

ROUTINE AND REVOLUTION

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The most prominent theories of public life in American law tend to be rooted in conceptions of virtue, welfare, or autonomy. For example, modern interest-group pluralism is defended on the ground that it respects private preferences, thus enhancing autonomy, and accurately aggregates private interests, thus promoting welfare.¹ The principal competitors to pluralism stem from republican theories of politics, which are designed to profit from and to cultivate virtue in political actors, whether citizens or representatives. Republican theories² also draw on a conception of politics that sees freedom in the selection rather than the implementation of ends. The dispute between pluralist and republican theories turns out to be a disagreement about the meaning and place of freedom, welfare, and virtue in public life.

Roberto Unger's *Politics* rejects these positions and places in their stead a distinctive theory of human nature and a distinctive approach to politics.³ The institutional proposals in *Politics*—embodying what Unger calls “empowered democracy”—are designed to break down the distinctions between routine and revolution and to facilitate individual and collective self-transformation. It should not be hard to see that this system departs dramatically from those based on the conceptions of virtue, autonomy, and welfare that have influenced modern democratic theory.

This Essay is organized in three parts. The first explores the relationship between Unger's approach and eighteenth-century constitutionalism, the principal target of Unger's institutional proposals. The second compares Unger's system of “empowered democracy” with the various understandings of public life that have dominated American constitutional theory since its inception. I explore the relationships among Unger's approach and the more conventional alternatives. The final part of the Essay examines Unger's conception of the relationship between democracy and constitutionalism. The task for the future, I suggest, is to minimize the pathologies of traditional constitutionalism in systems that

¹ See *infra* Sections II and IIA.

² See *infra* Section IIB.

³ Sartre and Nietzsche have obviously influenced the view presented in *Politics*; see other pieces in this Symposium for discussion.

have at least partly abandoned the goal of limited government. Unger's institutional proposals would not be likely to accomplish that task. For this reason, the program of *Politics*—a romantic, impressively learned, sometimes vague and repetitive, excessively rhetorical, seemingly self-contradictory work—ultimately points in the wrong direction.

I. THE TARGET: EIGHTEENTH-CENTURY CONSTITUTIONALISM

The major target of Unger's institutional proposals is eighteenth-century constitutionalism, which was designed to promote a wide variety of goals. Prominent among them was a desire to insulate basic institutional arrangements from fundamental change and to guard against dramatic intrusions on private property. In this way, the system was intended to limit the redistribution of wealth,⁴ a purpose that grew out of Lockean understandings of the institution of private property.

Eighteenth-century constitutionalism also attempted to control the dangers posed by the existence of well-organized private groups, or "factions." National representation and the system of checks and balances were designed to minimize the possibility that any particular group would be able to exercise control over governmental power in order to redistribute wealth or opportunities in its favor.⁵ A related but distinct goal was to diminish the likelihood of self-interested representation: the possibility that representatives would obtain and act upon interests diverging from those of the people at large. The fear that the rulers might oppose the ruled played an important part in efforts to promote political accountability, and the framework of the American Constitution was designed to limit the risk that representatives might act on interests independent of those of the governed.⁶

Finally, eighteenth-century constitutionalism reflected an effort to distinguish between different kinds of politics. Constitutional politics are revolutionary in character; they involve the citizenry at large and call forth a measure of far-sightedness and civic virtue. As a general rule, conventional politics contains less of both, and necessarily involves narrower issues and at least a measure of factional manipulation.⁷ In all of these respects, traditional constitutionalism distinguished between the routine operation of politics and the occasional revolutionary moments that serve as the backdrop for the system.

The institutional proposals in *Politics* amount to a wholesale attack on eighteenth-century constitutionalism. *Politics* diagnoses the problem

⁴ See the close of *The Federalist No. 10*, citing as reasons for the proposed constitutional framework its ability to offset "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."

⁵ See THE FEDERALIST NOS. 10 & 51 (J. Madison).

⁶ This is the meaning of the notion that "ambition" should be made to "oppose ambition" in THE FEDERALIST NO. 51 (J. Madison).

⁷ See Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

of modern liberal democracies as “routine without reason”: a system of politics in which people debate the distribution of marginal shares. The result, Unger claims, is a series of reform cycles, in which large issues are not addressed because the power of an unquestioned and even unidentified “formative context” severely limits political possibilities and hopes. For Unger, the overriding purpose of a revised system of institutional arrangements is to ensure that fundamental issues⁸ should be continually “up for grabs.” The system should be structured to facilitate its frequent and fundamental revision. The distinction between routine and revolution should be eliminated;⁹ checks and balances should disappear. Massive transformations should be easy to accomplish. The distinction between constitutional and ordinary politics is made much less sharp.

For example, Unger proposes a separate “destabilization” branch, authorized to break down entrenched arrangements.¹⁰ The system of checks and balances is to be abandoned in favor of one that facilitates large-scale transformation.¹¹ The legislative and executive branches are not to be mutually constraining. If the legislative branch fails to implement the president’s program in its entirety, the latter can call for new elections.¹² Among Unger’s category of rights is the “destabilization right,” affording an opportunity to disturb settled systems. A distinct branch of government is to be charged with disseminating and providing access to information; the goal is to ensure against the rigidities that might be produced by citizen ignorance of public affairs. The basic purpose of the system as a whole is to ensure that the system is capable of constant and fundamental self-revision.

In many respects, Unger’s conception of politics is neo-Jeffersonian. Jefferson also argued in favor of frequent constitutional amendment and was hospitable to “turbulence.”¹³ Both, he thought, would engage the public as a whole in matters of general importance. Such notions fit well

⁸ Unger does, however, immunize from revision both the basic system of rights and the institutional structures designed to ensure that fundamental issues remain up for grabs. Political actors may not attempt to bring about stability or durability in institutional arrangements or political roles. In this sense, they are prohibited from “smashing” the basic “context” set up by Unger. These forms of fixity create considerable awkwardness for the system.

⁹ In this respect the approach falls within the general tradition set out in B. YACK, *THE LONGING FOR TOTAL REVOLUTION: PHILOSOPHIC SOURCES OF SOCIAL DISCONTENT FROM ROUSSEAU TO MARX TO NIETZSCHE* (1986).

¹⁰ [T]he power responsible for systematic interventions should be a branch apart They should have at their disposal the technical, financial, and human resources required by any effort to reorganize major institutions and to pursue the reconstructive effort over time.

Such a branch of government must have a wide latitude for intervention. Its activities embrace, potentially, every aspect of social life and every function of all the other powers in the state.

FALSE NECESSITY at 453.

¹¹ See Unger’s critique of checks and balances. *Id.* at 72, 207, 266.

¹² See *id.* at 457-61.

¹³ Jefferson suggested that turbulence is “productive of good. It prevents the degeneracy of government, and nourishes a general attention to . . . public affairs. I hold . . . that a little rebellion

with Unger's approach, though Unger of course takes the notion of turbulence much further than did Jefferson. One can, moreover, find good reasons to support this approach, at least in some settings. The atrophied character of modern public life, in which citizens participate little in public affairs, might be altered if dramatic political shifts became likely—if, as Unger puts it, the issues of politics had to do with more than marginal distributive shares. The goods that accompany participation—education, feelings of community, personal growth of various sorts¹⁴—might be well served by such a system. *Politics* might be understood as a general effort to respond to Weberian concerns about the effects of rationalization on the possibilities of social life; some of the proposals could be salutary here.

Another point in favor of Unger's system derives from the fact that factional power can manifest itself in resistance to change as well as in change itself—a point missed by traditional constitutionalism, largely because of its emphasis on private property and its choice of a status quo baseline from which to measure factionalism.¹⁵ Unger's treatment of the problem is persuasive here.¹⁶ The ability of well-organized groups to block measures that might be approved democratically, or to set the agenda,¹⁷ poses a large problem for modern liberal democracies. Traditional constitutionalists saw factional power in what they regarded as government action—alteration of the existing distribution of wealth and entitlements—rather than inaction,¹⁸ and Unger's proposals are intended to remedy this defect. Liberal democracy poses an occasional risk of calcification, in which established practices become unrevisable, and oppressive rules are entrenched; the institutional proposals in *Politics* are designed to redress this problem. A recent example of a movement capturing some of Unger's goals is the student effort of the 1960s, when some basic issues were put “up for grabs” in a period of collective mobilization.

In all of these respects, the institutional proposals of *Politics* are designed to invigorate public life, to reduce the risks of rationalization and entrenched authority, and to promote participation in the workings of government—goals that point to genuine defects in modern democra-

now and then is a good thing.” Letter from Jefferson to Madison (Jan. 30, 1787), reprinted in THE PORTABLE THOMAS JEFFERSON 416-17 (M. Peterson ed. 1975).

¹⁴ See C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); cf. J. ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1983) (showing that some or all of these goods are “essentially byproducts”).

¹⁵ See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. (1987) (forthcoming); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

¹⁶ See FALSE NECESSITY at 370.

¹⁷ See S. LUKES, POWER: A RADICAL VIEW (1974); Bachrach & Baratz, *The Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962).

¹⁸ See Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923).

cies. The institutional proposals of *Politics* are intended to counter the stagnation built into political systems in which private groups have disproportionate, but sometimes invisible, power. *Politics* thus carries forward some conventional liberal themes, as Unger suggests in his description of his own project as “superliberalism.”¹⁹ But the institutional proposals point in unpromising directions.

II. THREE CONCEPTIONS OF PUBLIC LIFE

Unger’s system can usefully be approached by comparing it with the three conceptions of public life that have undergirded traditional public law. The first conception, which we might call pluralist, treats politics as a struggle among self-interested private groups for limited social resources; the goal is to ensure that politics accurately aggregates private interests. The second conception, associated with traditional republican thought, regards politics as a forum in which citizens participate in choosing shared values. The third conception, which we might call Madisonian, treats politics as a system in which representatives, rather than citizens, engage in the processes of politics. In the Madisonian system, those processes are an effort to decide on values rather than to implement preferences; politics has a deliberative component.

Each of these conceptions is grounded in principles of autonomy, welfare, or virtue. The pluralist understanding, for example, is defended on grounds of both autonomy and welfare. Pluralism is primarily concerned to respect private preferences and in that sense might be thought to promote autonomy. At the same time, a system of preference aggregation might be justified on welfare grounds, rooted as it is in utilitarian concerns. Republicanism, by contrast, tends to be defended on grounds of virtue and autonomy. Political participation is supposed to profit from and produce virtue in the citizenry. Republicanism also proceeds from an antipluralist conception of autonomy, one that sees personal freedom in selection of values and that defines political freedom as collective self-determination.²⁰ Madisonian republicanism is designed to profit from and to promote virtue in political representatives,²¹ but it is intended as well to serve the goals of autonomy and welfare. The allocation of political power to representatives is supposed to promote a healthy division of labor and to leave the people as a whole free to pursue their disparate conceptions of the good life.

¹⁹ FALSE NECESSITY at 588.

²⁰ See Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

²¹ See, e.g., THE FEDERALIST NO. 57 (A. Hamilton) (suggesting that the first “aim of every political constitution is . . . to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society”).

A. Pluralism

Under the pluralist conception, politics is a kind of market. Citizens have preferences, which are treated as prepolitical and which should be aggregated in political outcomes. This aggregation is the "public interest" produced by the political system. In a well-functioning political process, as in any other well-functioning market, the purpose is to ensure that both numbers and intensities of preferences are reflected in the outcome. Politics thus amounts to a struggle among self-interested groups for scarce social resources.

Implicit in the pluralist conception is a theory of representation that counsels representatives accurately to reflect constituent desires, in terms of number and intensity of preferences. It follows from this understanding that a lack of widespread political participation is hardly a problem, but instead reflects general satisfaction with the system. Participation is a form of "demand" generated by the failure of the system to satisfy citizen preferences. The absence of widespread participation demonstrates that the process is close to the equilibrium point. Citizens may be ignorant or apathetic about politics; neither is a source of serious concern. Political participation is not valued above other activities in which citizens may involve themselves. It is not a distinct means of promoting human development, feelings of community, or self-realization.

Pluralism has a long pedigree in American constitutional thought. Elements of pluralist thought can be found in the writings of Gouverneur Morris and Alexander Hamilton. More recently, political scientists and economists have explored pluralism as a predictive tool and as a normative good.²² But several risks threaten to undermine a pluralist system.

1. *Market Failure.*—Under a pluralist approach, the central defect in a political system is a failure in the political market. It is not altogether clear what such a failure might look like, but a familiar example is a diffuse, weakly organized group that suffers significantly from public or private conduct²³ because it is unable to participate effectively in the political marketplace. A somewhat more controversial example, of special importance in American law, is the discrete and insular minority subject to pervasive prejudice or hostility on the part of the majority.²⁴ It is unclear whether such groups can be brought into the usual category of "market failure." The special solicitude for them is probably attributable to a normative judgment about the nature of the "preferences" that typi-

²² See, e.g., R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

²³ See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

²⁴ See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

cally produce discriminatory legislation.²⁵ But at least on occasion, market failures of various sorts will be a source of concern in a pluralist system.

2. *Aggregation and Related Problems.*—Pluralist approaches seek to aggregate private preferences in political outcomes. But there are severe difficulties in the aggregation process. Cycling problems, strategic behavior, and other difficulties make it unlikely that majoritarianism will accurately implement private preferences.²⁶ A large problem for pluralist theory is to devise mechanisms to eliminate or reduce these risks. Because it depends on voting, majority rule is also indifferent to variations in intensity of preferences. And in light of free-rider problems and transaction costs, the outcomes of representative government are unlikely to reflect accurately private preferences.²⁷

3. *Rights.*—Pluralist theory places no limits on the pursuit of self-interest by political actors. “Rights” may appear as illegitimate side-constraints on the operation of the political market.²⁸ To some, however, the potential intrusion on rights is the most dangerous feature of pluralist bargaining. Under this view, it is necessary to constrain pluralist systems by declaring certain areas to be off-limits to government. Such areas may consist of rights of privacy, property, or nondiscrimination.

4. *Social Disintegration.*—As Tocqueville emphasized, a pluralist conception of politics can undermine social integration.²⁹ Politics becomes, in this scenario, a war of all against all or at best a matter of bargaining; the ultimate risk is a citizenry that is alternately passive and fawning. For those who believe that political decisions should encourage and reflect the public interest rather than promote self-interest, the pluralist approach carries significant risks of destroying social cohesion.

5. *Bad Preferences.*—The pluralist understanding treats private preferences as exogenous variables; indeed, in some settings pluralism can be seen as the obliteration of reason by will. For this reason pluralism will be unattractive to those who believe that private preferences should not always be respected. And even if elements of pluralism are accepted, some private preferences should be subject to critical scrutiny

²⁵ See Ackerman, *supra* note 23.

²⁶ See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963); B. BARRY & R. HARDIN, *RATIONAL MAN AND IRRATIONAL SOCIETY?: AN INTRODUCTION AND SOURCEBOOK* (1982); A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* (1980); D. MUELLER, *PUBLIC CHOICE* (1979).

²⁷ See R. HARDIN, *COLLECTIVE ACTION* (1982).

²⁸ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) (discussing the first amendment).

²⁹ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer & M. Lerner eds., G. Lawrence trans. 1966).

and review. Laws prohibiting discrimination on the basis of race and gender have their origin, at least in part, in a belief that the preferences giving rise to such discrimination are distorted or objectionable. In particular, recent advances in psychology, political theory, and economics have suggested that some kinds of preferences suffer from cognitive or motivational defects. Some preferences, for example, result from the attempt to adapt to the absence of available opportunities; they are not autonomous. Other preferences depend on misperceptions of the facts. In these circumstances, a system based on private preferences may substantially sacrifice autonomy, welfare, or both.³⁰ A system that subjects preferences to scrutiny, and considers their origins and effects, might be preferred to approaches that merely aggregate preexisting preferences.

6. *Bad Laws.*—Pluralism might also increase the likelihood of undesirable lawmaking. Under competing theories, laws must be supported by argument and dialogue; they cannot simply be fought for or be the product of self-interested “deals.” Such competing conceptions make private preferences an insufficient basis for legislation. Political actors—either citizens or legislators—must appeal to a broader public good. This requirement imposes a disciplining effect on the sorts of measures that can be proposed and enacted.³¹

These considerations apply even if one might imagine a pluralist system free from the distorting effects of “market failure.” Even a well-functioning pluralist system, in which private preferences are accurately reflected and aggregated, will suffer from the various distortions produced by any scheme in which self-interest, represented in private preferences taken as exogenous variables, is the driving force behind political outcomes.

B. Republicanism

Under traditional republican thought, politics is a process of public discourse and debate by which values are chosen and implemented. In this view, preferences do not filter into the political process as exogenous variables. The purpose of politics is to deliberate about values, not simply to implement them. Discussion and dialogue are critical features of the political process. Moreover, political behavior is not in any simple sense self-interested. The processes of politics cannot be assimilated to ordinary markets precisely because of the operation of “practical reason” in settling disputes.³²

³⁰ See Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY (J. Elster & A. Hylland eds. 1986); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 721 (1986).

³¹ A point emphasized by Tocqueville. See A. DE TOCQUEVILLE, *supra* note 29.

³² Michelman, *supra* note 20; see also M. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 290-317 (1986).

Under this view, politics is valued above other activities. Significantly, it helps the citizen develop his faculties, increases the likelihood of desirable laws, and promotes a sense of community among the public. But republicanism is subject to significant risks of its own.

1. *Corruption*.—The problem of corruption arises from the danger that participants in politics will attempt to promote their self-interest and use the notion of the common good as a disguise.³³ If corruption occurs, the republican conception of politics is at risk. Civic virtue is necessary for the system to function. Considerations of this sort formed the starting point for Madison's rejection of traditional republicanism. He believed that traditional republics produced factional strife, endangering both private rights and the public good.³⁴

2. *Rights*.—The threat to "rights" arises under the republican approach as well as under other conceptions of politics. Two aspects of the problem are distinctive here. First, for republicans, rights tend not to be regarded as prepolitical; they are typically regarded as a product of politics; they can be overridden if the deliberative process so concludes. Second, the risk to rights arises largely because of the dangers posed by corruption. In a well-functioning republic, constraints on the operation of the political process—in the form of fundamental rights—would not be necessary. But in any event, the republican understanding furnishes no guarantee against violation of rights.

3. *Turbulence*.—In some versions, a republican process may both lead to and suffer from turbulence and instability. In the framing of the Constitution, this point emerged most clearly in the debate between Jefferson and Madison on the frequency of constitutional amendment. Jefferson argued that the Constitution should be amended every generation. Frequent amendments would promote popular participation in the workings of government, ensure civic virtue, and prevent social disintegration. For Madison, however, such an approach threatened property rights and social stability. Frequent amendment, he wrote, would produce "the most violent struggle between the parties interested in reviving and those interested in reforming the antecedent state of property."³⁵ It was necessary to create checks preventing self-interested private groups from usurping governmental power in order to distribute wealth or opportunities in their favor. The discussion in *The Federalist No. 10* of the disastrous consequences of direct democracy is probably the most familiar treatment of the subject.

³³ See J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984).

³⁴ This is a principal theme of *The Federalist No. 10*.

³⁵ Letter from Madison to Jefferson (Feb. 14, 1790), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 232 (M. Meyers rev. ed. 1981).

For some, however, the potential for turbulence is a virtue rather than a vice. It prevents the system from becoming intolerably self-insulating. To Jefferson, for example, even turbulence "is productive of good. It prevents the degeneracy of government, and nourishes a general attention to the public affairs. . . . [A] little rebellion now and then is a good thing."³⁶

4. *Totalitarianism.*—The problem of totalitarianism may arise in any system that sets out a conception of the public good that is distinct from the aggregation of private interests. Under an approach that forbids citizens from appealing to satisfaction of private preferences, the notion of a unitary public good may be used as a means of imposing a particular and partisan conception of the public interest on the citizenry. Moreover, republican thought is sometimes associated with approaches that take the good as prior to the right and that reject "neutrality" as an undesirable constraint on government.³⁷ Current and recent experiences with totalitarian governments suggest that such fears are not fanciful.

5. *Power.*—A system in which citizens are allowed to participate and to deliberate on political outcomes will be unsatisfactory if power is distributed in such a way as to distort deliberative processes.³⁸ Discussion and deliberation may be ineffectual where there are widespread disparities in power and influence. Politics must, in this view, be accompanied by exercises of power on the part of the disadvantaged. Deliberation on the part of the citizenry will accomplish little if the deliberations are constrained by ideas that ensure that certain aspects of the existing order are taken for granted.

Classical republicanism exemplified this danger, for republican thought flourished at a time in which social roles and traditional hierarchies were regarded as natural, fixed, and largely inviolable. It is unclear whether and how the republican conception of politics might fit with a system in which social roles are fluid. Moreover, the notions of "public interest" and "common good" threaten to ignore differences between the perspectives of divergent social groups.

C. *Madisonian Republicanism*

A third conception of public life, prominent at the time of the framing of the American Constitution, borrows elements from the pluralist and republican approaches. Under this view, politics is properly under-

³⁶ Letter from Jefferson to Madison, *supra* note 13.

³⁷ See generally LIBERALISM AND ITS CRITICS (M. Sandel ed. 1984). Recent efforts to generate a kind of liberal republicanism are responsive to this problem. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); Michelman, *supra* note 20; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1986).

³⁸ See J. ELSTER, *supra* note 14, at 33-42.

stood as a means of selecting values rather than simply aggregating and implementing preferences; it is above all deliberative. But the deliberative tasks are entrusted to representatives rather than to the citizenry. Citizens at large are for a variety of reasons unable or unwilling to participate in the tasks of politics. But it would be intolerable, under this view, to allow politics to consist merely of bargaining among self-interested private groups. There is a common good distinct from the aggregation of private interests; such interests should not be taken as exogenous. The solution is to allow representatives, chosen by the people, to engage in deliberative tasks.

In extreme form, this view is associated with Burke's understanding of representation, in which legislators assumed a role akin to that of Platonic guardians deliberating far above their constituents. A less extreme version can be found in Madison, whose understanding of representation consisted of a mixture of Burkean and pluralist elements.³⁹ For Madison, the role of the representative was to deliberate, not to respond mechanically to existing constituent pressures. Madisonian representatives were not, however, to undertake their deliberations in a vacuum. Political accountability was designed to ensure that their decisions would not stray far from the desires of their constituents. But whether Burkean or Madisonian, this view produces serious difficulties as well.

1. *Factionalism.*—The problem of factionalism—according to Madison, the central problem of politics—arises from the danger that self-interested private groups will obtain undue power over governmental processes, using public force to distribute wealth or opportunities in their favor. This concern has been associated, as an historical matter, with solicitude for private property, and the desire to insulate representatives from constituent pressures has sometimes been seen as an effort to protect private property from democratic intrusions.

There is not, however, a necessary connection between a concern with faction and a desire to protect the existing distribution of wealth. Redistribution of property may be justified, or even necessary, in order to fulfill some normative conception of proper income distribution. Under such a conception, a reallocation of property rights might not be understood as “redistribution” at all. Indeed, particular distributions of private property could themselves be seen as triumphs for self-interested factions. Concerns about factional power can therefore accommodate a wide range of views about the proper role of government.

2. *Self-interested Representation: Rulers v. Ruled.*—The problem of self-interested representation arises from the risk that representatives will attempt to implement their own private interests rather than the interests of the community as a whole. This problem is especially acute in

³⁹ See generally Sunstein, *supra* note 37.

a Burkean or Madisonian system, in which representatives are not tightly controlled by their constituents; pluralist conceptions of government are often the response. The system of checks and balances is designed to control self-interested representation at the same time that it tends, by making government action harder, to insulate the existing distribution of wealth from public intrusion.

3. *Rights*.—As in the republican and pluralist conceptions, there is in Madisonian republicanism a risk of disrespect for private rights. A traditional solution is a “bill of rights” that declares certain spheres to be off-limits to legislators.

4. *Power*.—As under the classical republican understanding, and for the same reasons, maldistributions of power may infect the operation of the Madisonian system. Deliberative processes may be distorted by such maldistributions.

5. *Self-insulation and Stability*.—Under the Madisonian framework, representatives are insulated in order to ensure that a more moderate view prevails; checks and balances operate as a check on significant change. In these respects the Madisonian system tends to preserve the status quo. Stability is highly valued. For those who perceive stability as a protection of the existing (and unjustified) distribution of property and as a devaluation of public life, this effect is far from an unambiguous good.

6. *Citizen Withdrawal: The Absence of Participation*.—Hamilton stressed that the American Constitution, unlike all republican approaches that had preceded it, was characterized by a “total exclusion of the people in their collective capacity” from governmental processes.⁴⁰ This exclusion of the citizenry at large has been deplored by many as the most objectionable feature of the Constitution; it was also, as we have seen, a major concern for Jefferson. The risk posed by Madisonian republicanism is that the role of the citizen in government is so small and peripheral that citizens will eventually withdraw from politics altogether. The result is similar to the problem of social disintegration that threatens pluralist approaches to government. Implicit and necessary to Madisonian republicanism was the use of federalism or other forms of decentralization that ensured other institutions in which citizens could participate. Tocqueville’s intermediate organizations fulfilled part of this role. The traditionally important role of the states in American government has been justified on these grounds.

⁴⁰ THE FEDERALIST NO. 63 (A. Hamilton).

III. UNGER'S "EMPOWERED DEMOCRACY"

The institutional proposals described in *Politics* are designed to implement "empowered democracy." Among the characteristics of Unger's discussion is a high level of ambiguity and abstraction, combined with considerable rhetorical flourish. Analytical precision is sometimes absent here. To some degree Unger's institutional framework might be understood as proposing marginal changes in existing systems; indeed, parts of the framework can be seen as conservative. Moreover, some elements of the discussion contradict each other; there are many themes in *Politics*, and the most individualistic parts of the book coexist uneasily with the treatment of solidarity. The discussion that follows reads *Politics* as setting out the radical framework that Unger purports to seek. This reading of the book makes it distinctive, though, as we shall see, it makes it more vulnerable as well.

A. Underlying Premises of the System

The "empowered democracy" described in *Politics* is a departure from all of the traditional understandings. The system is designed to invigorate public life, to break down the distinction between routine and revolution, and thereby to satisfy at least some classical republican goals; but it is to do this without relying on republican appeals to civic virtue. In these respects, the approach is designed to reject the traditional opposition between self-interest and civic virtue as the alternative driving forces of political life. Unger believes that the opposition is a false one, depending on particular institutional arrangements, and that by subjecting formative contexts themselves to politics, it is possible to generate a system in which the opposition is dissolved.⁴¹ In this respect *Politics* reflects a significant departure from Unger's *Knowledge and Politics*, which attempted to transcend liberal "antinomies" through a neo-republican theory of organic groups.⁴²

The foundation for Unger's system is neither virtue nor welfare in the traditional sense; nor is it autonomy, at least not in any familiar incarnation. Unger argues for his system in two ways. First is the strategy of "internal justification":⁴³ argument that starts from the premise of a

⁴¹ The constitution of empowered democracy does not oppose private desires and collective devotions. Instead, it robs this polemical contrast of its force. It does so by enabling people more easily to extend the humdrum practice of pursuing interests within a framework of unquestioned institutional and imaginative assumptions into the extraordinary activity of questioning this framework. Thus, the practice of fantasy and enactment that the institutional program encourages is less a public militancy than an extension of the ordinary activity of defining goals and pursuing them. Its chosen expression is not civic pomp and heroic striving but the activity of a working life. And its favorite devices are conversations rather than meetings, conversations that continue when the meetings end.

FALSE NECESSITY at 591.

⁴² See KNOWLEDGE AND POLITICS.

⁴³ FALSE NECESSITY at 368-95.

particular, received view of democracy, operates within that received tradition, suggests how the current system fails to satisfy its own goals, and leads in the direction of alternative arrangements. The second strategy is the “visionary” portrayal of approaches to social life that depart radically from current systems.

To the extent that there is a foundational value in *Politics*, it is captured in the related notions of “empowerment,” “self-assertion,” and “context smashing.” Unger’s emphasis on self-assertion reveals the radically individualistic character of much of *Politics*. For Unger, self-assertion should be seen

less as the depiction of a limited, contentious value, to be weighed against competing values, than as a summation of our strivings for happiness. If the effort to formulate such views of self-assertion has a central theme, it may be the struggle to resolve the conflict between the imperative of engagement in shared forms of life and the dangers of dependence and depersonalization such engagement brings.⁴⁴

The basic point emerges even more clearly in a later discussion:

Both altruism and harmony are deemphasized in [the] reconstructed image of community. Insofar as they continue to play a role, they do so for the sake of their contribution to the view of community as a zone of heightened mutual vulnerability. *In this zone people may experiment more freely with ways to achieve self-assertion through passionate attachments.*⁴⁵

Unger says similarly that a “driving force of the constitutional program is the desire to do justice to the human heart, to free it from indignity and satisfy its hidden and insulated longing for greatness in a fashion it need not be fearful or ashamed of.”⁴⁶

The institutional mechanisms described in *Politics* are structured so as to increase the opportunities for individual and collective self-revision. From the standpoint of traditional approaches, Unger’s system is paradoxical in its willingness to embrace vigorous public life without community. Indeed, some pluralist premises are largely accepted, even extended. One of Unger’s central metaphors, frequently repeated, suggests that matters should be “up for grabs”; the metaphor is revealing here, especially when one considers its literal meaning. The objection to current democratic practice is not that it is based on raw exercises of power or self-interest. Unger argues instead that the fundamental problems stem from the routinized character of political life and the fact that some issues are immunized from the process of “fighting” and “conflict.” Consider in this regard the character of Unger’s rhetoric: “smashing” of contexts, “fighting,” “grabs,” “struggle over the mastery and uses of governmental power,” and “conflict” are key terms here.

Unger is critical of classical republicanism because, in his view, it

⁴⁴ *Id.* at 351-52.

⁴⁵ *Id.* at 536 (emphasis added).

⁴⁶ *Id.* at 584.

represents an optimistic inversion of the current system that is unaccompanied by proposals and strategies that would help bring it about. His system is designed to alter institutional arrangements rather than to offer what he considers an unrealistic, unproductive, and potentially tyrannical appeal to selflessness. Unger claims that his approach is “less a sequel to the classical republican vision than a superliberalism. It pushes the liberal war against privilege and superstition to a point that requires the abandonment of the forms of governmental, economic, and legal organization with which liberalism has traditionally been associated.”⁴⁷

The institutional proposals in *Politics* thus have the iconoclastic characteristics described above. For Unger, “the classical liberal technique of dividing central government into a small number of well-defined branches . . . generates a stifling and perverse institutional logic.”⁴⁸ Instead of checks and balances, Unger constructs a system of multiplied branches with overlapping functions. One branch, for example, is “charged with enlarging access to the means of communication, information, and expertise, all the way from the heights of governmental power to the internal arrangements of the workplace.”⁴⁹ The same branch would both “make know-how available to those who . . . set up new productive enterprises” and “intervene in all other social institutions and change their operations, by veto or affirmative initiative,” when that intervention is “related to the task of securing the conditions that would maximize information about affairs of state and achieve the maximum subordination of expert cadres to collective conflicts and deliberations.”⁵⁰ Another branch of government would be entrusted with destabilization.⁵¹ Conflicts among branches would be resolved by rules of priority and by devolution of constitutional impasses to the general electorate.⁵² The principal representative body would ensure that the party in office actually implemented its program.⁵³ The goal, building on some forms of European constitutionalism, is to provide frequent opportunities for fundamental transformations of the system.

Unger distinguishes this system from what he calls “the program of social democracy,”⁵⁴ which emphasizes participation and redistribution. That program does not involve “radical institutional innovations” of the sort proposed in *Politics*, though it is informed by similar goals. Unger contends that the intentions of social democrats will not be achieved un-

⁴⁷ *Id.* at 588.

⁴⁸ *Id.* at 449.

⁴⁹ *Id.* at 450.

⁵⁰ *Id.* at 451.

⁵¹ *Id.* at 453.

⁵² *Id.* at 456.

⁵³ *Id.* at 460.

⁵⁴ *Id.* at 389-91.

less there is major institutional change; if current institutions are accepted, neither redistribution nor participation will be brought about.

Significantly, however, Unger urges a system of rights to check the risks posed by the basic institutional structure. Most important, Unger argues for a set of "immunity rights," consisting of power to fend off poverty, violence, violations of civil rights and liberties, and other fundamental intrusions.⁵⁵

B. *The Question of Foundations*

The first question raised by the institutional proposals of *Politics* goes to the problem of foundations. Imagine a system in which social roles were largely or entirely fluid, fundamental issues were up for grabs, and the distinction between routine and revolution was eliminated. We have seen that the most prominent theories of public life in American law are founded in conceptions of autonomy, welfare, and virtue. Unger rejects all three, and places in their stead a conception of "self-assertion" or "empowerment."⁵⁶ At times *Politics* appears to treat self-revision and constant transformation as intrinsic goods; hence the emphasis on placing the fundamental issues "up for grabs." But the question whether self-revision is desirable turns largely on the directions in which the revision leads.

For example, the liberation of women from traditional gender roles does serve the end of autonomy, but not because it is "context smashing" or "self-assertion" for its own sake. The traditional gender roles have been the only realistic option, and their selection is hardly autonomous when it is based on limitations in the feasible set of opportunities.⁵⁷ Self-transformation is desirable when it is in the service of freedom or autonomy⁵⁸—when people select their preferences or identity through some exercise of free choice.⁵⁹ But constant transformation of self and society—even if the artifactual quality of both is accepted—is hardly an unambiguous good, especially if it is to occur through "fighting" and "conflict"; and if its foundations in autonomy are absent, it might not be desirable at all.

Indeed, the "smashing" of contexts might be destructive of both freedom and welfare; some old contexts should be preserved and some new ones should be avoided. Consider the rejection of contexts in direc-

⁵⁵ Other rights include market rights, solidarity rights, and destabilization rights.

⁵⁶ Cf. N. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* (1983) (criticizing approaches to politics having such foundations).

⁵⁷ See J. ELSTER, *supra* note 14, at 109-40.

⁵⁸ See B. YACK, *supra* note 9, for a discussion of how the notion of autonomy, as set out by Kant, has been transformed into one of self-transcendence.

⁵⁹ There are some large conundrums here; self-determination is always done against a backdrop that is unchosen. For discussion, see T. NAGEL, *THE VIEW FROM NOWHERE* (1986); M. NUSSBAUM, *supra* note 32.

tions that may be autonomy-reducing: women who are pressured to return to traditional gender roles; doctors who are forced to become manual laborers; farmers who are forced to make their way in urban life; social systems that borrow from fascist premises. Autonomy and personal identity themselves depend on a certain level of acceptance of context, artifactual or not.⁶⁰ The displacement of contexts may produce exhilaration, but its frequent occurrence will result in severe forms of stress, alienation, feelings of impotence, and even terror.⁶¹ The “smashing” of context will, in such circumstances, be destructive of autonomy and welfare and hinder the formation of character itself.

Unger’s system appears to be an attempt to wed Christian notions of transcendence with conceptions of freedom influenced by existential thought. In parts of *Politics*, freedom itself appears to consist of breaking through fixed roles, whatever their content may be. This accounts for the strikingly procedural, even lawyerly, character of parts of *Politics*, in which such substantive problems as racism, poverty, and sexism are barely mentioned. But some contexts are far worse than others, and the reasons to oppose the most harmful of contexts should go to their content, not to their identity as “contexts.” Such substantive arguments are largely absent from *Politics*. The lack of clear foundations for the institutional proposals in *Politics* thus makes it difficult to approve the system as responsive to an appealing conception of freedom.⁶²

The roots of the system in “context smashing” also suggest that Unger has exaggerated some peculiar and unappealing tendencies in Enlightenment thought. The central metaphor of context smashing is best understood in terms of separation and self-assertion rather than community and compassion. Unger’s driving metaphor, almost Faustian in character, is one of self-transcendence and self-creation. The notion is, literally, one of giving birth to oneself and thus erasure of the mother. Approaches of this sort have been subject to powerful criticism in feminist theory.⁶³ The governing aspiration is hopelessly unrealistic, and it is likely to lead in destructive directions.

Unger is also unclear in explaining why his system would not incorporate civic virtue, in the classical republican vision, at least in some form. A large literature exists on the possibility of developing systems that generate and profit from citizen involvement in public affairs. Concrete proposals have been offered and sometimes implemented in the ser-

⁶⁰ See A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

⁶¹ Unger is aware of this problem; the immunity right recognized in *Politics* extends partial protection.

⁶² See also Cornell, *Beyond Tragedy and Complacency*, 81 NW. U.L. REV. 693 (1987); J. ELSTER, *MAKING SENSE OF MARX* 90-91 (1983).

⁶³ See L. IRIGARAY, *SPECULUM OF THE OTHER WOMAN* (G. Gill trans. 1985); cf. D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); J. KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* (1980); M. NUSSBAUM, *supra* note 32.

vice of the republican conception.⁶⁴ Unger's wholesale abandonment of the republican conception of politics is an assertion, undefended empirically or theoretically. The effort to explain how the system of empowered democracy removes the "force" of the contrast between civic virtue and self-interest is quite mysterious. It is hardly clear that the extension of politics into a "questioning" of the basic framework dissolves the distinction between virtue and self-interest. Indeed, the distinction may be especially important when fundamental issues are at stake. Consider controversies over the appropriate distribution of wealth, the proper treatment of racial minorities, and the relationship between the sexes.

The system of *Politics* gives little or no place to practical reason as an element in the process of individual or collective self-transformation.⁶⁵ Thus, little premium is placed on discussion and dialogue or deliberative approaches to politics as elements of the system. Instead, "conflict," "struggle over the mastery of power," and "fighting" are the principal determinants of social outcomes. It is unclear whether such terms as "smashing" and "fighting" are meant literally or as metaphors; in any case they are hardly independent goods. In Unger's empowered democracy, political outcomes represent an equilibrium point among hostile forces—everything is "up for grabs." But the foundations of this approach have been effectively criticized by approaches to politics that stress the possibilities of dialogue and empathy in social life.⁶⁶ Deliberation is an important filter on enactments, reducing the likelihood that laws will amount to naked transfers of wealth or exercises of power.⁶⁷ Deliberation also protects against the degeneration of politics into civil war, profiting from and generating some form of citizenship.⁶⁸ Unger's system, moreover, does nothing to filter out distorted or objectionable preferences, which appear to be a permissible element in his system.

C. *The System of "Empowered Democracy" in Practice*

All this suggests that although Unger's institutional framework might in its ideal form contain some advantages over the current liberal democracies, it would have significant dangers. In actual operation, however, the system would be unlikely to achieve its intended purposes. The notion that individual or collective self-transformation might be constant or continuous is contradicted by historical experience.⁶⁹ In practice, systems that attempt to break down the distinction between routine

⁶⁴ See citations in B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); E. GREENBERG, *WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION* (1986); J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

⁶⁵ See M. NUSSBAUM, *supra* note 32; Michelman, *supra* note 20.

⁶⁶ See N. HARTSOCK, *supra* note 56; Michelman, *supra* note 20.

⁶⁷ Goodin, *supra* note 30.

⁶⁸ See Pitkin, *Justice: On Relating Public to Private*, 9 *POL. THEORY* 327 (1981).

⁶⁹ See *infra* text accompanying note 81.

and revolution tend to be undermined, in the short or long run, by the power of self-interested private actors. There is good reason to be skeptical of approaches that remove institutional checks on fundamental change, especially when they accept, as does Unger, some of the premises of pluralist conceptions of politics.

Pluralism is most palatable if it is accompanied by side constraints on political outcomes. Without such constraints, an approach like that in *Politics* threatens to reintroduce, in especially severe forms, many of the pathologies associated with other conceptions of public life. When power is maldistributed, revolutionary or radical change might increase the authority of well-organized private groups over government. Checks on institutional change often operate largely in the interest of the minority rather than the majority. The poor and the poorly organized may well be the victims of fundamental change.⁷⁰ The problem is especially severe if self-interest is the motivation for political action.

Unger anticipates such criticisms and offers two responses. First, Unger claims that if the distinction between routine and revolution is eliminated and institutional changes weaken social roles, so that power is more evenly distributed and self-interest does not point in any particular direction, the problem of faction will be reduced significantly. Some support for this proposition comes from recent work on preference formation. Preferences are not exogenous; they adapt to the available opportunities.⁷¹ In a world in which legal arrangements and individual endowments are different, different preferences can be expected as well. In this respect, Unger's approach might be understood as a variation on Madison's defense of a large republic. The idea is that in a system without fixed positions, "interests" will be so fluid and attenuated that factions will not emerge.

But it is difficult to imagine what a world of genuine fluidity would look like. Indeed, part of individual autonomy might be thought to consist of the ability to have a measure of narrative continuity over time, and Unger's system is designed to prevent that sort of continuity.⁷² But Unger does not contend that his system will ensure that people have common (or no) interests. He acknowledges that there will be a plurality of interests, and says that conflicting interests should be the basis for political "fighting." The problem of factionalism thus remains unsolved.

Unger's second response has to do with the various rights created by the system and the existence of a "rotating capital fund" to redistribute income. The system of rights is designed to ensure a form of immunity and protection from the constant fundamental struggles of politics. But it remains to decide how capacious these rights are to be. If they are

⁷⁰ This will not always be the case. Sometimes institutional checks prevent issues unfavorable to the majority from surfacing at all.

⁷¹ See J. ELSTER, *supra* note 14.

⁷² See E. TUGENDHAT, *SELF-CONSCIOUSNESS AND SELF-DETERMINATION* (1986).

narrow, the problem of factionalism remains, and the immunities will be insufficient to prevent self-interested struggle over the terms of social life in a way that is destructive of individual identity.⁷³ But if the rights are broad, the institutional program is seriously threatened. A secure system of rights coexists uneasily within a system in which the fundamental questions are “up for grabs.” Thus the interaction between the system of rights and the institutions of “empowered democracy” is ambiguous.⁷⁴ Similar considerations apply to the rotating capital fund. That mechanism is not designed to equalize the distribution of wealth and to freeze an equal distribution for all time; such an approach would be fundamentally at odds with Unger’s system. The rotating capital fund thus does not eliminate the competition for power or solve the problem of factionalism.

Moreover, it is unrealistic to believe that a system could be created that would remove the fixed interests of powerful private actors or rulers—a point that Unger seems to accept. In any particular regime at any particular moment, both the private and public beneficiaries are likely to be resistant to change and well-situated to prevent it. Unger apparently intends to make such possibilities less likely, but it is hard to see how his system would do so. *Politics* is vague on this critical point.

What this suggests is that Unger’s “empowered democracy” is likely to be subject to many of the same pathologies associated with conventional conceptions of politics. In particular, the system is subject to risks generated by the absence of deliberative government—that is, the problems of self-interested representation and factional power associated with Madisonian republicanism, and the dangers of turbulence and authoritarianism associated with classical republicanism.

A significant task for modern constitutional theory is to promote the original safeguards against factional tyranny and self-interested representation in an era in which government inaction is far from an inevitable good, and is even ambiguous as a conceptual category. Indeed, the failure to protect citizens from environmental harm, unsafe conditions in the workplace, poverty, or discrimination on the basis of race and gender might itself be seen as action or as the product of factional power. The ultimate goal is to develop institutional arrangements that will accomplish at least some of the purposes associated with eighteenth- and nineteenth-century constitutionalism in a time in which the substantive agenda of “limited government” has been, at least in part, repudiated, and collective selection of preferences or values frequently seems desirable.

⁷³ Cf. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁷⁴ See FALSE NECESSITY at 579: “The constitutional basis for this willingness to accept the risks of expanded conflict lies in the guarantee of immunity afforded by a system that precludes entrenched dependence . . . and keeps every issue open for another day. Its higher spiritual significance consists in the assertion of transcendence as diurnal context smashing.”

But a system that sees politics as a self-interested struggle opens up fundamental issues to frequent contest and “fighting,” and removes institutional checks on change, thus creating serious risks in its effort to achieve the ends of democracy. Madison’s sensitivity to the dangers posed by factionalism stemmed in part from his desire to protect the existing distribution of wealth from majoritarian pressures, but one need not share that concern in order to recognize that a system of fixed rights and checks and balances, working to diminish factional power, serves the interests of the politically powerless as much as or more than those of the politically powerful.

IV. CONSTITUTIONALISM AND DEMOCRACY

Unger’s institutional proposals are based on his view that eighteenth-century constitutionalism is a threat to democracy. For Unger, fixed institutional arrangements are desirable only as a means of ensuring that fundamental matters are continually “up for grabs.” His basic institutional framework is principally designed to ensure against efforts to reinvent the distinction between routine and revolution. Both the system of rights and the basic institutional arrangement are intended to promote opportunities for constant revision.

This understanding, however, oversimplifies the relationship between constitutionalism and democracy and disregards the functions of precommitment on the part of political actors. Precommitment occurs when people oblige themselves in advance, in the fashion of Ulysses and the Sirens,⁷⁵ to follow or not to follow a particular course of conduct. The phenomenon is closely related to that of “second-order preferences,” or preferences about preferences: both individuals and collectivities often have second-order preferences and rely on them in public and private life.⁷⁶ Those involved in politics thus may decide to enact second-order preferences through constitutional provisions. Unger’s discussion might be seen as an attack on precommitment of that sort. But the discussion raises several questions.

A. *Precommitment as Facilitative*

For Unger, insulation of the status quo from collective conflict and deliberation is an unambiguous evil. In Unger’s view, such insulation was the vice of eighteenth- and nineteenth-century constitutionalism, which failed to take liberalism to its logical conclusion. For a number of reasons, however, a polity may decide to insulate certain arrangements from collective control—not in the interest of calcification, but in the

⁷⁵ See J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

⁷⁶ See T. SCHELLING, *CHOICE AND CONSEQUENCE* (1984); *THE MULTIPLE SELF* (J. Elster ed. 1986).

interest of democracy itself.⁷⁷

If the basic institutional arrangements are settled, the public is liberated to resolve other problems without having to reevaluate these institutional questions. In this respect, stability can be liberating and facilitative rather than confining. A public that continually alters the institutional arrangements governing decision-making might find itself unable to make substantive decisions at all. For example, agreement that laws will be made in a constitutionally specified way makes it easier to enact laws. The issue of how laws must be made can be taken for granted. The ability to take some matters as fixed is emancipating in the same sense as the rules of grammar. If the rules of lawmaking are continually up for grabs, democracy is much harder to achieve.⁷⁸ An established institutional framework can promote, rather than impair, democracy.

B. Rights as Democracy-Promoting

The rationale for precommitment parallels the concerns that prompted constitutional guarantees of separation of church and state. When religious issues are subject to political control, factionalism may occur, enduring enmities may form, and other issues may become impossible to resolve. The argument for privatization of religion need not be made solely in terms of "rights." The argument may depend instead on the notion that if certain issues are placed off limits to democracy, democracy will itself be strengthened. In private relationships, people often voluntarily forgo discussion of subjects that will cause stress; so too with politics. The insulation of public issues from public processes may in this sense, quite paradoxically, promote democracy.

This phenomenon suggests that Unger's view that fundamental issues should be constantly "up for grabs" in the interest of democracy oversimplifies the problem. If the fundamental structure is subject to revision, the system may dissolve into one of factionalism and impasse with no questions, fundamental or not, capable of resolution. Unger is persuasive in objecting to the calcified character of aspects of modern politics and to the fact that fundamental issues are sometimes closed off from collective resolution. The strategies of precommitment and privatization pose significant dangers as well. But the institutional structure of *Politics* understates the risks of a system in which everything is always "up for grabs."

⁷⁷ The most useful recent discussions here are Holmes, *Gag Rules and Democracy*, and Holmes, *Precommitment and Self Rule*, in CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstaad eds. forthcoming), on which I draw heavily here.

⁷⁸ See Holmes, *Precommitment and Self Rule*, *supra* note 77.

C. *Planning, the Rule of Law, and Stability*

The distinction between routine and revolution can be defended on various grounds.⁷⁹ For one thing, it promotes planning; people can conduct their affairs without fear of dramatic and sudden change. It also promotes individual security by minimizing drastic alterations of the status quo. In these respects, the distinction promotes the virtues classically associated with the rule of law: stability, checks on discretion and caprice, and predictability over time. All of these virtues serve both economic welfare and (under a certain understanding) freedom.⁸⁰ Unger's system is largely indifferent to them.

Moreover, if fundamental issues are "up for grabs," individuals in power may want to use their positions for private gain, and those out of power, fearful of change, may hesitate to perform projects that will take time. Jon Elster's recent discussion of constitutionalism and democracy in Florence in the thirteenth and fourteenth centuries reflects these concerns.⁸¹ The Florentine experience is instructive for Unger's system because its political system was based on similar premises. The frequent shifts in political power, in which routine and revolution were collapsed, led to severe factionalism.

D. *The "Destabilization" Branch*

Unger argues for a branch entrusted with destabilization. Despite the efforts of his system to break down fixed interests, he recognizes that electoral majorities or other powerful actors may succeed in entrenching themselves. The notion behind the "destabilization" branch is that the accountable branches are unlikely to undermine the existing regime, because they are subject to electoral control. Moreover, the courts lack the institutional assets that might enable them to undertake significant social change successfully. Unger thus borrows from the ombudsman model and from the aggressive American courts of the 1960s and 1970s, which reformed mental asylums, prisons, schools, and other institutions.⁸² For Unger, the virtue of the destabilization branch is that it will accomplish some of the goals associated with the Warren Court—breaking up entrenched institutional arrangements—but, unlike the judiciary, it will have the tools to carry out its tasks.

Serious problems, however, remain. If the destabilization branch is accountable to and its members are appointed by the other branches, it is unlikely to accomplish its intended functions. It will be subject to polit-

⁷⁹ Cf. A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982); Ackerman, *supra* note 7.

⁸⁰ There are of course serious dangers here as well.

⁸¹ See Elster, *Introduction*, in *CONSTITUTIONALISM AND DEMOCRACY*, *supra* note 77. Elster draws on J. NAJEMY, *CORPORATISM AND CONSENSUS IN FLORENTINE ELECTORAL POLITICS* 1280-1400 (1982).

⁸² See generally O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

ical control, much like modern administrative agencies operating under presidential guidance. A branch subject to other institutions is unlikely to “destabilize” in ways that Unger would approve. But equally severe problems may arise if the destabilization branch has a measure of autonomy. Its particular conception of destabilization may be undesirable. It may seek, for example, to create dramatic disparities in wealth. Granting authority to an entity entrusted with breaking up institutional structures in accordance with its own independent agenda is fraught with risks. However the system is structured, the destabilization branch would generate many of the problems associated with an aggressive judiciary attempting to bring about large-scale social transformation.

Some justifications, treated in the vast literature on judicial review, are available to defend such a system. In particular, many have stressed the failures of pluralist systems that stem from the absence of deliberation or from disparities in political power. But such justifications are uncongenial to Unger’s system, which is to some degree grounded on pluralist premises rejected by these alternative systems.

V. CONCLUSION

The institutional proposals in *Politics* are based on a rejection of eighteenth-century constitutionalism, which prized stability, distinguished sharply between routine and revolution, and saw in public life a threat of factionalism. For Unger, institutions should be structured so as to ensure that fundamental issues are constantly up for revision. The distinction between routine and revolution should be broken down; the principal issues should be “cracked open to politics”—left for collective conflict and deliberation. The system appears to be based on a conception of human nature that links Christian notions of self-transcendence with existential approaches to freedom, and sees “self-assertion” and “context smashing” as foundational goods.

The proposals in *Politics* are designed to generate a more vigorous public life and overcome the entrenched quality of the existing distribution of power and the existing set of preferences. The basic approach, however, lacks clear foundations. “Context smashing” and “self-assertion” are not intrinsic goods; their desirability depends on a substantive conception distinguishing between contexts that promote autonomy, welfare, or virtue and those that do not. Moreover, Unger’s system underestimates the dangers of putting everything “up for grabs,” the risks of factionalism, the possibilities of deliberative democracy, and the facilitative functions of constitutionalism. A system in which fundamental issues are constantly open to “fighting” and “conflict” is likely to be undermined by powerful, well-organized private groups and by self-interested representatives.

Institutional arrangements that can be taken for granted help to facilitate democracy; they need not undermine it. The task for the future is

not to ensure that everything is constantly up for grabs, but to design mechanisms to limit factional power and self-interested representation, to facilitate deliberative approaches to democracy, and to promote participation in government in an era in which the traditional constitutional goal of “limited government” has lost some of its appeal.