staying power than one that did not fit into such a theory, but it is difficult to come up with a theory of politics that can plausibly support that argument.

The persistence and recurrent revival of interest in grand theories suggests that there is more to the story of the revival of grand theory than transitory political matters. The most important aspect of that story is the way in which it reflects, indeed is the expression of, the crisis of contemporary liberal political theory. A student of grand theory notices rather quickly that the presentations have a common structure. In “Part I” the theorist offers a critique of all other grand theories, and in “Part II” he presents an assertedly defensible and therefore different grand theory. Yet this structure is obviously flawed. Because we are experiencing a revival of grand theory, the critiques are readily available. When Ely gives us


5. For example, Ely’s theory may perhaps justify the reapportionment decisions, but those decisions have suffered at most minor erosion. The Court allows relatively small variations, as compared with those that existed before the Court developed the “one person, one vote” approach, and has indicated its unwillingness to tolerate extreme population disparities. See, e.g., Brown v. Thompson, 462 U.S. 835, 846 (1983) (large variance upheld because of limited scope of challenge presented, but suggesting that result would have been different had litigation strategy differed), 850 (O’Connor, J., concurring) (two Justices of five-person majority expressing “gravest doubts” about the plan as a whole).

Some might think that minor inroads on the reapportionment decisions are more troubling than substantial erosion of the criminal justice decisions, but Ely appears to believe otherwise. See, e.g., Alan Dershowitz and John Hart Ely, “Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,” 80 Yale Law Journal 1198 (1971). Similarly, Ely’s presentation of his theory has little to say about the Warren Court’s criminal justice decisions, although they are the ones under most serious pressure. See, e.g., Fred Graham, The Self-Inflicted Wound (1970). What has happened is that the liberals have essentially given up on winning anything substantial in the area of criminal procedure, and constitutional theorists have similarly abandoned the effort to defend a position that has been lost anyway.
"representation-reinforcing review," his critics can draw on the literature discussing the inadequacies of Harlan Fiske Stone's version of that theory. Ely in turn can draw on the criticisms of the earlier reliance on natural law that pejoratively characterize that reliance as Lochnerism, after the Supreme Court decision holding that a maximum hours law violated a constitutionally protected freedom of contract.6

Another effect of the common structure of grand theory appears in its applications. Because the "Part II" of each theory is quite unstable, theorists have to be blind to criticism when they offer specific examples of how their theories work. The applications therefore have a wearying sameness. Once one identifies the grand theory, one knows with a high degree of certainty what its applications will be. If one sees the key words "process values," for example, one knows that we are about to learn that the Constitution requires the implementation of the platform of the 1964 Democratic Party, and if one sees "equal concern and respect," one knows that we are about to learn that the Constitution requires the implementation of the 1972 Democratic platform.

The familiarity of grand theories, and of their critiques, suggests that the enterprise of theory has deep roots. As I will argue in a moment, grand theory's primary function is to explain why the existing system of constitutional law deserves our rational respect. Each grand theory identifies problems around the edges, and offers solutions to them, but grand theory rests on the premise that at the core of the system things are basically all right. Thus, natural law theorists rarely challenge the existing distribution of wealth in a serious way, although they will defend marginal alterations in the distribution of access to particular goods—access to lawyers but not to food, for example. But it is a commonplace of contemporary social thought that Western society is currently experiencing a crisis of legitimacy. "The system" is not delivering the goods, and all the ideological structures designed to explain why the shortfall is defensible, indeed is inevitable, have broken down. Grand theory and its problems are just constitutional law's version of this general crisis of legitimacy.7

6. Of course some advances have been made within each grand theory, as progressive refinements and accommodations to criticism occur. For example, there appears to be general agreement that Ely, Democracy and Distrust, has substantially clarified the role that the analysis of motivation plays in constitutional adjudication. But these advances may have purified the theories into their highest and best forms. If so, criticism is especially devastating, for if the present versions of the theories are the best that are likely to be devised, and if they succumb to obvious attacks, grand theory may well be pointless.

7. That it truly is a crisis is suggested by the extraordinarily short lifetime of each grand theory. For example, Ely's book was greeted by a symposium of review essays that left his theory in a shambles. Symposium, "Judicial Review versus Democracy," 42 Ohio State Law Journal 1 (1981).
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The crisis of grand theory is the form that the failure of liberal political theory has taken in constitutional law. The next section examines the role that constitutional theory plays in liberal thought by describing its relation to other institutions of government such as federalism.

Traditions of American Political Theory: The Role of the Constitution

Judicial review is an institution designed to meet some difficulties that arise when one tries to develop political institutions forceful enough to accomplish valued goals and yet not so powerful as to threaten the liberties of the citizenry. By granting substantial power to government, people are able to accomplish more of what they wish, but they find themselves subject to oppression by the government they have created. They may attempt to protect themselves by writing into the Constitution certain restrictions on the power of government, but they still need some mechanism to assure that those restrictions will be honored. Judicial review is one of several mechanisms that the framers designed to enforce constitutional limits. Yet as I will argue, judicial review alone cannot eliminate the possibility of a certain kind of governmental oppression—oppression by the judges themselves. Constitutional theory completes the structure by providing guidance to the judges on when and how they should exercise the power of judicial review and by giving the citizenry widely shared criteria by which to evaluate judicial performance.

An overview of the Constitution’s structure will illuminate the role of judicial review and constitutional theory in our society. The Constitution was framed in an era when two general theories about citizenship contended on roughly equal terms. One theory, captured in the liberal tradition, emphasized the individualism of people acting in society and

8. See Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (1985). Much of the literature, though not McDonald’s work, on the framers’ worldviews is infected by one major problem: its authors tend to insist that the true view held by the framers was either liberal or republican, although the framers almost certainly had not sorted out the theories in the way that later authors have. Joyce Appleby, “Liberalism and the American Revolution,” 49 New England Quarterly 3, 7 (1976), suggests that the blending of liberal and republican themes was the product of a “disjuncture in colonial life” that began in the second quarter of the seventeenth century. When read with the caution that both sides of the argument are probably right, useful collections on the framers’ views are How Democratic is the Constitution? (Robert Goldwin and William Schambra eds. 1980); The American Founding: Politics, Statesmanship, and the Constitution (Ralph Rossum and Gary MacDowell eds. 1981).

9. In earlier versions of this work I tended to call this the Lockean tradition, but I have been persuaded by the work of John Dunn and his student James Tully that this designation
examined how social institutions rest on and constrain individual preferences. The other theory, recently labeled the civic republican tradition, emphasized the essential social nature of individual being and examined how individual preferences rest on and constrain social institutions.

By calling these theories traditions I mean to suggest that they provided, and continue to provide, competing general frameworks for orienting thought about political life. Few people adopt one or the other framework in its entirety, and systematic thinkers often develop creative synthesizes of elements in both traditions. Yet one can arrive at a judgment that one or the other tradition has more cultural power at any particular time in the sense that people at that time tend to believe that the then-predominant tradition makes more sense of their daily experience than its competitor does. For example, I will repeatedly suggest that the

is inaccurate. See, e.g., John Dunn, “The Politics of Locke in England and America in the Eighteenth Century,” in his Political Obligation in Its Historical Context 53, 70–77 (1980) (arguing that Locke’s works had little direct influence on the framers); James Tully, A Discourse on Property: John Locke and His Adversaries (1980) (emphasizing nonindividualist dimensions of Locke’s thought). By calling this a tradition I intend to avoid locating it in the works of any particular theorist. Most systematic political thinkers have had a more subtle understanding of the problems than those I will describe as inherent in the tradition. Dunn calls the genre in which this kind of tradition is located amateur political theory, which seems exactly right.


See, e.g., Gerald Gaus, The Modern Liberal Theory of Man (1983), arguing that the modern liberalism of T. H. Green, Bosanquet, Hobhouse, Dewey, and Rawls aims at reconciling individuality and community.

Historians rediscovered the republican tradition in their studies of the revolutionary era. See note 11. Their consensus is that the republican tradition gradually became subordinated to the liberal tradition as a way of organizing thought about society, and much recent historical work locates the republican tradition in dissenting and subordinate groups. See,
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liberal tradition is so dominant today that it has become difficult to appreciate the force of the civic republican tradition.¹⁴

Traditions are not systematic, well-organized bodies of thought; rather, they help people to understand the world by providing some familiar categories to use. With that caveat we can contrast some of the main elements of the traditions. The liberal tradition stresses the self-interested motivations of individuals and treats the collective good as the aggregation of what individuals choose; the republican tradition has an ill-defined notion that the whole is greater than the sum of its parts.¹⁵ Although it acknowledges the role of public institutions in providing the framework for individual development, the liberal tradition insists that such institutions be neutral toward competing conceptions of the good and tends to emphasize the risks of governmental overreaching. The republican tradition, seeing public institutions as important means by which private character is shaped, is less suspicious of government. The liberal tradition places relatively more emphasis on liberty than on equality,¹⁶ and historically it has been associated with the view that the natural operations of a market economy produce sufficient liberty and equality to necessitate only relatively modest public adjustments. It has tended to be more alert to the threats posed to liberty by government than to those posed by private centers of power. The liberal tradition has given relatively greater weight than has the republican tradition to freeing people of the constraints of tradition, and, in contrast to the more communitarian and therefore exclusionary republican tradition, the liberal tradition has insisted on promoting interests that it views as common to all people. Finally, the liberal tradition has tended to design institutions to separate law from politics, an issue of less concern in the republican tradition.


¹⁴. See also William Sullivan, Reconstructing Public Philosophy (1982), whose title suggests that reconstruction is needed. This is not to deny the persistence of rhetorical appeals to republican values in our society. See, e.g., Robert Bellah, Richard Madsen, William Sullivan, Ann Swidley, and Steven Tipton, Habits of the Heart: Individualism and Commitment in American Life (1985). It is only to suggest that those appeals are unlikely to move beyond rhetoric.


As this summary suggests, the traditions are distinguished largely by matters of emphasis. Each tradition captures important and valuable aspects of life that no sound understanding of political activity can ignore. Indeed, as the framers considered questions of fundamental institutional design, they discovered that liberalism and civic republicanism converged on some important matters. Each theory suggested that the institutions of government should protect private property, should distribute powers vertically in a federal arrangement and horizontally through the separation of powers, and should provide for judicial review. These institutions, however, reduced the dangers that individualism and community pose to each other only because the framers’ society was poised between the stable mercantilist and aristocratic order of the past and the dynamic democratic capitalist society that the Constitution was about to set in motion. After that equilibrium was disturbed, not federalism, separation of powers, or judicial review could adjust individualism and community as the framers believed they could.

We can work our way back to the world of the framers by beginning with the Preamble to the Constitution, where they defined the purposes of their efforts. The new government was designed to “establish Justice, insure domestic Tranquility, . . . promote the general welfare, and secure the Blessings of Liberty.” For present purposes I will simplify this by claiming that the Constitution was designed to establish a government of ordered liberty. 17 But ordered liberty can exist only in a society with certain characteristics. For example, the framers had recently experienced Shays’s Rebellion, in which irate debtors used armed force to close local courts, thus impeding creditors’ efforts to collect the debts they were owed. 18 Generalizing, the framers believed that liberty cannot be promoted unless there is a government with sufficient power to prevent armed marauders from terrorizing the countryside. If “domestic Tranquility” is thus a precondition to ordered liberty, it follows that the institutions of government must be strong. And in general the institutions that the framers designed helped to secure some of the social characteristics that ordered liberty requires. The liberal tradition argued that the institutions secured the social prerequisites of ordered liberty in one way while the republican tradition argued that they did so in a different but complementary way. The triumph of the liberal tradition has destroyed the coherence of the constitutional scheme by eliminating those complementary mechanisms for assuring the preconditions of ordered liberty.

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The liberal tradition was shaped by its assumptions about how social institutions can best accommodate what it saw as the dominant tendencies in human nature. In the liberal tradition people were considered to be motivated, in large measure, by what C. B. Macpherson has called "possessive individualism." The intellectual history of possessive individualism is fairly familiar by now. It begins with Hobbes, who argued that people want to maximize their material well-being. To do so they will invest their efforts in two activities. First, they may use their physical powers to transform natural materials into human wealth. Second, they may use their physical powers to wrest human wealth from those who have engaged in the first activity. The two activities then create a classic prisoners' dilemma: anyone who foresees the possibility that another person may come along to grab his or her newly created wealth is foolish to create it in the first place. Individual efforts to maximize wealth are individually, and therefore socially, disastrous.

Hobbes and his successors argued that we are better off relinquishing some or all of our individual power to wrest material wealth from others. If we can be assured that the wealth each of us creates will remain ours, we will engage in productive activities without diverting our efforts into unproductive self-defense. We can provide that assurance by banding together and investing a portion of our wealth (necessarily less than we would otherwise devote to self-defense) in an enterprise we can call government. Our investments, now called taxes, will support a police force that we can call upon when we believe that our holdings of wealth are in jeopardy. These are the roots in the liberal tradition of the framers' desire for a strong government.

Property plays a central role in the liberal tradition. As material wealth, property is the aim of human activity, and it is therefore the purpose for which we desire liberty. But property holding also contributes to liberty

21. Alternatively, each wealth creator would divert some effort from the primary task of wealth creation into the development of defensive measures, thus reducing the amount of wealth actually created. This is another version of the prisoners' dilemma: if I allocate my investment by giving 90 units to the creation of wealth and 10 units to defense, you can overwhelm my defenses by devoting 40 units to attack and 60 to the creation of wealth. You will end up with the product of 150 units, and I will end up with nothing. I therefore ought to devote more to defense and less to production, thus producing an arms race and ultimate impoverishment.
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directly and indirectly. A person holding property cannot be dominated by someone else: the sturdy yeoman farmer owning his own land can never be a peasant under the thumb of a land-"lord." At least the landowner can sell the land and use the proceeds to finance relocation to a place where no one tries to impose on him or her, perhaps because each resident had fled from similar oppression. In addition, property holding promotes the ordered dimension of liberty. Widespread property holding gives many people a stake in maintaining the order that secures their holdings. Thus, by spreading property holding widely, we help ensure domestic tranquillity. And now another connection between strong government and property appears. Sustained economic growth may be the best way to spread property holding broadly. Government can forestall attacks on existing holdings by developing a police force, to be sure, but it may also do so by ensuring that growth occurs fast enough to provide increasing numbers with a share of an ever-expanding pie. 22 A government must have the power to act decisively when necessary if it is to promote this kind of economic growth.

The liberal tradition understood that a government strong enough to protect property and promote growth might be too strong. After all, those who hold positions in the government can be possessive individualists too. Having disarmed the citizenry to protect each from the other, the government will be in a position to seize whatever it chooses from all citizens. In a major innovation in political theory, the framers believed that they could avoid this result by creating institutions that diffuse governmental power. Federalism diffuses power vertically by granting only specifically enumerated powers to the national government. As Madison put it, the central government's powers are "few and defined," whereas those of the states "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." 23 In addition, federalism allows citizens to avoid localized oppression and secure the services they desire by voting with their feet and moving elsewhere. 24 Thus neither local nor central government can become too powerful. Further, the framers created a federal structure that, as a practical matter, requires the concurrence of many representatives

22. See Henry Hart and Albert Sacks, "The Legal Process" 110–16 (ms. 1958), for an expression in the legal literature. The idea has become part of the political folklore in the expression "A rising tide lifts all boats."
23. The Federalist No. 45 (Madison).
with substantial local constituencies before the national government can act.\textsuperscript{25}

The framers also diffused power in another way. They insisted that even those powers granted the national government be exercised subject to a number of specifically identified limitations. The courts would review legislation to determine whether it exceeded those limitations and was otherwise within the powers granted to the national government.\textsuperscript{26}

These mechanisms for diffusing power created their own problems. The point of the enterprise of institutional design was to create a government strong enough to promote ordered liberty and economic growth. The more that government's power was diffused, though, the less likely it was that the national government could act when action was needed. A government beset by chronic paralysis is no better than no government at all, yet that was what diffusion of power threatened. Judicial review was also an unstable solution to liberalism's problems, because the framers, as liberals, had no reason to think that judges would be any less attached to possessive individualism than were the representatives whom the judges were to restrain. Although the judges' self-interest might be mobilized on different occasions than that of the representatives, it could not be eliminated. Judicial review thus substituted the threat of tyranny by the judges for the threat of tyranny by the legislators. Modern constitutional theory attempts to provide the necessary limits on judges.

The republican tradition, though quite different from liberalism in its origins and intentions, offered solutions to the related problems of potential legislative tyranny, potential paralysis, and potential judicial tyranny. The republican tradition insisted that people are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create.

Republicans, consistent with their traditionalism, could have been inattentive to questions of institutional design.\textsuperscript{27} But in the eighteenth century republicans were deeply concerned about institutions for a number of


26. The Federalist No. 78 (Hamilton).

27. Saying that people draw the meaning of their lives from social participation has few implications for institutional design. After all, if people are inevitably social beings the institutions that they have define what they are, willy-nilly: a different set of institutions, a different sort of equally social beings. Thus their relative indifference to the details of institutional design tends to make republicans students of the history and traditions of “a people.”
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mutually reinforcing reasons. As traditionalists, republicans wished that citizens would develop not just any characters—which they inevitably would—but appropriately civic-minded characters. Properly designed institutions can instill civic virtue in citizens. In addition, republicans saw the traditions they revered under assault and naturally looked to institutional design as providing a means to reinvigorate their traditions. Finally, republicans did not romanticize human nature. They understood that people will sometimes heed the call of self-interest rather than that of public interest. They were therefore intensely worried about what they called corruption, the use of public offices for private interest. They believed that corruption explained the assaults on tradition that they witnessed. They argued that alterations in institutional design can constrain corruption directly, by limiting the opportunities in which self-interest can overcome civic-mindedness, and indirectly, by reinforcing the citizenry’s dedication to the public interest.

The republican tradition saw diffusion of power as an important element in institutional design. Private property, federalism, and judicial review thus served republican goals as well as liberal ones. Property provides the independent foundation that a citizen needs for proper consideration of the public interest. Those who lack property will be so concerned with securing the material conditions of their lives that they will surely place their immediate private interest before the public interest. In addition, they might be dominated by those on whom they depend; rather than contributing a distinctive voice to the public dialogue, the unpropertied will be reduced to puppets of their superiors. Shielded by private property, then, the republican citizen can enter into public debate without fear.

Federalism fits into republican theory in several ways. First, by ensuring that the most important activities of public life take place in small units of government, federalism makes it easier for citizens to participate. Further, citizens can draw broader lessons from their experience in local government. Small-scale dialogues lead citizens to understand that each of them has to subordinate self-interest to the public business if civic projects are to occur at all. That is, governmental paralysis at the local level will inflict pain on the citizenry, but the cooperative remedies for avoiding pain and

29. Republicans knew that property holding has a less attractive side. At least above a certain point, the more property one holds, the more likely it is that the desire to retain and increase one’s wealth will overwhelm one’s attention to the public interest. Other institutions of civic education may be used to offset the impulse to serve self-interest, even though such institutions cannot offset a superior’s threats to the material well-being of the unpropertied.
paralysis at that level will be more evident than they would be in larger-scale governments. Thus, participation in local government is itself an especially desirable form of civic education. In addition, citizens can watch one another carefully as they go about the public’s business in the locality and can learn which of them has the best character to serve as a delegate to the next larger unit of government. As Madison put it, the people will be “more familiarly and minutely conversant” with their representatives in local governments. This contributes to the final virtue of federalism. The general diffusion of power limits the opportunities for corruption, just as it limits the opportunities for individualistic overreaching in the liberal scheme of things. A republican federalism, however, would not be paralyzed by the diffusion of power. The delegates to the national government would be chosen precisely because they were unlikely to be susceptible to corruption. When the national interest required, they could put aside self-interest—as the delegates in a liberal polity could not—and act without threatening the system of ordered liberty.

In the republican tradition judicial review serves many of the same functions that it does in the liberal tradition. Republicans believed that they could avoid the traps the liberal tradition set for a theory of judicial review. Hamilton emphasized the weakness of the courts, suggesting that the threat posed by judicial corruption is small. More important, the framers emphasized the clarity of the Constitution’s proscriptions. Thus, Marshall thought that he clinched his argument in *Marbury v. Madison* by listing three provisions and implying that it would be absurd to hold that judges could not invalidate “a duty on the export of cotton” or “such a bill” of attainder or a statute declaring that “one witness [would be] sufficient for conviction” of treason. Modern readers are often puzzled by Marshall’s assurance on this point, for it seems to us that he finessed the central issue: Conceding that courts need not enforce a bill of attainder, they may wonder why the courts’ determination that a piece of legislation is “such a bill” should prevail over Congress’ judgment that it is not. In the eyes of those in the republican tradition, the limits the Constitution places on the government are stated in terms whose meaning is readily understood within the relevant communities.

31. The Federalist No. 78 (Hamilton).
32. *5 U.S. (1 Cranch)* 137, 179 (1803).
might become corrupt and disregard the plain meaning of the Constitution, but the independence given the judges makes it unlikely that they too will be corrupted. The judges will therefore enforce the terms of a readily understood Constitution. The republican tradition had available a theory of constitutional interpretation; the liberal tradition did not.

This description of the role of institutions in the republican tradition suggests that its account of institutions is more complete than that offered in the liberal tradition. Possessive individualism will systematically affect institutions designed in the liberal tradition, and ordered liberty can be purchased only by risking a governmental paralysis that itself can threaten order and liberty. In contrast, corruption is an inevitable but essentially random characteristic of those who staff republican institutions. Yet the republican tradition has become remote from our present experience because of the commitment to private property it shared with liberalism as a means of diffusing power.

That the republican tradition has become remote seems incontestable, and exploring some aspects of that remoteness illuminates its most important causes. The republican tradition assumed that leaders will arise from local constituencies whose members will become familiar with their capacities by experiencing their leadership in local government. Representatives will remain familiar with their constituencies, drawing insights and knowledge about social problems and their solutions from those contacts. Much of what we know about contemporary politics belies these arguments. Mobility among the citizenry, a virtue in the theory of federalism, has so increased that fewer and fewer of us have roots in any particular

34. In this regard giving judges life tenure (itself a term derived from property law) is like giving them property interests to assure their independence.


It is important to emphasize that the argument of this book is concerned with the liberal tradition, that is, liberalism as lived and experienced in the culture rather than the systematic thought of particular thinkers. It could be that some specific liberal intellectual worked all the problems out. If any did, however, those solutions have not been, and are not likely to be, deeply assimilated into the culture. What are assimilated if at all are some broad concepts—for example, that the rule of law is a solution to some of the problems that Hobbes discussed or that the welfare state is not inconsistent with the premises of liberal individualism.
community. Even when we do the scale of local government has grown to the point where only the most avid followers of politics have contact with their local governments. Further, political experience on the local level is no longer the most obvious route to national political office. People can become widely known as radio broadcasters, military heroes, or star athletes—or can create celebrity by spending their money freely—and can use their fame as the basis for political careers." As the scale of the national government increases, direct contact between representatives and citizens diminishes." Legislators become the heads of staff bureaucracies and direct their ghostwriters to say what the legislators mean. Interest groups rather than constituents become the major source of information about social problems. Judicial power has increased to the point that many citizens believe that judges are their primary oppressors. These facts make it difficult to remain confident that republican institutions operate as smoothly as republican theory suggests.

Indeed, the republican tradition as it stood in the late eighteenth century understood that the risk of corruption has to be contained by noninstitutional means. It stressed the importance of civic education so that the citizenry will be alert to corruption and active in fighting it. Yet the tradition understood that some people will believe that their lives will be better if the social order is turned upside down. Civic education may not be enough to overcome this sort of self-interest. It has to be coupled with deference toward social leaders. The republican tradition did not envision nearly universal suffrage. The nation’s population was divided into citizens and others. The others were not expected to participate in politics and so would not require the guarantees of independence that property holding provides. The republican tradition therefore did not postulate widespread property holding as a condition for ordered liberty. But as did the liberal tradition, the republican tradition somehow had to ensure order. “Noncitizens” do not have the kind of stake in republican institutions that citizens do, or that everyone does in liberal institutions. Civic education in the republican tradition would instead cultivate a culture of deference. Within the citizenry, deference to other citizens dampens self-interest and reduces the risk of corruption. Outside the citizenry, deference to superiors dampens disorderly urges. Republican theory did not rely on institutions alone to promote ordered liberty.

By the time of the framing forces were in motion that rapidly weakened the noninstitutional supports republican theory needed. That theory’s

36. Here is a bipartisan list of Senators described in the text: Jesse Helms, John McCain, John Glenn, Bill Bradley, Frank Lautenberg.

commitment to a hierarchical traditionalism was under sustained intellectual attack. The relatively less propertied had gained sufficient political power to make it impossible to restrict the franchise over the long term. Once suffrage was more widely available the republican tradition had to rest on widespread property holding as its guarantor of order. Thus the liberal and republican traditions converged in supporting the institution of private property and, not incidentally, in the policy of sustained economic growth to assure that property holdings would be widely distributed.

The political system that this convergence produced provided the framework for a dynamic economy whose long-term growth transformed society in the United States and abroad. The transformation also produced the mobility and the growth and bureaucratization that have made it difficult to accept the program of the republican tradition. All this has left the liberal tradition without substantial challenge in our present public life. Yet, as I have argued, that tradition provides an unstable solution to the problem of securing ordered liberty: it leads either to paralysis and disorder without liberty or to unrestrained liberty and a different kind of disorder.

The framers tried to solve these problems by drawing on the republican tradition. The liberal tradition understood that self-regarding behavior is pervasive. Liberal economic theory turned vice into virtue: the invisible hand of the market uses self-regarding behavior to produce the benefits of a dynamic economy. Liberal political theory tried to accomplish the same results in politics by establishing institutions that operate not to transform private vice into private virtue but to use private vice to produce public virtue. With respect to the courts, the framers had to explain why judges would not be purely self-regarding—out to maximize their personal power—or indirectly self-regarding—out to promote the interests of narrow groups with which they were affiliated. Their answers were that judges, like others in the national government, would “discern the true interest of their country” because they were selected from a nationwide pool and were given guarantees of tenure that assured that they would interpret the Constitution responsibly. The framers’ commitment to private property eventually invalidated these answers. Judicial appointments have become politically sensitive matters, and the idea that the Constitution has a “plain meaning” is now implausible. Grand theorizing in constitutional law can be understood as an effort to fill the gap

39. The Federalist No. 10 (Madison).
created by the decline of the republican tradition in the framers’ approach to institutional design.

In the absence of republicanism even grand theory is bound to fail. Here a metaphor from economics, the paradigmatic science of the invisible hand, may be useful. Economists have attempted to analyze the ways in which groups of people can arrive at collective decisions. One famous result in the field of public choice is Arrow’s theorem, which states that if we make certain apparently uncontroversial assumptions about rationality and individual preferences, we cannot design a mechanism for social choice that will satisfy all the assumptions. Because I use Arrow’s theorem metaphorically, I do not intend to discuss it in detail. For my purposes only one of its assumptions is interesting: the rule of nondictatorship.

Arrow’s theorem as a metaphor helps us understand the problems of constitutional theory in more conventional terms. Our society has a very complicated mechanism for arriving at public policy. For present purposes, though, its complexities can be simplified to this. In general the choice made by a majority is to be respected, but on some issues and in some contexts majoritarian decisions may be overridden. Through exercise of the power of judicial review, the courts say when and how that can properly occur. Unhappily, we are left with a choice of dictatorships: sometimes the majority will be the dictator, and sometimes the judges will. Judicial review is often defended as the only way to escape the potential tyranny of the majority, but it simultaneously creates the potential for the tyranny of the judges. The general function of constitutional


41. A second assumption is that of “unrestricted domain”: there are no limitations on the preferences of the individuals in relevant society. One can try to escape the powerful result of Arrow’s theorem in several ways. By rejecting the assumption of unrestricted domain, we could bar some preferences from figuring in the process of social choice. This is the route taken by Ronald Dworkin, who does not allow what he calls “external” preferences—those reflecting a simple desire to hurt someone else—to be counted. Ronald Dworkin, Taking Rights Seriously 240–58 (1978). See Ely, Democracy and Distrust, p. 67n. At least in the context of the metaphor, this exclusion runs up against the nondictatorship assumption, for who is to decide what kinds of preferences are, as a normative matter, to be ruled out? Alternatively, one might make the empirical claim that in contemporary American society the domain of preference is in fact restricted enough to allow us to have a coherent mechanism of social choice. It is hard to test the truth of that claim. But even if it is true, new questions arise. For example, how is it that in a liberal society that prides itself on tolerating diverse preferences, the domain of preferences is actually restricted? See Chapter 9.
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theory has been to specify how judicial review can exist without becoming judicial tyranny. The Arrow theorem metaphor suggests that constitutional theory must fail in that task.

If the problems I have discussed arise because of inadequacies within the liberal tradition, an obvious alternative is to look to the republican tradition for solutions. Republicanism does indeed provide the backdrop against which much of the argument of this book is played out. Nonetheless, I doubt that revitalizing the republican tradition can solve the present difficulties of constitutional law. Republicanism made sense only in a specific social setting, with a restricted franchise and substantial equality of wealth among the citizenry. It is both unrealistic and irresponsible to suggest that the franchise be restricted once again. Yet reconstituting the other social condition to republicanism—that is, assuring substantial equality of wealth among a fully enfranchised population—is no small thing. In addition, as I suggested earlier, republicanism has no strong implications for institutional design. In particular, in a vital republican society judges might well exercise the power of judicial review entirely unselfconsciously, seeing it, as Marshall did, simply as one among many republican institutions of government. Normative conclusions about the present-day institution of judicial review cannot be drawn from the republican tradition.

The remainder of this book therefore concentrates on grand theory in the liberal tradition. Part I surveys a number of prominent grand theories of constitutional law. Each chapter attempts to provide the best arguments for the theory it discusses and then considers what the defects in that theory are. This gives the part a certain single-mindedness, in that the discussion does not consider whether it would be desirable or possible to combine the best elements from a variety of theories into an eclectic approach to constitutional law. Chapter 5 explains why two kinds of eclectic strategies fail to solve the problems of constitutional theory.