

SELF-CONTRADICTIONS AND MORALITY: A NATURAL LAW CRITIQUE OF
DELIBERATIVE DEMOCRACY

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Abstract

Should democracy itself be a value worth striving for? If so, should it take precedence over other values? Is it possible to “add” democracy to a list of these other valuables and treat them all as equally good? Finally, how did the Framers of the United States Constitution view democracy, and why?

This thesis seeks to answer these questions. It argues that theories of natural law, not deliberative or direct democracy, offer a level of theoretical precision and protection for human rights and freedoms that democracy cannot be safely trusted to do if it is without the guidance of such a law. This thesis utilizes such natural law theories as those of St. Thomas Aquinas and John Locke to critique deliberative democratic theories, and concludes that democracy has been seen as usually good, but *never* as an end-in-itself, and thus only as an *instrumental* end for fulfilling some other good.

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Introduction

Democracy is a fascinating concept. It is simultaneously fought for and fought over, defined and redefined, praised and feared. Some say it is highly subjective; what may count as “democratic” for some people fails to satisfy others as “democratic”, and others insist that it does have a fixed set of criteria that a system must meet to be properly “democratic”. As has been noted by many authors, liberal democracy apparently triumphed over totalitarian communism in 1989-1991, and this victory has vastly accelerated the worldwide drive for democracy while also raising multiple questions regarding the nature of “true” democracy.¹ In the contemporary world, most people say they favor democracy, but we have a shared understanding of “democracy”? If we did, would we strive for it as an end-in-itself, or would we see any need to restrain it?

While widespread disagreement prevails among those who attempt to define “democracy”, one broad consensual definition has emerged. Democracy is commonly defined literally, as the rule of the *demos*, or “people”.² Problems and contentions arise, however, when scholars and legislators attempt to define “the people”. At one time, only white propertied Protestant males were fully considered “people”, and theirs was the only voice considered worthy of governing. Gradually, in the West, over the last two centuries, this narrow definition of “the people” has been extended, at least formally, to include all rational adults of both sexes and all races and creeds. Overall, we have seemingly determined who “the people” are.

¹ Most notably, Francis Fukuyama declared that democracy had “triumphed” in 1989-1991.

² See Aristotle, *Politics*, trans. Carnes Lord (Chicago: University of Chicago, 1984), Book 4, Chapters 3-4.

“The people” govern themselves via *politics*. As utilized in this thesis, *politics* refers to the various series of debates, discussions, bargains, compromises, and even threats that take place in the human condition, especially in relation to matters of physical human governance. Humans interact, discuss their preferences, and, in a democratic system, vote according to their beliefs. This thesis fully subscribes to the idea that politics is an inherently normative practice; one’s values play an integral role in determining the fashion and motives behind one’s participation in politics. In politics, discussion and debate are key. As an abstract concept under the natural law position taken here, politics is value-neutral, since these discussions are seen as *helping to frame* one’s values, and *never* ultimately to create them. Ultimately, one is responsible for one’s own actions and beliefs, and humans bring these beliefs into politics where these discussions and compromises help to shape them further.³

However, when one turns to the problem of how “the people” should rule themselves, considerable dissent emerges. Can the people govern themselves directly, discussing and voting on all of the pressing or most important issues of their governance, or should such tasks be left to representatives chosen by the people according to set rules and procedures, and who are bound to speak for and in place of the people?⁴ In democracy’s historical birthplace, classical Greece, the former approach was tried, while in the modern era, representative democracy has been the norm. The institutions of this

³ Definitions of *politics* are hard to locate within natural law theories; the above definition draws upon those of Stephen Griffin and Ian Shapiro. See also Ibid, Book 1, Chapter 2, 1253a1-a40.

⁴ There are also disputes regarding how “bounded” representatives should be to honor their constituents’ wishes even when doing so would violate their better judgment; for opposing views on the appropriateness of such arrangements, see Edmund Burke, *Reflections on the Revolution in France*, and Jon Elster, “Deliberation and Constitution-Making, in Jon Elster (ed.), *Deliberative Democracy* (Cambridge, UK: Cambridge University, 1998), 97-122.

representative democracy have been constructed for the purpose of limiting the direct rule of the people over themselves, as direct democracy has been deemed impracticable and even dangerous. As this thesis will demonstrate, such fears have considerable normative merit.

As for the Enlightenment thinkers who “refounded” democracy in the modern era, the most prominent of them, John Locke, firmly supported a representative government governed by a “social contract”, or constitution. Locke felt that the political life of man was actually contrary to his nature; he was freest without government, or failing that, living under as limited a government as possible. Accordingly, he prescribed a small, democratically-elected government whose job it was to enforce the natural law, and very little else. Its mandates were not to be considered as equal to the commands either of Christianity or the natural law, and it was not to impose its will on the private lives of the people contrary to these laws.⁵ For this reason, the natural law perspective favors the establishment and maintenance of various constitutional and extraconstitutional safeguards to protect its preexistent values and morals against “too much democracy”.

Since the time of Locke, others have arisen to defend the idea of natural law; perhaps the best-known was Dr. Martin Luther King, Jr. In his 1963 “Letter From a Birmingham Jail”, King spelled out his basic philosophy for his fellow Protestant clergy, and for his followers at large.⁶ King insisted that a higher law than man-made statutes or even constitutions existed, the natural law installed by God Himself. He then argued that

⁵ John Locke, *Second Treatise of Civil Government*. See also Chapter 1.

⁶ This is partially reprinted in Robert L. Hayman, Jr., Nancy Levit, and Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* (St. Paul, MN: West Group, 2002), 46-52.

it was ultimately this law, not any human law, for which people were held responsible, and accordingly, whenever fallible human beings enacted fallible human laws, humans ought to disobey these mortal laws if they came into conflict with the dictates of the natural law. In his words,

...there are two types of laws: just and unjust. I would be the first to advocate obeying just laws.

One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that “an unjust law is no law at all”.

Now, what is the difference between the two? How does one determine whether a law is just or unjust? *A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law.*⁷

Thus, the natural law inspired King to undertake his famous protest actions to overturn unjust segregation laws while remaining obedient to those human ordinances that were not in violation of the natural law.⁸

Others, while not embracing the natural law’s belief in prepolitical moral absolutism, believe that deliberative democracy represents a dangerous temptation to mob rule, and much prefer the security of written constitutions with their checks and balances, all designed to limit or slow democracy.⁹ Still others desire a more direct democracy, but are convinced that it is still impracticable, even given the modern

⁷ Ibid, 49.

⁸ As noted in Chapters 2 and 3 of this thesis, many of those who still favor restrictions on democracy are quite opposed to the idea of the existence of a natural law as providing an excuse for protests that might endanger sociopolitical stability. The late Hubert J. Storing was an example of such scholars; see below.

⁹ Keith Whittington is an example of a scholar who relies solely on written constitutions, as discussed in Chapter 3. Natural law theorists such as John Locke are also inclined to rely at least partially on written constitutions to restrict potentially dangerous democracy.

information and communications revolution.¹⁰ Thus, these scholars and lawmakers resist “populizing” efforts to reform the system towards more direct rule of the people by themselves.¹¹

In spite of these fears, in recent years, an opposition movement to representative democracy has arisen. Sometimes referred to as “populism”, in this thesis this movement is referred to as “deliberative democracy”. Scholars who advocate deliberative democracy stress the values placed on human reason by the Enlightenment, namely the ideal that humans can and should govern their own affairs through direct participation. Since all or most people are “reasonable”, it follows that they are capable of living their lives as they see fit. In more moderate, “populist” versions of deliberative democracy, such arguments hold that the independence of officials and representatives should be sharply limited by the wishes of the people, who should also be free to make for themselves many of the decisions currently left to elected officials, or worse, to appointed bureaucrats.

The most radically deliberative democrats, such as Benjamin Barber, have been willing to press their case even further. Rather than debate over the level of democracy contained within currently existing institutions, they argue that these systems themselves are fundamentally flawed whenever they constrain the direct choices and political existences of the people themselves. Democracy is seen as a value in and of itself, and as such it is the standard by which to judge the fairness, the desirability, and often even the “goodness” of political systems. Accordingly, these scholars have pressed for

¹⁰ Elster is an example of these authors; see Elster, 97-122.

¹¹ Harvey Mansfield, Jr. serves as an example of this; see Harvey Mansfield, Jr., *America's Constitutional Soul* (Baltimore: Johns Hopkins University, 1991).

completely replacing the existing systems, which they claim to be undemocratic, with a form of “deep” or “strong” democracy that involves the citizens very deeply in making their own decisions regarding their day-to-day governance, unhampered by procedural rules and unfiltered by the views of elected representatives.¹²

Locke’s ideas have come under strict scrutiny from these advocates of direct democracy. Some have claimed that he was too limited by the realities of his own time, and couldn’t see beyond his prejudices against nonwhites and women, let alone to the high-tech Internet age of the present day. Others, notably communitarians and feminists, argue that his establishment of reason as the basis of the natural law unnecessarily and even dangerously excludes other worthy sentiments like compassion and leaves humans completely isolated, “alienated” from each other. Still others, such as Benjamin Barber and Sheldon Wolin, claim that Locke’s ideas and the institutions based on them do not allow the common people enough freedom to truly rule themselves.¹³

The deliberative democrats’ observations and claims pose key problems for the natural law concept. Should democracy be seen as the main value toward which society should be striving? Can we merely “add” it to a list of more traditional liberal values such as liberty, and then use it as a criterion for measuring political orders along with such ideals? Does democracy, by its very inclusiveness, make itself less potentially dangerous than the apparent absolutist tendencies of natural law? Even if we are agreed that a single absolute natural law exists, who should be seen as its primary interpreters? Finally, would not the possibility of an absolutist tyranny falsely justified by feigned or

¹² Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California, 1982). This thesis will discuss many other similar authors in succeeding chapters.

¹³ See Chapter 1.

misinterpreted reference to the natural law be potentially the worst of all possible sociopolitical orders humanity was ever subject to, precisely because there would be no escape from such a totalizing order?

Not all of these considerations can be adequately discussed in this thesis. Rather, this thesis seeks to posit a natural law-based critique of deliberative democracy, and to demonstrate that it is the safer and the sounder of the two political theories. It is assumed that humanity has an innate capacity to reason and will utilize it, and furthermore, that reason has only one correct outcome when seen from a purely logical perspective.¹⁴ Having said this, it should be repeatedly stressed that human reason is just that, *human* reason, and as such will never be identical to what Kant described as “pure” reason. Nor does it follow that reason itself is necessarily infallible, as St. Thomas Aquinas claimed with his separation of “divine reason”, “natural reason”, and “human reason”. Ultimately, reason cannot completely explain *all* things, nor can it be expected to provide *all* morals. However, because of its relative stability, its straining towards objectivity, and its capacity to change its views according to new discoveries, reason is treated here as being a better and more useful means for the discovery of natural laws, if such things exist, than are emotions and passions.¹⁵

This very fallibility of human reason may lead to grave dangers from a natural law perspective. Within natural law theories, two common dangers have been stressed and must be treated here. The first of these is the very intangible nature of the natural

¹⁴ While politics is not often seen as a “logic game”, the Enlightenment association of reason with politics relates politics and logic to one another.

¹⁵ See Thomas Aquinas, *Summa Theologica* (trans. Dino Bigonari), excerpted in *The Political Ideas of St. Thomas Aquinas* (New York: Hafner Publishing, 1953), I-II, Question 97, First Article.

law. Because it simply exists, being neither created nor amended by humans, it is by its very nature usually seen as invisible or intangible.¹⁶ How then is it to be discovered and applied? In natural law discourse, only two possibilities are given: *reason* or *revelation*. *Reason*, as discussed above, refers to human reason. Natural law theories that embrace reason, such as those of John Locke, Immanuel Kant, and John Finnis, hold that humans can discover the precepts of the natural law by making use of their capacity to reason.¹⁷ This immediately begs the question of what “reason” is, and whether nonreasoning human beings and animals are seen as even being subject to the natural law. If they are not, then they do not possess the rights granted under that law, and one may treat them however one pleases. In the past, such ideals of various groups as thusly “subhuman” has led to the coexistence of gross inequities and injustices with ideals of the natural law and human reason within the same societies. These examples provide powerful demonstrations of the second great danger of natural law theories, as discussed below.

The second way in which humans receive the natural law is via divine revelation. Such divine revelation figures prominently in the natural law theories of St. Thomas Aquinas and Dr. Martin Luther King, Jr. In such accounts, God Himself grants humans the natural law, which they quite possibly *cannot* know without such revelation.¹⁸ Such

¹⁶ John Finnis’ conception of natural law provides somewhat of an exception here; he sees the natural law as being “developed” by humans via “practical reason”. See John Finnis, *Natural Law and Natural Rights*, excerpted in Keith Culver (ed.), *Readings in the Philosophy of Law* (Toronto, Ontario: Broadview Press, 1999), 55-87. In his “Law and What I Should Decide” (*American Journal of Jurisprudence*, 2003, 107-129), Finnis likens this development to that of children on a playground who instinctively understand the need for order and protection from bullies.

¹⁷ To a degree, Locke could be placed with “revelation” thinkers like Aquinas and King, as discussed below; he definitely believed that the natural law came directly from God, but prioritized its discovery via reason.

¹⁸ Aquinas explicitly states that humans can never discern God’s natural laws on their own, while King never explicitly discusses the subject in his “Letter From a Birmingham Jail”.

revelation minimizes human reason to the mere attempting to better decipher God's commandments, and not to their actual discovery. As this thesis is mostly concerned with matters of political philosophy, and not with those matters commonly seen as being expressly religious ones, a full discussion of these revelation-dependent theories is beyond its scope.¹⁹

Such divine revelation, though, would by its very nature escape the second great danger or problem inherent in natural law philosophy, namely the problem of which persons are interpreting the law, and to what ends they are doing so. As previously mentioned, even after John Locke published his *Second Treatise on Civil Government* in 1690, white European males continued to treat all other groups on earth as being somehow less than completely human even while they invoked Locke's ideals in their political writings and governments. As discussed in Chapter 2, the American Framers provide one such example of those who took upon themselves the sole task of interpreting the natural law, and they chose to do so in a manner that very much enhanced their own sociopolitical positions at the expense of the other groups.

This example shows that the very concept of the existence of a natural law necessarily raises the stakes for all people. As good and infallible as the natural law is seen from its advocates' perspective to be, grave danger is inherent in its claims to absolutist morality. In particular, whether via honest misunderstanding or open maliciousness, certain people or groups may take upon themselves the task of interpreting and enforcing the natural law, and subsequently attempt to justify horrific atrocities by reference to the natural law that, after all, only they are entitled to interpret. Thus, Adolf

¹⁹ See *ibid*, and St. Thomas Aquinas, *Summa Theologica*.

Hitler felt that it was “only natural” for the Aryans to expand and exterminate the Jews and Slavs, and European colonizers felt they were “civilizing” the native inhabitants of the New World when they enslaved them to work on *haciendas* or mines. Thus, just as the natural law is seen to grant vast benefits and promises the hope of true objective justice on those whose peoples and leaders faithfully observe its commands, so too does the misuse of these commands pose a grave threat to humanity. After all, no unjust regime is harder to escape than a totalitarian one, and a misused natural law carries in it an inherent tendency towards totalitarianism.²⁰

How are we to recognize such misuses of the natural law? When seen via the revelation-based theories of Aquinas and King, this becomes relatively easier; any regime whose commands contradict those of God as found in the Bible is violating His divine and natural laws, and ought not to be obeyed.²¹ When the natural law is seen from a Lockean, Kantian, or Finnisian perspective that relies on rationalism for the discovery of the natural law’s precepts, then the question becomes much harder to answer.²² One can attempt to pit one man’s rationality against another, but this begs the questions posed by the first danger of natural law theory as discussed above. Alternatively, one can attempt to posit that certain truths, such as Locke’s “no man ought to harm another” can be used as absolute criteria of the natural law, but this again begs the question of why Locke or the other thinker in question should necessarily trump the interpretation of the natural law

²⁰ This likely captures much of Sheldon Wolin’s critique of the religiously-based American “megastate” of Ronald Reagan; see Sheldon Wolin, *Politics & Vision: Continuity and Innovation in Western Political Thought* (Princeton, NJ: Princeton University Press, 2004).

²¹ People have debated and will continue to debate the meanings of Scripture for as long as humanity exists, but the contents of these debates are likewise beyond the scope of this political philosophy thesis.

²² In the author’s opinion, this is largely why natural law theories have diminished considerably in popularity since what Ian Shapiro calls their “secularization”; see Finnis, *Natural Law and Natural Rights*, Chapter XII.

by those maintaining the unjust regime. In the end, the natural law may be either reduced to “common sense” or seen as emerging via ongoing debate.²³

In his work, *Cosmopolitanism*, Kwame Anthony Appiah advocates such a system.²⁴ In his opinion, all of humanity can and should agree on the basic universal principles of the natural law.²⁵ At the same time, though, the mere presence of so many differing religions and value systems renders agreement about particulars nearly impossible. However, Appiah insists that humanity really does not need such consensus; if humans will simply start to open themselves and their value systems to others, the best values will inevitably emerge from discussion and terrible tragedies such as those that have too often attended natural law’s second problem will be eliminated.²⁶ Thus, Appiah sets out a “middle ground” of sorts between natural law’s emphasis on universal laws and the deliberative democrats’ views prioritizing open discussion and deliberation.

Appiah is correct to recognize natural law’s first great problem; as he phrases it, “figuring out moral principles, as an idle glance at the history of moral philosophy will show you, is *hard*”.²⁷ He also recognizes the second danger of natural law theory,

²³ This would render it much like the conceptions of the “constitutional change” school, as discussed in Chapter 2.

²⁴ Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W. W. Norton & Co., 2006).

²⁵ In his words (96): “Cross-cultural analysis reveals that there really are some basic mental traits are universal- in the sense that they’re normal everywhere.” He then concludes, similarly to Finnis (*Natural Law and Natural Rights*, Chapter V), that practicality alone helped to determine that these values would be held by all societies. In other words, humans think similarly, and found normative and empirical answers to their problems that are basically the same across societies. Ultimately, however, mere universality does not render something a natural law, for if such a conception would render the law dependent on human consensus to generate it, a concept which most natural law advocates (unlike Finnis) are reluctant to endorse.

²⁶ Ibid, 166. Here, Appiah’s viewpoints are very similar to those of John Stuart Mill as famously expressed in his *On Liberty*, namely that of the “best” argument necessarily emerging granted enough political openness.

²⁷ Ibid, 162 (emphasis in original).

pointing out the wrongful applications and invocations of that law from “enlightened” European slave traders to present-day radical Islamic fundamentalists, and the devastation such wrangling of the natural law can wreak. However, his advocacy of cosmopolitan “openness” leaves his own values in some doubt. True, his alternative may signal an alternative to either moral absolutism or moral relativism, but it is unclear where “universal” values ever emerge in his thinking, since, as noted above, he merely assumes that they spring from human cross-cultural consensus, although they are embedded in apparently different practices. In the end, his thought is quite similar to that of the deliberative democrat Joshua Cohen, and it shares his extremely optimistic view of humanity’s innate goodness and possibility for harmony.²⁸ It also fails to take seriously those viewpoints that are simply incompatible with others. In the end, while Appiah suggests a very interesting “middle ground” possibility between natural law moral absolutism and deliberative democracy, his work reflects many of the strengths and the flaws of both approaches, and as such posits many valuable points and ideas that cannot be adequately addressed in this thesis, but nevertheless illustrate the great complexity and multifaceted nature of moral philosophy.²⁹

Ultimately, though, the natural law can *never* be interpreted as allowing a relative morality, for that would be to deny its own nature.³⁰ Instead, the debates continue to rage over exactly what this absolute morality says or commands. If one allows, as this thesis

²⁸ He explicitly acknowledges Cohen in his book (175). For more on Cohen and his argument, see Chapter 1 of this thesis, 50. While in general Appiah shares Cohen’s perspective, he admits (166) that slavery has been, among other practices, an especially cruel one that may cast some doubt on his thesis.

²⁹ This thesis seeks to contrast natural law claims with deliberative democracy’s, and accordingly perspectives such as Appiah’s, while interesting, are beyond the main scope of this thesis.

³⁰ Kant was especially adamant concerning this, but it is implicit in all the studied natural law theories.

does, that absolute natural law exists, then it becomes imperative that humanity discover and interpret it in as careful and measured a manner as possible. Historically, this has usually meant that those people who are entrusted with discovering and interpreting the natural law do so in as sterile an environment as possible. While it is theoretically possible for most people to debate and rationally interpret the natural law, since the vast majority of humans possess reason, in practice, most people prefer to follow the dictates of their bodily and emotional passions rather than deciphering and obeying an absolute, but abstract, natural law. This has also been borne out by history. Because of this, the most reliable way to best discern the true dictates of the natural law is via small, closed-off conventions of thinkers and leaders, whose careful, reasoned deliberations can partake of pure reason as much as possible, and of human fleshly passions as little as possible.

Of course, there is always a near-certainty that even these leaders will fail in some points to comprehend the natural law, since they remain *human beings*. In fact, humanity can never perfectly decipher the natural law. For this reason, no human constitution should ever be either seen as being equal to the natural law itself, or as being its equal in authority.³¹ In fact, human-made constitutions should constantly be monitored to assess their statuses relative to the natural law. If and when they differ from the law, they must not be obeyed, and should be changed as soon as humanly possible to make them conform to the natural law.³² Because of the extreme risks posed by a bad or evil interpretation of the natural law, the decisions of those who claim to interpret it must be continually assessed and reassessed, and the people must remain vigilant.

³¹ See the discussion in pages Chapters 2 and 3 of this thesis.

³² See Finnis, *Natural Law and Natural Rights*, Chapter XII, in which he claims that an unjust law “lacks moral pedigree” needed to enforce compliance.

As this thesis will demonstrate, however, it *does not follow that they should be given the full and immediate power to directly rule themselves in all things at all times*. The very sensitive nature of the natural law should exclude the people from continual involvement in its interpretation, because with more interpreters would come a better chance of introducing human passions, and hence of a potentially disastrous wrongful interpretation of the natural law.³³ Natural law thus possesses the key strengths of positing a universal absolute moral standard of conduct and justice that does not depend on the whims of the rulers to create it; it always remains, albeit too-often undiscovered or misinterpreted. In Finnis' words,

Principles of this sort would hold good, as principles, however extensively they were overlooked, misapplied, or defied in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking. That is to say, they would 'hold good' just as the mathematical principles of accounting 'hold good' even when, as in the mediaeval community, they are unknown or misunderstood.³⁴

At the same time, this possibility of ignorance or misinterpretation can often lead to drastically bad consequences, especially in the short term, that are less likely with more constant input from the people themselves.

Deliberative democrats are correct to point out that humanity possesses the capacity to reason, and that it should exercise this capacity instead of being blindly led by professed elites. Their attempt to give the people full freedom to govern themselves and

³³ With more chances to interpret the law come more chances that a potentially disastrous misinterpretation will gain credence; this especially applies if the lack of reason commonly attributed to large groups is considered.

³⁴ Ibid, II.1.

to be subject to no laws except those which they themselves had a role in making is a very laudable one, and one which should theoretically prevent tyranny. Certainly, people must not be reduced to automatons who simply follow the orders of those who claim to interpret natural laws or any other laws, for this would enable the grim totalitarian picture described above to become terrifying reality. Politics, the series of discussions and compromises by which humans govern themselves, is thus indeed a necessity, and deliberative democrats are right to recognize this. This thesis agrees with the deliberative democrats that politics is essential and should be respected; it differs from them in not regarding the very nature of morality as itself a subject created or determined by these debates and compromises.

Finally, it is important to note that not all deliberative democrats subscribe to a relative view of morality, nor does it always follow that they believe that “anything goes” if they do hold such views. It is perfectly possible to hold that some things are “more right” or “more wrong” than others without a perception shaped by moral absolutes. While this author expresses serious doubts about the logical feasibility of such views, the above discussion should be remembered; reason alone, particularly human reason, is far from infallible.³⁵ Thus, while the author strongly disagrees with the normative standpoints and views of the deliberative democrats, he believes they write using well-reasoned arguments and agrees with them that democracy is a value worth protecting.

This thesis acknowledges the strengths of deliberative democratic ideals such as liberty and democracy, but argues that these values are insufficient ones as they are expressed by deliberative democrats. It holds that theories of the natural law, such as

³⁵ See discussion in Chapter 1.

John Locke's, provide a degree of protection to rights and freedoms that deliberative democracy and constitutionalism do not. When properly construed, these theories are neither libertarian nor totalitarian, but respect "liberty, not license"; that is, they demonstrate the way in which people should be living and behaving with respect to each other and to the law itself.³⁶ They hold humanity to follow the dictates of its conscience directed by reason, revelation, or some combination thereof. Thus, it could be said that the natural law, while definitely forbidding certain actions, behaviors, and perhaps even thoughts, does not place any burdens upon humanity other than those of morality itself. Since the natural law is seen to have existed before politics, and even before humanity, it cannot be created, amended, or altered by humans, and is therefore perfectly impartial with regard to human disputes.³⁷

Accordingly, Chapter 1 of this work discusses democracy's normative value. It examines the moral and ethical worth of democracy as a value in itself, and witnesses its strengths and its shortcomings. While it is true that not all or even most deliberative democrats advance their ideas about the value of democracy to the radical extent of Benjamin Barber, all see democracy as inherently a good-in-itself, and while it may not necessarily be held as the *sole* good for which humanity should strive, it is still believed to possess intrinsic normative and moral worth, especially in a morally relativistic or near-relativistic worldview.³⁸

³⁶ The phrase "liberty, not license" is paraphrased from Locke, Chapter II.

³⁷ Some, such as Whittington and Shapiro, have suggested that the natural law is irrelevant as well as impartial to human disputes. These claims do not logically follow from its impartiality unless one is willing to hold the postmodern belief that all morals are fundamentally subjective. While Shapiro might entertain such views, Whittington does not. For a more detailed discussion, see Chapter 3.

³⁸ As will be demonstrated in Chapter 1, this idea of "some things are only right in context, for certain people and at certain times and not for others" will be shown to be logically fallacious.

By contrast, Chapter 1 concludes that democracy is certainly untenable as the main normative value for political society, or even as a normative value at all. However, it does not necessarily hold that democracy has no value or any kind whatsoever. Its true value derives from the natural rights and freedoms that precede and override political systems; democracy has value because these rights are most easily protected within democratic systems. Thus, democracy's real worth comes from its instrumental use, to protect human rights as provided by the natural law. Left to itself as a sole or primary value, democracy may be quite destructive to these rights and freedoms, especially if written constitutions themselves are left open to continual democratic debate. Natural law and its derived rights, not democracy, should provide the paramount values to govern society.

These doubts concerning democracy's inherent worth are held by many to have been shared by the Framers of the United States Constitution, but serious debate continues to rage amongst historians and legal scholars over the truth of this claim. Chapter 2 will examine these views regarding the nature of the Constitution's relationship to democracy. Scholars such as Robert Dahl have lamented that the United States' governing order is not truly "democratic".³⁹ While deliberative democrats such as Barber agree with Dahl, Marxist-inspired writers such as Charles Beard also insist that the American system is undemocratic, but for economic rather than for "purely" political reasons.⁴⁰ The chapter will demonstrate how the American political system more closely adheres to a "constitutional democratic" model than to either economic or deliberative

³⁹ Robert Dahl, *How Democratic Is the American Constitution?* (New Haven, CO: Yale University, 2003).

⁴⁰ Charles Beard, *The Economic Interpretation of the Constitution* (online; 1913).

democracy, thus apparently validating the claims of those who argue that the Framers designed the Constitution to at least partially limit democracy.

Having so demonstrated that the United States' democracy is "constitutional", Chapter 2 will then examine the empirical debates over just how "democratic" the United States Constitution truly is. On the one hand, the "Princeton school" scholars argue that the United States government stresses constitutionalism and its checks on popular passions, and that such was the intent of the Framers. On the other hand, the "constitutional change" school claims that the U.S. Constitution's words and phrases should not be interpreted as they originally were in the present day; these scholars hold that the document's meaning must change over time along with the meanings of words if it is not to be rendered superfluous and obsolete, and furthermore, that the Framers themselves anticipated this. Thus, Chapter 2 will conclude by examining the empirical nature of the American constitutional system, and examine the viewpoints concerning how "constitutional" or "democratic" it is and was intended to be.

Finally, Chapter 3 will connect Chapters 1 and 2 by applying the deliberative democrats' arguments, the empirical arguments concerning constitutional democracy, and natural law theory to questions of justice. It will examine the views of various deliberative democrats, and demonstrate why any attempt to achieve justice or coherent constitutionalism through simply attempting to add democracy to natural law's listing of rights and responsibilities is logically doomed to failure. It will then examine the more radical views of Ian Shapiro, who holds with Barber that all morals are in fact relative and therefore democracy should be allowed to roam mostly or entirely unfettered, either

because it will produce the “right” results in the end, or, because there is no true “right”, it will at least allow the people to govern themselves.⁴¹

The chapter will then examine the competing arguments of Keith Whittington, who holds that only written constitutions are capable of reliably ensuring justice in the real world, and of the natural law.⁴² It will demonstrate how Whittington’s normative claims do not possess the moral danger of the deliberative democrats’ arguments. However, it will also demonstrate how and why his conception of true justice and his faith in written guarantees of rights are sorely misplaced. In the end, the chapter will conclude by demonstrating that the properly applied natural law is a more reliable source of justice and of constitutions than either democracy alone or constitutionalism alone; rather than threatening either of them as Benjamin Barber or Keith Whittington claim, it can and should actively support both of them.⁴³

Finally, the “Conclusion” to this thesis will demonstrate the overall lesson to be learned from a comparison of deliberative democratic claims with natural law claims, and will summarize the conclusions regarding deliberative democratic weaknesses and natural law’s strengths. It will examine the scholastic similarities and differences between legal scholars’ perspectives on constitutionalism and morality with political theorists’ views on these topics. In particular, it will discuss the fact that these two groups of scholars focus on very different questions, and questions that may occur to one group by be seen as irrelevant by the other. In the end, the conclusion will examine the

⁴¹ Ian Shapiro, *Democratic Justice* (New Haven, CO: Yale University, 1999).

⁴² Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999), and Keith Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999).

⁴³ This is of course dependent on whether they are in accordance with the dictates of the natural law!

process of writing the thesis itself, presenting the author's perspective on the research and drafting of this work.

Chapter 1

While humanity has been engaged in various disputes since the beginnings of recorded history, the most profound intellectual and physical disputes have raged over normative issues.⁴⁴ Many theorists have posited that democracy itself should be the solution to the world's ills. Democracy, they argue, is and should be recognized as a normative end-in-itself, not as merely a means to some other end. Only in democracy, they claim, can people truly govern themselves, and thus only in democracy can they be "free". However, when democracy is examined for its potential as the primary value for society, it will be seen to be not only theoretically unsatisfying, but also quite possibly dangerous, morally and intellectually. A better foundation for rights and liberties will be shown to lie within natural or God-given law, not in the whims of democratic majorities. While democracy is valuable, it will be seen to be only valuable as a means to the end of ensuring the protection of people's rights under the natural law.

Perhaps the first theorist to posit the existence of an absolute natural law in the postclassical period was St. Thomas Aquinas. Aquinas sought to unite the ethical and metaphysical teachings of the classical writers, especially Aristotle, with the theology and Scripture of the ruling Roman Catholic Church. In so doing, Aquinas theorized that God had given a natural law to humanity and indeed to all of His creation, and that even this law was but a reflection of the divine law with which He identified Himself. While the divine law was not discernable by human reason except in cases of special revelation

⁴⁴ Plato realized this; in the *Euthyphro* (trans. Dover Editions, Mineola, NY, 1992, 6-7), his Socrates reminds Euthyphro that mankind and even the Greek pantheon of gods and goddesses quarreled the worst over moral issues.

from God, the natural law was in fact capable of being discovered by human reason.⁴⁵

This law commanded humanity to observe the morals and laws that God had decreed, and these morals were never created by man, nor were their contents subject to public debate. Overall, Aquinas may be seen as putting forward the revelation-based aspect of natural law into the Western tradition of political theory.⁴⁶

Even as history progressed, and Europe secularized, the notion of the existence of an absolute natural law persisted. If it was not given by God alone with minimal human reason, then it was still largely discovered by that reason from nature itself. Writing in the 1680s, John Locke was a revolutionary political theorist in many ways; his works followed the new largely secularized ideal of human reason and nature and reached a normative conclusion similar to that of Aquinas. His writings followed those of Thomas Hobbes, but Locke's ideas differed in profound ways from Hobbes' *Leviathan*. Whereas the *Leviathan* proscribed a totalizing state with near-absolute powers, Locke's *Second Treatise on Government* insisted on minimizing the role of government in society. Like Hobbes, however, Locke grounded his theoretical state on a "social contract" in which the people themselves agreed to unite and form the state to defend them from the miscreants within prepolitical human existence. For the first time in ages, the government was held to exist for the sake of the people, and for as long as it continued to

⁴⁵ This was one of the most important reasons for changing human laws; see Aquinas, *Summa Theologica*, I-II, Question 97, First Article.

⁴⁶ Ibid, Questions 90-95.

serve the people's interests.⁴⁷ These "interests" were defined as the liberties, or basic freedoms, of the people.⁴⁸

The people received these liberties from the natural law, which existed before and independently of government itself. Before governments existed, people were in "a state of *liberty* and not of *license*" under the natural law; they did not exist in perfect freedom, as in Hobbes' conception of prepolitical humanity as engaged in a war of "all against all" in which everyone had a right to everything he/she could seize and hold by force, but instead were bound to obey the dictates of an absolute, irrevocable law, which stated that "no one ought to harm another in his life, liberty, or possessions".⁴⁹ Crucially, this law was *never* invented, created, or fundamentally amended by humans, but it was discoverable by them through the correct application of their capacity to reason.⁵⁰ This law may have existed in nature, but Locke believed that it was ultimately bestowed by God. Either way, it was not created by humanity, but it was accessible to humanity through reason.⁵¹

⁴⁷ In the *Politics*, Aristotle had argued that the form of government for each society should be shaped to fit the needs of that society and its people, but he did not articulate the role of consent (in fact, he seemed hostile to the idea, describing democracy as a "deviant" form of government. Aquinas, as usual, followed his lead; see Aquinas, *On Kingship*, Chapter II, as found in Bigoniari, ed. 178).

⁴⁸ Richard Ashcroft argues in "Locke's Political Philosophy" (in *The Cambridge Companion to Locke*, ed. Vere Chappell, NY: Cambridge University Press, 1994, 226-251) that Locke's main purpose in writing his famous *Two Treatises of Government* was to urge the people both in England and abroad to support the Whigs' resistance to the absolutist monarchical ambitions of Charles II and James II. This may well be the case, but even if so, it has little bearing on the value of the normative ideals of freedom and law that Locke expresses.

⁴⁹ Locke is sometimes unfairly construed as being a libertarian.

⁵⁰ For more on this subject, see J. B. Schneewind, "Locke's Moral Philosophy" in Chappell (ed.), 199-225. Schneewind points out that Locke relied *very* heavily, perhaps excessively so, on the use of reason as a foundation for morality, and was totally confident in humanity's ability to overcome its innate appetite-controlled "badness" through the use of reason, despite the very real possibility that reason could be misused. This account makes Locke similar in many epistemological and progressive aspects to classical philosophers such as Plato.

⁵¹ John Locke, *Second Treatise on Civil Government*, Chapter II.

The prepolitical nature of this society should be stressed. According to Locke, civil society preceded and established the political entities and governments, not the other way around. Even after the government was established, civil society retained its full independence from the government, as can be seen in the fact that Locke vested it and its people with the right to abolish the government if it failed to protect them or their rights.⁵² Thus, the people's most basic, fundamental laws and associations were held to be outside the realm of political governments; the "private" home lives were to be separated from the "public" lives within the political sphere, and all were subject to natural law.

In such a society, the establishment of a political state would seem unlikely. Unfortunately, not all people obeyed the dictates of the natural law, and sought to harm the persons or the property of others.⁵³ In fact, Locke possessed a very pessimistic view of human nature:

There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of nature be plain and intelligible to all rational creatures; yet men, being biased in their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.⁵⁴

⁵² Ibid, Chapter XI. In *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas, Lawrence, KS, 1999), Keith E. Whittington makes the implausible claim that Locke wanted the government to possess near-absolute power over the people because they had surrendered their "popular sovereignty" to it in forming the social contract. While a full refutation of Whittington's argument is beyond the scope of this paper, the deliberative democrats advance many similar claims, as will be seen below.

⁵³ In *Political Theory and the Displacement of Politics* (Ithaca, NY: Cornell University Press, 1993), 29-34, Bonnie Honig explains Immanuel Kant as referring to such people as having "forfeited their humanity" by their immoral actions that violated the natural law.

⁵⁴ Locke, *Second Treatise*, Chapter IX. See also Schneewind, 200-204.

With no political government to adjudicate cases for the people, they were left to rely solely on their own force to avenge these wrongs. However, passions for revenge too often blinded these wronged parties to avenge themselves too excessively upon the wrongdoers, and therefore the nation-state system of political governance was instituted to arbitrate these cases.⁵⁵ This nation-state only existed to ensure that the natural law was upheld and the people's rights were thus protected; Locke intended for the state to exist only in a minimal capacity.⁵⁶

Thus threatened by these “thieves” lurking in prepolitical societies, people accordingly gave their rational consent to form a “social contract” establishing a democratic or semi-democratic form of governance.⁵⁷ In Locke's conception, only the people had the right to form a government, and that government was thus wholly beholden to them.⁵⁸ Accordingly, Locke's ideal state was a democracy, since only by ruling themselves could the people be assured that their own liberties under the natural law were never threatened by a government that owed no allegiance or responsibility to them or to the law.⁵⁹ As Keith Whittington (1999) expressed it, Locke's writings

⁵⁵ See Locke, *Second Treatise*, Chapter IX.

⁵⁶ Ibid, Chapter VII.

⁵⁷ Of course, Locke lived in England under a constitutional monarchy. He was a fierce champion of parliamentary authority within this system. He has been much-criticized for his emphasis on property as the basis of political rights, and thus accused of presenting a justification for the exploitation of the many poor by the wealthy few, but a more thorough examination of the *Second Treatise* reveals that he included human beings themselves as sacred and inviolable property. Everyone thus possesses “property”, regardless of income level, in his/her own person, and protection of that most fundamental property is in fact a stout defense *against* slavery, exploitation, and oppression. See also Keith Whittington, *Constitutional Interpretation*, and Ashcroft, “Locke's Political Philosophy”, 240-246.

⁵⁸ He thus agreed with Immanuel Kant that people must be free to reason for themselves. See also Schneewind, 204-205, and Immanuel Kant, “What is Enlightenment?”.

⁵⁹ In contrast to Locke, Aquinas held that a monarchy was the best form of government. This led to various theoretical problems when he attempted to discuss whether and how kings were bound to obey any laws; see Aquinas, *Summa Theologica*, Question 105, Article I.

pioneered the idea of “popular sovereignty”.⁶⁰ In most societies that claim intellectual inheritance from liberal ideas such as Locke’s, this “social contract” has taken the form of a fixed constitution.⁶¹

Such a government established by rational consent was in Locke’s view obviously acceptable for its initial signatories, but what of future generations? Locke’s answer was to assume that these future peoples would be rational, just as the initial signatories were rational. Furthermore, the social contract was also itself rational, since it was based on the rationally discovered natural law. Locke accordingly believed that since the future generations were rational, they would have no qualms or reservations about accepting and obeying the government formed by the initial social contract. If by some chance some person still harbored grave reservations concerning the government or the contract, he/she could simply emigrate to another nation-state. By remaining in the nation-state whose government was founded on the natural-law-derived social contract, people were giving their “tacit consent”, or silent agreement, as to the legitimacy of the governing order.⁶²

In fact, the governing order only retained its legitimacy as long as it continued to protect the people’s rights granted by the natural law. It was *never* allowed to violate these rights or the natural law, no matter how democratic the procedure that aimed to violate the law. As Locke expressed it: “the first and fundamental law of all

⁶⁰ Whittington, *Constitutional Interpretation*, 110-159.

⁶¹ See Ashcraft, 237, 249-251. This concept will be discussed in the context of the United States Constitution in Chapter 2.

⁶² Locke, *Second Treatise*, Chapter VIII. This concept was far from new to Locke. Plato’s Socrates refused Crito’s pleas to flee Athens and thus escape execution by hemlock in the *Crito* (Dover, 46-48). In *Designing Democracy: What Constitutions Do* (NY: Oxford University Press, 2001), 116-107, Cass Sunstein claims that the freedom of movement within federal systems such as the United States’ helps to prevent tyranny, since those who disagree with one region or state’s laws can simply move to another area.

commonwealths, is the establishing of the legislative power; as the *first and fundamental natural law, which is to govern even the legislative itself*.⁶³ The legislature, however democratically it may have been constituted or how institutionally “democratic” its procedures are, is never allowed to violate the universal natural law.⁶⁴ If it should ever pass a law that violates the dictates of the natural law, its actions are illegitimate:

*The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an external rule to all men, legislators as well as others. The rules that they make for other men's actions must...be conformable to the law of nature, i.e., to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.*⁶⁵

Locke thus envisioned a limited democracy in which the government would play a small role in the people's lives, and its deliberations would be unconditionally bound by an absolute, inalterable natural law.⁶⁶

Locke's vision of natural law and accompanying natural rights was quite similar to, and in some ways was more fully developed by, Immanuel Kant. As Bonnie Honig observes, Kant insisted upon the existence of the natural law, and possibly went even farther than Locke in postulating that man could simply and safely assume its existence without the excessive use of reason:

⁶³ Locke, *Second Treatise*, Chapter XI.

⁶⁴ Nor, as Ashcraft (228) points out, was the executive; when he/she does, he/she becomes a tyrant.

⁶⁵ Locke, *Second Treatise*, Chapter XI (emphasis added).

⁶⁶ As Schneewind (221) points out, Locke “was more interested in the epistemology of natural law than in working out a code”; in other words, Locke failed to fully articulate what the moral law required, but it is a reasonable assumption that he believed it to be cognizant with and similar to Christian moral norms.

Reason was not meant to undermine faith. Put to its proper use, and maintained daily, reason can deduce in the world an order that is reliable *not because it is built on reason but because it is secured by the one object invulnerable to rational dissolution, the one object about which man need not speculate, an object not of cognition but of respect: the moral law.*⁶⁷

In many respects, such a definition of natural law exceeds even that of John Locke. Kant claims that the natural law exists and permeates material reality. Our level of respect for the law never wavers as long as we are willing to consider it honestly, and our levels of respect for other people vary according to how well or poorly they observe the all-encompassing natural law.⁶⁸ Just as in Locke, however, civil society only exists to carry out the natural law. Both Locke and Kant thus held similar views regarding the existence of an absolute, natural morality and the appropriate role of civil society, and both have proven major influences on political liberalism.⁶⁹

Deliberative democrats are currently calling these ideals into question. In his survey of the history of Western political thought, Sheldon Wolin is quite critical of Locke and the other Enlightenment thinkers. He makes many accusations against them, accusing them of “cowardice” regarding the proper role and nature of politics. According to Wolin, the public/private distinction advocated by Locke only served to prevent the communities from realizing their full progressive potential. In Wolin’s opinion, humanity has great potential for technological, economic, and social progress, but this

⁶⁷ Bonnie Honig, *Political Theory and the Displacement of Politics*, 24.

⁶⁸ We are never permitted, however, to deny them all rights to live, etc. See *ibid*, 18-34, and discussion below.

⁶⁹ In the opinion of this author, Locke provided the better overall description of the political world, while Kant better described the natural law and its accompanying absolute morality. Additionally, Aquinas presented a masterful, comprehensive religious-based picture of the natural law, while Finnis provided an interesting legal interpretation of this law.

potential can only be realized if people put aside their “private” lives and work together to advance the common goal of “bettering” humanity.⁷⁰ Thus, according to Wolin, the Lockean insistence on limiting the sphere in which the government can legitimately interfere in the people’s private lives represents a lack of faith in government that is both hazardous to the progress of humanity, and representative of cowardice on the part of aristocrats such as Locke and Adam Smith.⁷¹

Anthony Arblaster has expressed similar misgivings about such restricted democracy. He claims that ideals such as Locke’s are “elitist” because historically the elites have been the ones entrusted with interpreting (or “inventing”) the natural law.⁷² Like many contemporary theorists, Arblaster is skeptical of the existence of such a natural law, and emphasizes instead the need to embrace a form of deliberative pluralism. Since people hold irreconcilable viewpoints, it is crucial that they be allowed to rule themselves so that they will not be oppressed by those who hold differing viewpoints.⁷³

Other deliberative democrats such as Benjamin Barber, Jane Mansbridge, and Iris Young have repeatedly offered similar arguments, stressing the urgent need to expand the boundaries of the “political”. These theorists insist that the Lockean space between the

⁷⁰ Sheldon Wolin, *Politics & Vision: Continuity and Innovation in Western Political Thought* (Princeton, NJ: Princeton University Press, 2004), 257-314.

⁷¹ Wolin repeatedly emphasizes that Locke, Adam Smith, and the other Enlightenment writers were all well-to-do white men who would profit greatly from limited government, whereas expansive governments might threaten to redistribute their finances to the needy. This criticism of the Enlightenment has been oft-repeated by writers ranging from critical race theorists to feminists; see Charles W. Mills, *The Racial Contract*, and Jane Mansbridge, *Beyond Adversary Democracy*. Many writers have also made very similar criticisms of the Framers of the United States Constitution (see Chapter 2). Ashcroft, however, responds (242-246) by emphasizing Locke’s great concerns for the poor, as expressed both by his writings in his *First Treatise on Civil Government* and by his actions when head of the Board of Trade.

⁷² Anthony Arblaster, *Democracy* (Philadelphia: Open University Press, 2002). See also note 57 above.

⁷³ Arblaster (67-69) uses the example of Northern Ireland to emphasize the need for democratic openness. It is unclear, however, how the minorities’ rights are to be protected without natural law; see discussion below.

“public” and the “private” needs to be eliminated if real social justice is to be achieved.⁷⁴

Some of them, echoing Karl Marx, insist that governments create society, instead of the Lockean reverse, while others simply believe that the government should help to curb the excesses of civil society.⁷⁵

In these arguments, the concept of absolute natural law is seen as hegemonic, favoring the propertied classes at the expense of others. Such arguments focus on the two main difficulties of the natural law as discussed above. First, they highlight the intangibility of the natural law. Because of that intangibility, some of these theorists regard natural law as either effectively meaningless or as completely nonexistent, since it is so intangible, and so many people are openly seen to disobey its supposed dictates.⁷⁶ Secondly, they highlight the tarnished empirical legacy of those who took it upon themselves to interpret the natural law. After all, for most of Western history, only rich white men were seen as being “fully rational”, and thus fully capable of discovering and understanding the natural law.⁷⁷ Throughout Western and indeed world history, such exclusiveness has repeatedly led to horrific atrocities of the kind discussed above, inflicted by the “rational, natural-law-abiding” ruling class on a supposed “subhuman,

⁷⁴ In this, their ideas are very reminiscent (and are in fact often merged into) feminist theories; see Anne Phillips, “Dealing With Difference: A Politics of Ideas, or a Politics of Presence?”, in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University, 1996), 139-152.

⁷⁵ See Jean L. Cohen, “Democracy, Difference, and the Right of Privacy”, in *ibid*, 187-217.

⁷⁶ Of course, this may call the assumption that humans are fundamentally rational into sharp question as well. In *The Cost of Rights: Why Liberty Depends on Taxes* (NY: W. W. Norton & Co., 1999), Stephen Holmes and Cass Sunstein argue that natural rights are in fact useless unless society recognizes them; Benjamin Barber consistently agrees in his writings.

⁷⁷ Aristotle is (in)famous in the *Politics* for claiming that women and children are not, and women never can be, fully rational; instead, they only possess “animal” rationality; Iris Young, “Communication and the Other: Beyond Deliberative Democracy”, in Benhabib, 120-135, emphasizes this tendency.

irrational” lower class or caste.⁷⁸ Either way, these theorists object strongly to what they regard as a class-based fabrication, and rightly illustrate the potential dangers posed by those who inaugurate horrific systems by claiming justification from the natural law.

Additionally, many of these theorists agree with postmodern writers like Marcuse and Nietzsche in arguing that the whole concept of natural law is in fact only a formula for preventing them from enjoying “true” freedom. In this view, the people should always make their own laws.⁷⁹ Any law imposed on people that they did not themselves create, whether by a government, a previous generation, or some prepolitical “natural law”, is in fact repressive because it was not consented to by the people themselves.⁸⁰ Accordingly, these theorists reject Locke’s conception of “tacit consent”, viewing it as merely a veneer for oppression.

Such theories carry Locke’s notion of popular sovereignty to a new level. Locke had advocated democracy as valuable, indeed as presenting the only system of government likely capable of recognizing the natural law. By contrast, instead of positing the values of natural law, these theorists insist on the value of democracy itself. Democracy is seen as the only form of government that could possibly allow people to be truly “free”, because only in a democracy can the people truly possess the government and thus the sovereignty to rule themselves. Thus, democracy is seen as a normative

⁷⁸ Plato famously postulated that unpropertied philosophers should rule (*Republic*, trans. Alan Bloom, NY: Basic Books, 1991). Historically, though, the white male property-owners have filled this “role” in the West.

⁷⁹ See Amy Gutmann, “Democracy, Philosophy, and Justification”, in Benhabib (ed.), *Democracy and Difference*, 340-347.

⁸⁰ In his *Constitutional Interpretation* (196-208), Keith Whittington refers to this as the “dead-hand problem” of written constitutions.

value in and of itself, and in fact, it is seen as the prime or core value around which societies should be based.

In such a view, any institution, belief, law, or practice that stands between the people and their self-governance is inherently “unfree” and therefore illegitimate. Representative democracy, accordingly, is in fact “unfree” because within it the people do not have the right to directly make their own laws. In Benjamin Barber’s words,

A well-known adage has it that under a representative government the voter is free only on the day he casts his ballot. Yet even this act may be of dubious consequence in a system where citizens use the franchise only to select an executive or judicial or legislative elite that in turn exercises every other duty of civic importance.⁸¹

Except on Election Day, the officials of the government are free to make or repeal any laws they wish without the consent, or often even the knowledge, of their constituents. According to Barber, in a representative liberal democracy, only these officials are truly “free”, since only they are actively and directly involved in lawmaking, while the common people are “alienated” from their true right to self-rule:

Representation is incompatible with freedom because it delegates and thus alienates political will at the cost of genuine self-government and autonomy...Men and women who are not directly responsible through common deliberation, common decision, and common action for the policies that determine their common lives are not really free at all, however much they may enjoy security, private rights, and freedom from interference.⁸²

⁸¹ Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California, 1982), 145.

⁸² *Ibid*, 145-146.

Thus, the representatives' laws are in fact democratically legitimate, but only for themselves, not for the common people, who had no real say in their making.

In practice, most of these theorists are quite critical of written constitutions; since these constitutions were drawn up years ago, and often by preceding generations, the theorists question how “democratic” a system bound by them ever is or could be.⁸³ To make matters worse, these written documents contain within them numerous constraints on the power of the people to directly govern themselves. They established the representative institutions that are keeping the people and the society from being truly “free” by limiting the powers of direct democracy. For instance, these documents were designed to last for many years in their present state, and they are hard to amend to change with changing times.⁸⁴ In fact, the most radically participatory of the theorists, such as Barber, have advocated that the written constitutions be continually subject to popular debate and more easily amended by the people themselves directly, or even abolished entirely.

Some of these theorists have explained their visions for a “truly” democratic Society, and while they have advocated varying degrees of reform, all see democracy as humanity's ideal. Jane Mansbridge built and refined her vision of a “nonadversarial” democracy through her observations of a town-hall-meeting-governed Connecticut town,

⁸³ According to Sheldon Wolin in “Fugitive Democracy” (in Benhabib, ed., *Democracy and Difference*, 31-45), the present-day dominance of liberal ideals and liberal institutions has made “true”, or deliberative, democracy all but impossible.

⁸⁴ Cass Sunstein presents the interesting anomaly of a writer who repeatedly applauds both deliberative democracy and written constitutions; he even insisted in *Designing Democracy* (114) that the very *purpose* of written constitutions is “to aid democracy”! His argument bears certain normative similarities to that of Kwame Anthony Appiah, but the latter never discusses constitutionalism.

and of the members of a radical leftist organization in the early 1970s.⁸⁵ She doubts the prospect of a full-scale radical transformation of American politics into a deliberative democratic one, but she insists that reforms are needed to push the United States in that direction. In particular, she stresses the need for more inclusiveness and opportunities for all groups of people to express their views, and advocates that the United States adopt a proportional representation (PR) system of government. In such a system, Mansbridge believes that the groups would not only have the ability to voice their opinions, but since no single group would predominate, each group would be forced to meaningfully engage the views and ideas of others. In such a system, she believes that Americans can move “beyond adversarial (i.e. contentious) democracy” to a more progressive, harmonious system. Thus, she advocates a reformation of the existing system, not a radical overhaul. Such a view does not differ radically from natural law theory, which requires existing systems to be overturned when and if they conflict with the natural law.⁸⁶

Not all deliberative democrats’ views coincide so well with natural law theory, however. In *Strong Democracy*, Benjamin Barber articulates one of the most radical arguments for a complete democratization of society.⁸⁷ Like Mansbridge, he stresses the need for the people to recognize the long-forgotten value of listening to each other’s points of view. He believes that if the people would simply start listening to each other’s worldviews and seriously trying to understand them, they would both better understand

⁸⁵ Barber (*Strong Democracy*) and many communitarians such as Michael Sandel have criticized liberal democracy for its “polarizing” tendencies; they argue that the Lockean emphasis on self-interest is at best highly inimical to the process of building truly “just” or “good” societies.

⁸⁶ Jane Mansbridge, *Beyond Adversary Democracy*, (NY: Basic Books, 1980), 233-302. Iris Young expresses similar views in Benhabib (ed.), 120-135. Cass Sunstein’s writings are also moderate in tone.

⁸⁷ He has pressed for this in other writings as well; see Barber, “Foundationalism and Democracy” in Benhabib (ed.), *Democracy and Difference*, 348-359.

these competing ideas and their own ideas as well.⁸⁸ In order to achieve this, Barber advocates a radical restructuring of American politics to force all people to govern themselves directly in local assemblies. These people would be “forced” to be political, to engage in debates and discussions, and to modify their views accordingly. They would be reeducated to serve the democracy in all things, to think and continually to act democratically by being forced to participate daily in deliberation and decision-making.⁸⁹

All of these deliberative democrats, from moderates such as Mansbridge to radically participatory ones like Barber, insist that the people create their own laws. The laws are not to exist before or outside the limits of democratic society. They are entirely created by and beholden to democracy. In effect, in the latter’s proposal, nothing should exist outside the limits of the democracy and the political, for a democratic society is the ultimate goal of humanity. In Joshua Cohen’s words,

The deliberative conception of democracy is organized around an ideal of political justification. According to this ideal, justification of the exercise of collective political power is to proceed on the basis of a free public reasoning among equals. A deliberative democracy institutionalizes this ideal. Not simply a form of politics, democracy, on the deliberative view, is a framework of social and institutional conditions for participation, association, and expression-and ties the authorization to exercise public power (and the exercise itself) to such discussion-by establishing a framework ensuring the responsiveness and accountability of political power to it”⁹⁰

⁸⁸ In this, Barber echoed John Stuart Mill; in his *On Liberty*, Mill stressed the need for people to engage in public debate over normative issues in order to help them weed out bad or incoherent arguments and to improve their own in contrast. See also Appiah, *Cosmopolitanism*, 45-68.

⁸⁹ Here Barber was quite similar in many respects to Jean-Jacques Rousseau, with his famous advocacy or “forcing men to be free” (*Social Contract*).

⁹⁰ Joshua Cohen, “Procedure and Substance in Deliberative Democracy”, in Benhabib (ed.), *Democracy and Difference*, 95-119, 99.

Deliberative democracy thus claims as its overall goal a more responsive and thus more legitimate means of governance, based on its continual reinvention by its own reasoning and deliberating citizenry.

Finally, deliberative democrats claim that this entire ideal of democracy as an end-in-itself is self-legitimizing. In Barber's words, "democracy is self-correcting".⁹¹ He and the other deliberative democrats believe that democracy legitimates and corrects its own abuses over time. "Time" may involve decades or even centuries, but deliberative democracies can evolve with changing times as liberal democracies, with their relatively immobile, "fixed" written constitutions cannot. After all, in the United States, democracy has gradually extended rights to non-property owners, to racial and ethnic minorities, and to women. Deliberative democrats thus bestow great faith in the self-corrective abilities of deliberative democracy.⁹²

This approach enjoys considerable popular appeal, especially as countries are seeking to democratize all over the world, and democracy is increasingly being seen as a "cure-all" for the world's problems.⁹³ Within the United States, many people accept the deliberative democrats' arguments. After all, they live within a society that claims to derive its legitimacy "from the consent of the people", and democracy has been and is being taught as intrinsically valuable. After all, popular sentiment argues, truly free people should have the right to live and to rule themselves in whatever way they see fit.

However, when taken as the normative end-in-itself for society, democracy fails.

⁹¹ Barber, "Foundationalism and Democracy", 354.

⁹² See *ibid*, 348-359. Here, deliberative democracy contrasts favorably with natural law, in which misinterpretations are much harder to correct; see the discussion in the Introduction.

⁹³ Many scholars, such as Michael Doyle insist that democratization is the only way to produce lasting peace.

Its failure stems from a variety of factors, which can be summarized into three main problems, each of them related to the previous one. First, it is theoretically incomplete, since it lacks any total foundation and is therefore always cultural-specific and only relatively applicable; it is not in fact “self-legitimizing”. Second, it fails to provide or to recognize the existence of any moral absolutes, a failure that has drastic ethical and empirical consequences. Third, and finally, since it fails to possess a sound theoretical base or a moral foundation, it also fails to provide an adequate defense of political rights and freedoms, leaving these unsecured and subject to the arbitrary whims of the mass populace. While democracy remains valuable, it must remain a *means to an end*, and never attempt to function as the *end-in itself*.

Deliberative democracy lacks a solid theoretical basis, even though it is based on Locke’s ideas of government by the rational consent of the free people, largely because it discounts his reasons for establishing the government: to secure the people’s rights and freedoms *under the natural law*, and replaces the natural law with democracy itself. In fact, by its very nature, deliberative democracy eschews the need or even the existence of any universal notions of the good and the just. In Barber’s words,

Like every political system, democracy too has a birth mother, and thus rests on foundations.

Unlike every other political system, however, democracy is necessarily self-orphaned, the child who slays its parents so that it may flourish and grow autonomously.⁹⁴

Thus, according to deliberative democrats like Barber, Joshua Cohen, and Seyla Benhabib, democracy is bound by its very nature to “burst out” of the liberal moral absolutism and redefine the normative terms of its own existence. This redefinition is to

⁹⁴ Barber, in Benhabib (ed.), *Democracy and Difference*, 355.

take place repeatedly, always prioritizing the plurality of normative opinions held by members of the society. They are to meet in rational discourse to produce consensus.⁹⁵

Thus, public morals are now to be held up to public debate, and revised according to “consensus”. This begs the question of what counts as real democratic “consensus”. As Iris Young points out, the definition of “consensus” assumes that deliberative democracy will somehow forge agreement on the issues even though it is including very radically differing viewpoints. In her words, “in contemporary pluralist societies we cannot assume that there are sufficient shared understandings to appeal to in many situations of conflict and solving collective problems”.⁹⁶ In other words, deliberative democrats seemingly believe that there are no viewpoints so radically different that they could not be brought together and persuaded to reach a consensus by deliberation. Because “consensus” is required for legitimacy by many deliberative democrats, the deliberative democracies would be prone to be hopeless deadlock by handfuls of recalcitrant people who will not be persuaded by “deliberation”.

In *Designing Democracy*, Cass Sunstein acknowledges the problem of the potential of small groups to paralyze democracy. In the first chapter of the book, entitled “Deliberative Trouble”, Sunstein discusses the phenomenon of “deliberative enclaves”. “Deliberative enclaves” are groups of like-minded people who meet together and share their similar social, moral, political, or economic views. Sunstein praises the deliberation that takes place *within* these groups, but fears that their members often only consort with each other and never with the outside society-at-large. This exclusivity tends to press

⁹⁵ See Joshua Cohen, “Procedure and Substance in Deliberative Democracy”.

⁹⁶ Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy”, 125.

them towards extreme views that become increasingly irreconcilable with other views and totally hostile to any attempt at compromise. Sunstein is unwilling to abolish these groups outright, but admits that they render any attempt at achieving total “consensus” problematic.⁹⁷

Some deliberative democrats escape this requirement of consensus by modifying their theories to include only “rational” deliberation.⁹⁸ As Young, Anne Phillips, and others have pointed out, this begs another question: which people and which discourses count as “rational”?⁹⁹ The deliberative democrats appear to be committing the same exclusionary error as the liberals here; they exclude people whose lifestyles and means of language are not considered “rational”, thus excluding everything from emotions to storytelling from public debate, and potentially severely limiting the kinds of ideas and people that can succeed therein. In such scenarios, oppression of minorities or simple suppression of opposing voices becomes far easier.¹⁰⁰

Thus, deliberative “consensus” can be achieved by simply silencing all those who may disagree with the prevailing majority opinions or who cannot express themselves articulately enough to be heard. In her study of the Connecticut small-town meeting and the radical self-help group, Jane Mansbridge, though herself a moderate deliberative democrat, reluctantly arrived at this same conclusion. Although both the Connecticut town-hall meeting and the self-help group’s meetings were carried out in deliberative

⁹⁷ Cass Sunstein, *Designing Democracy*, 13-48. He did, however, provide for some coercion against these groups; see discussion below.

⁹⁸ As quoted above, Joshua Cohen makes this qualification; throughout his essay in Benhabib’s book, he repeats that people often “*reasonably* disagree” on normative and empirical objectives (emphasis mine).

⁹⁹ See Iris Young, “Communication and the Other: “Beyond Deliberative Democracy” as well as *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 52-80.

¹⁰⁰ See Anne Phillips, “Dealing with Difference”, and Jean L. Cohen, “Democracy, Difference, and the Welfare State”, in Benhabib (ed.), *Democracy and Difference*.

fashion, they were still heavily influenced by societal factors, such as age, gender, income levels, area of residence, ethnicity, and education. These factors influenced who spoke, how often they spoke, how long they spoke, and what they spoke about.¹⁰¹ In general, middle-to-upper class white educated males still dominated discussions. Many of those who either spoke very seldom or failed to attend meetings altogether attributed their lack of participation to their paucity of education, or to their poverty, race, or sex. They claimed that they were either unqualified or uncomfortable speaking because of their assumed lack of skill, i.e. to their presumed lack of discursive rationality. Thus, Mansbridge admits that deliberative democracy's norms of "consensus" and "rational discourse" might actually serve to exclude minorities from being heard at all.¹⁰²

One wonders about the true potential of people to "rationally disagree".¹⁰³ After all, rationality is usually linked with "right" and "wrong" answers, unless it is defined in purely instrumental terms. In other words, mathematical reasoning and other "rational" reasoning insists upon the existence of a "correct" and many "incorrect" ways of thinking; otherwise, mathematics would be relatively true, and therefore meaningless, since "two plus two" could equal anything.¹⁰⁴ Such rationality would quickly curtail deliberative politics, because given all "rational" people, no one would ever "rationally", and thus "legitimately", disagree about anything. On the other hand, if rationality is merely instrumental instead, it can (and often has been) used to justify any practice.

¹⁰¹ For instance, did they raise controversial issues, or simply ask questions and give information?

¹⁰² This is one of the main reasons why her stance is far more moderate than that of Joshua Cohen, Seyla Benhabib, or Benjamin Barber; see Mansbridge, *Adversary Democracy*.

¹⁰³ This phrase is taken from Joshua Cohen, "Procedure and Substance in Deliberative Democracy", 96.

¹⁰⁴ Michael Foucault famously designated this reasoning as mere arbitrary power, but even most postmodernists and poststructuralists have been unwilling to follow his lead.

Thus, deliberative democratic theory is either forced to define rationality as having a “right” and “wrong”, which it has already denied, or it is forced to recognize that all rationality is relative to its user, which renders any meaningful discourse and deliberation problematic if not impossible.¹⁰⁵

Lacking “consensus”, is deliberative democratic authority really “legitimate”? In her contribution to *Democracy and Difference*, Mansbridge repeats and acknowledges that deliberative democracy will never persuade all people to adopt its views and follow its laws, and thus at least some coercion is necessary, as in any political system, to enforce stability and allegiance to the governing order. She admits that this coercion is highly problematic in a deliberative democracy precisely because of its lack of an objective basis for truth claims:

In conditions of lasting disagreement, there is *no unquestionably fair procedure for producing a decision to coerce*. Moreover, such coercion in existing democracies will be far from fair, and policies requiring coercion will often have features that are far from just.¹⁰⁶

In a deliberative democracy, in which “truth” depends on majority opinion or “consensus”, coercion is simply the many imposing its wishes on the few. The minority have no real reason to agree with the majority’s opinion or to see the coercion as anything but “might makes right”, “might” being “strength in numbers”.

Even Cass Sunstein, who celebrates the virtues of “deliberative enclaves”, still advocates the regulation of the Internet and other venues in which people can choose to

¹⁰⁵ On this dilemma, see Chantal Mouffe, “Democracy, Power, and the ‘Political’”, in Benhabib, *Democracy and Difference*, 245-256. Mathematics, while not often linked with politics, is often linked with rationality, which the Enlightenment thinkers, including Locke, emphasized as paramount in politics; see Introduction.

¹⁰⁶ Jane Mansbridge, “Using Power/Fighting Power: The Polity”, in *ibid*, 46-66; 46.

hear only those views they wish to hear; instead, they will be forced to communicate their ideals with others who hold widely differing beliefs, and every person will evaluate and reevaluate his/her ideals accordingly.¹⁰⁷ Because these people are being forced to interact with others against their wishes, this formula represents a form of coercion, and while it may increase the overall exchange of ideals, as Jane Mansbridge points out, it lacks theoretical democratic legitimacy.¹⁰⁸

On the other hand, if coercion-based “consensus” ideals are too distasteful for deliberative democrats to even consider, then their state becomes illegitimate and incapable of ruling itself. If, instead of stressing “rational consensus”, deliberative democrats urge “rational pluralism”, then society becomes totally relative.¹⁰⁹ Every single person’s opinion must be seen as “rational”, and accorded equal weight in discussion, no matter how ill-informed or prejudiced it really is. In such a society, forming coherent governmental, educational, moral, and legal standards becomes literally intellectually impossible; we are left with Cass Sunstein’s “incompletely theorized agreements” that no one but those in agreement, and possibly not even they, are bound to obey.¹¹⁰ These “agreements” are nothing but compromises and amalgamations from everyone’s respective opinions, and as such lack consistency and coherency. Thus, if

¹⁰⁷ This idea is very similar to those repeatedly expressed in a more radically participatory form by Benjamin Barber on repeated occasions.

¹⁰⁸ In *Slander: Liberal Lies About the American Right* (NY: Three Rivers Press, 2002), 117, 146-150, conservative pundit Ann Coulter also rightly points out the coercive dangers inherent in Sunstein’s plans to censor the Internet and other venues in order to enforce deliberation.

¹⁰⁹ Postmodern theorists in particular have insisted on such pluralism; see Bonnie Honig, “Difference, Dilemmas, and the Politics of Home”, in Benhabib, *Democracy and Difference*, 257-277.

¹¹⁰ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, NY, 1996), 35-61. Although these “agreements” may well reflect daily empirical reality for many people, they present an extremely flimsy basis for authority or legitimacy, since they are often self-contradictory and can be continually questioned by literally anyone.

deliberative democracy does not transform states into enforcers of “rational consent”, it would turn them into weak and vacillating entities that lack any strength at all to either protect themselves or their peoples.

By contrast, natural law requires neither “rationality” on the part of all people, nor “consensus” to exist and rule accordingly. Although it is discovered by reason, it is not *created* by reason, and it applies to all people, “consenting” or otherwise.¹¹¹ In fact, it openly confesses its own coercion, but points out that, when it is correctly applied, people are only coerced in order to prevent them from doing what is morally wrong, or from harming themselves or others. Finally, while it does coerce the people away from these things, thus bestowing responsibilities on them, it is also supposed to bestow on them the absolute rights to life and liberty.¹¹² Deliberative democracy cannot promise the protection or even the recognition of basic rights and freedoms, and its coercion can be accordingly far more menacing; while natural law possesses the potential for great harm if used unwisely or incorrectly, it does possess a single “correct” usage and that usage protects rights and liberties, and deliberative democracy lacks these “correct” answers to protect the rights of the people.¹¹³

Additionally, deliberative democracy is based on an extremely lofty view of human nature that bears little resemblance to harsh reality. As Locke himself expressed it, people are “the greater part no strict observers of equity and justice”; they are naturally

¹¹¹ In many versions, including Locke’s (*Second Treatise*, Chapter II), and St. Thomas Aquinas’ (*Summa Theologica*), it is also bestowed by revelation from God. Of course, this can lead to gross abuses and even totalitarianism; see Introduction.

¹¹² As Locke (*Second Treatise*, Chapters II, VII, and IX) points out, those who break their responsibilities under the natural law also lose these concurrent rights and freedoms.

¹¹³ See discussion below.

predisposed to harm each other.¹¹⁴ History, with its repeated instances of wars, civil wars, oppressions, genocides, and atrocities, bears witness to Locke's characterization. Given that people are so given to injustice, some deliberative democrats and postmodernists have insisted that morality is only relative and nonexistent. However, basic logic teaches us to separate normative intellectual and moral *beliefs* and *ideas* from the *actions* of the people who claim to adhere to these precepts.¹¹⁵ Even though people are not fundamentally good, then, it does not follow either that we should abandon the *attempt* to discover and follow universal moral precepts, or certainly that we should allow any people to govern themselves totally free from restraints. Deliberation might in fact help to make people better, but it must be controlled.¹¹⁶

Ultimately, deliberative democracy is not self-legitimizing.¹¹⁷ When seeking to legitimize it, its adherents usually do so in relation to the ends that it can bring. These "ends" are usually such concepts as "freedom", "justice", and "self-government".¹¹⁸ Thus, by its defenders' own tacit admission, deliberative democracy is only *instrumentally* useful or desirable, not justifiable as an *end-in-itself*.¹¹⁹ Lockean liberalism also sees democracy as instrumentally useful for achieving other ends, and

¹¹⁴ See Locke, *Second Treatise*, Chapter IX.

¹¹⁵ Karl Marx made this mistake in "On the Jewish Question" when he characterized Christians as "Jews" (meaning "greedy"), despite the fact that both testaments of the Bible clearly condemn such behavior; Marx was only really judging the people's *behavior*, not the validity or nature of Judeo-Christianity.

¹¹⁶ See Schneewind. As stated in the Introduction, the high stakes of natural law combine with the harsh reality of too many humans' prejudices to discourage routine mass attempts to decipher that law.

¹¹⁷ Across the deliberative democratic spectrum, scholars have repeatedly insisted that it is. Benjamin Barber has repeatedly claimed that democracy is self-legitimizing; even Cass Sunstein, whose writings are far less radical than Barber's, claims in *Designing Democracy* (6) that "self-rule is a good in itself".

¹¹⁸ Among others, see Joshua Cohen, "Procedure and Substance in Deliberative Democracy", 99-101, and Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy", in Benhabib (ed.), *Democracy and Difference*, 67-94; 69-74.

¹¹⁹ Benjamin Barber is an exception to this, but as previously mentioned, he represents the most radically participatory tendencies of deliberative democratic theory.

unlike deliberative democratic theory, it restrains democracy to avoid potential egregious excesses, by positing definite normative criteria. In the end, Amy Gutmann expressed the theoretical dilemma of deliberative democracy:

Defenders of deliberative democracy can offer only a moral and political argument (with the hope that it catches on). The argument, in brief, might be that the legitimate exercise of political authority requires justification to those who are bound by it, and decision-making by deliberation among free and equal citizens is the most defensible justification anyone has to offer for provisionally settling controversial issues.¹²⁰

The constant use of “provisional” in Gutmann’s essay is indicative of deliberative democracy’s theoretical weakness. It is a weak normative value by itself, and often must be seen as instrumental to other normative values. It either fails to govern entirely, or it creates a forced “rational consensus” that squashes minority voices.

This danger of forced consensus or near-anarchy is intensified by deliberative democracy’s moral ambivalence. As previously stated, deliberative democracy accepts no moral absolutes, natural, God-given, or otherwise, precisely because they were not decided on by democratic means, and neither are they subject to democratic debate. This has led deliberative democrats to literally claim that they and the democratic peoples within deliberative democracy are above the law; that is, they can make or abolish any laws or statutes that they wish, and thus the law is beholden to them, instead of the reverse.¹²¹ All laws and norms are thus negotiable to democratic debate. Constitutions and other written laws are infinitely negotiable and renegotiable, and their authoritative

¹²⁰ Gutmann, “Democracy, Philosophy, and Justification”, 344.

¹²¹ See Barber, “Foundationalism and Democracy”.

force is thus all but destroyed, since people can simply change them whenever they see fit.¹²²

Thus, deliberative democrats eviscerate morality by rendering it contingent on majority opinion. In effect, “right” and “wrong” become whatever the people say they become. Under such a system, it may be true that “anything goes” in moral terms; that is, all are entirely free to do *anything* they choose, with no firm moral obligations whatsoever. Plato thus likened democracy to an uninhibited man:

he doesn’t admit true speech or let it pass into the guardhouse, if someone says that there are some pleasures belonging to fine and good desires and some belonging to bad desires, and that the ones must be practiced and honored and the others checked and enslaved. Rather, he shakes his head and says that all are alike and must be honored on an equal basis.¹²³

Democracy thus knows no moral restraints on its own. Under deliberative democracy, it attempts both to function itself as a moral value, or to create its own morality.¹²⁴ By Plato’s reckoning, such democracy has no insight at all or interest in true morality. Unable to discern between “good” and “evil”, it ends by claiming that they are alike. When one compares this with Barber’s assertions regarding the antifoundationalism inherent in democracy and that any outcome reached by democratic means is “legitimate”, Plato’s concerns are justified.¹²⁵

¹²² As Whittington (*Constitutional Interpretation*, 47-60) points out, this was exactly the reason why the Framers of the United States Constitution insisted on having a written constitution, as opposed to an unwritten one such as the United Kingdom had (and still has).

¹²³ Plato, *Republic*, 561b-561c.

¹²⁴ As demonstrated above, deliberative democracy must by nature be a relative, not an absolute, value.

¹²⁵ In “Foundationalism and Democracy” (334), Barber declares that “the citizen wishes only to act in common in the face of conflict, not to know with certainty or to uphold ancient norms that claim to be foundational”. It should be pointed out that the Nazis and the Stalinists “acted in common in the face of conflict, not upholding ancient norms that claim to be foundational”.

Thus deprived of all moral constraints, deliberative democracy could literally remake law to radically redefine morality. As Aristotle expressed it,

Further, tyrannical institutions too are held to be characteristic of popular rule...tolerating everyone living as he wants. For the element assisting a regime of this sort will be considerable; living in a disorderly way is more pleasant to the many than living with moderation.¹²⁶

Since most people are not moral, they are not to be trusted with absolute power over their own governments. If they were, they would use these powers to perpetuate their own visions of moral relativism. Many of these visions would be highly immoral and even evil, but in the absence of fundamental notions of law and the good, it is questionable whether they could ever be curbed.¹²⁷

Even many deliberative democrats are uncomfortable with the potential such uncontrolled democracy could have to wreak havoc upon morality. Cass Sunstein decries what he refers to as the injustice of democratically-installed laws such as the bans on homosexual marriage.¹²⁸ He believes that the written constitution and the Supreme Court exist to curb such “parodies of democracy” and “promote democracy, *properly* understood”.¹²⁹ Without recognizing absolute morality, however, it is unclear what standard “properly” refers to. In the end, Sunstein is forced to tacitly acknowledge the existence of absolute standards of morality in order to avert gross injustice, even if such morality is placing limits on democratic deliberation:

¹²⁶ Aristotle, *Politics* (trans. Carnes Lord), Book 6, 1319b26-1319b32.

¹²⁷ One can look to Weimar Germany’s democratic dissent into Nazism as an example of this. While Barber and other deliberative democrats have dismissed this example as a “one-time” experience, even a cursory view of contemporary African states will yield similar examples of total moral collapse.

¹²⁸ At the time of this writing, twenty-six states had democratically enacted such bans.

¹²⁹ Cass Sunstein, *Designing Democracy*, 9 (emphasis added; note the clear potential here for coercion as discussed above).

*Nor is social consensus a consideration that outweighs everything else. Usually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree. A just constitution is more important than an agreed-upon constitution.*¹³⁰

Thus, even many deliberative democrats recognize the need for some objective standard of justice that must curb the democratic process and prevent catastrophe.

As for the deliberative democratic claim that there exists a moral obligation that dictates that majority opinion should possess unfettered claims to governance, Edmund Burke fitly replied:

It is said, that twenty-four millions ought to prevail over two hundred thousand. True; if the constitution of a kingdom is to be a problem of arithmetic. This sort of discourse does well enough with the lamp-post as its second: to men who *may* reason calmly, it is ridiculous. The will of the many, and their interest, must very often differ; and great will be the difference when they make an evil choice.¹³¹

Once again, while it is good, indeed imperative, for the people to be governed by their own consent, it is best for their own moral and physical well-being if they are not granted the *unfettered* power to do so. To assert that all men are equally able to govern is very morally dangerous when people such as Hitler, Stalin, and Nero are taken into consideration.

Absolute morality, as revealed in the natural law, is the best way to restrain the ambitions and atrocities of such monstrous men. If their ambitions are not curbed, then

¹³⁰ Ibid, 65 (emphasis added). For an argument that the natural law is a reliable path to justice, see Chapter 3, 121-127.

¹³¹ Burke, *Reflections on the Revolution in France*, 64 (italics in original). See also 75.

catastrophe may well result.¹³² Logically, this morality must be universal, applying to all men in all circumstances in all situations, because if it is not universal, then all morality becomes relative.¹³³ There can be no such thing as “relatively relative” morality; “relatively relative” morality is simply relative morality.¹³⁴ Either absolute natural law exists as a universal, or it has no existence at all, because it is by its very essence universal. If it does not exist, we are left unable to condemn *anything* as morally wrong, because then self-justifications cannot be refuted.¹³⁵ Because deliberative democracy by its very nature excludes or even destroys such recognition of absolute morality, it is quite morally dangerous as well as theoretically incoherent.¹³⁶

While deliberative democrats are divided on many issues, they are mostly united in their firm opposition to morality or natural-law-based “rights discourses”, because, as with natural and constitutional law, these discourses and claims place restrictions on the limits of acceptable material suitable for public debate.¹³⁷ Many assert that rights, like the Lockean natural law that bestows them, are not really existent or useful in reality:

¹³² Of course, even worse disaster ensues when a dictator justifies his/her actions by falsely referring to the natural law! Even St. Thomas Aquinas, who defended enormous powers for kings, insisted that the kings must *never* attempt to alter or violate the natural law; see Aquinas, *On Kingship*, Chapter Six.

¹³³ Both Locke and Kant (especially the latter) understood this. See Schneewind, and Honig, *Political Theory and the Displacement of Politics*, 18-41. Of course, human logic is itself fallible; see Introduction.

¹³⁴ Some scholars have rationalized historical atrocities by claiming the perpetrators were “good for their time”. Such explanations leave the way open for “I will do as I please, and let history judge me” claims. In his “Democratic Theory and Democratic Experience” (in Benhabib, *Democracy and Difference*, 336-339), Robert Dahl admits that democracy is forced by its very moral relativism to confine itself to areas of the world in which the people “want” it, because otherwise it might be “against their will” and thus “wrong”.

¹³⁵ Hence rationalizations like “I was only following orders”, and “It felt alright to me”.

¹³⁶ See Barber, “Foundationalism and Democracy”.

¹³⁷ For instance, Cass Sunstein asserts that such values can lead to a rigid and calcifying society” (*Designing Democracy*, 60). Many feminist deliberative democrats such as Iris Young still believe that “rights” can serve a utilitarian purpose.

What is a right, or even what a right is, cannot in itself determine political judgment. Rights themselves are both constantly being redefined and reinterpreted *and* dependent for their normative force on the engagement and commitment of an active citizen body.¹³⁸

Given what has been observed and stated before concerning human nature, such statements are quite unsettling. It appears that, at least to Barber, “rights” become whatever the majority of people in any given society agree that they are. Such ideas have led to practices such as African slavery and segregation, the forced relocation of indigenous peoples in the Americas, Africa, and Australia, National Socialism, and totalitarian communism, among other horrors. In all of these cases, the rights of the minority were defined by the majority as nonexistent, and the minorities themselves were dubbed “nonhuman” or “subhuman”.

Sensing the potential within deliberative democracy for such atrocities, some less radical deliberative democratic theorists have asserted that their posited deliberative societies would still uphold fundamental rights because they are so universally accepted that the people would approve them democratically, and continue to do so even though they were subject to continual popular vote. In this way, Joshua Cohen believes that deliberative democracy would agree on “the rights of the ancients”, that is, on the rights that are supposed to guarantee all people access to the democratic process. He supposes that the recognition of these “rights” will emerge naturally from democratic discourse. In fact, he seems almost annoyed by the liberal preoccupation with rights discourses, and believes that those who are concerned about the preservation of rights in deliberative democracy are either timid or exaggerating the danger they are in. However, he admits

¹³⁸ Barber, “Foundationalism and Democracy”, 334.

that deliberative democracy still faces a “dilemma” when dealing with the question of religious and other similar liberties. In the end, he simply insists that deliberative democracy must go “beyond procedures”.¹³⁹

Firstly, as discussed above, given humanity’s poor intrinsic moral nature and disposition, it is still doubtful whether these rights would ever emerge from democratic deliberation.¹⁴⁰ Secondly, even if these rights were once agreed upon by deliberative discussion, without a recognition of their absolute status, their future security of being actually observed is still in constant danger. As Carol Gould points out, protections such as the ones posited by Cohen and Benhabib are inadequate for rights:

Rights as having any status independent of a democratic procedure simply do not exist here.

*Rights are what are consensually taken to be rights, and if the consensus changes then what was once a right may no longer be.*¹⁴¹

She is justifiably dubious as to the real security of rights if their composition is left to shifting popular majorities. As for Benhabib’s similar claim to Cohen’s that the common people can be trusted to create and uphold “good” notions of rights, Gould replies: “*Either rights are contestable, or they are not*”.¹⁴² Even though deliberative democrats such as Cohen and Benhabib assert that rights would still be secure in deliberative

¹³⁹ Cohen, “Procedure and Substance in Deliberative Democracy”, 97-99. Note the similarities between Cohen’s argument and that of Kwame Anthony Appiah, as described in the Introduction to this thesis.

¹⁴⁰ While it is true that the Framers of the United States Constitution and many other constitutions did democratically agree to protect rights, as the deliberative democrats are continually emphasizing, times and attitudes change constantly; will rights still be protected unless they are recognized as absolute? See also Schneewind, 200-203.

¹⁴¹ Carol C. Gould, “Diversity and Democracy: Representing Differences”, in Benhabib (ed.), *Democracy and Difference*, 171-186; 178 (emphasis not in original). In particular, she is referring to Iris Young’s idea of “communicative democracy” (see Young, “Communication and the Other: Beyond Deliberative Democracy”), which strongly resembles a more inclusion-focused deliberative democracy.

¹⁴² Ibid (emphasis added).

democracy, Gould thus points out that they would in fact be quite insecure. When combined with deliberative democrats' aforementioned wish to render what is now seen as "private" up to public decision, the possibility of totalitarian "tyranny of the majority" becomes clearer, as no part of the lives of the people would ever be safe from the possibility of the loss of their rights and freedoms.¹⁴³

In fact, the classical writers saw democracy as only a single step removed from tyranny. In the *Republic*, Plato's Socrates famously categorized democracy as only a single "deviation" away from tyranny, and tyranny was acknowledged by "all" to be the worst form of government. In his view, democracies became tyrannies precisely because the people were gullible and greedy, and were prone to deceive themselves or be deceived by others into following a popular leader or into themselves tossing aside morals and rights.¹⁴⁴ Aristotle, who held very similar views on the subject, expressed them thusly:

...where the laws are without authority, there popular leaders arise. For the people become a monarch, from many combining into one-for the many have authority not as individuals but all together.... such a people, being a sort of monarch, seek to rule monarchially on account of their not being ruled by law, and become like a master: flatterers are held in honor, and this sort of [rule of] the people bears comparison with tyranny among the forms of monarchy.¹⁴⁵

¹⁴³ In George Orwell's *1984*, "Big Brother" (the state) tells all citizens what they can and cannot do and think, even in the privacy of their own bedrooms. The state maintains its totalitarian control by *abolishing privacy*. Orwell based his novel on the real example of the Stalinist Soviet Union, and the potential still exists for such horrific governmental experiences to be repeated (take, for example, Mobutu's Zaire, in which even unborn babies were held to be state property as members of the ruling MPR Party).

¹⁴⁴ Plato, *Republic*, 585a-569c.

¹⁴⁵ Aristotle, *Politics*, Book 4, 1292a9-1292a19.

Interestingly, both men lived in a real deliberative democracy, classical Athens, and even after witnessing it in action, both men rejected it decisively, precisely because of its moral ambiguity and its tendency to become oppressive and totalitarian. After all, deliberative democracy makes popular passion enough to create laws and punish offenders as it sees fit at any given time, with no help or recourse from arbitrary action. The people were, and still are, liable to tyrannize themselves and others unless they are curbed by recognizing and encoding the natural law.

Only by correctly recognizing rights as part of the universal natural law, and then translating them into fairly fixed written constitutions, can they be adequately and securely protected. While they may still not be observed, their existence in written legal and absolute moral form gives the ever-present potential that they *might* one day be observed.¹⁴⁶ Writers such as Benjamin Barber and Cass Sunstein insist that rights are meaningless unless they are enforced, but their potential can never be known until their very existence as absolute entities has been recognized. Once again, does the “uselessness” of rights talk really mean we should simply forget about rights? Barber answers this question affirmatively, but few are willing to follow him. Most are too fearful, and rightfully so, of the consequences that may well follow upon minorities when “rights” are dismissed as irrelevant. Thus, even among most deliberative democrats, there is a recognition that rights play a crucial role in ensuring justice and peace. The only surefire way to protect them, however, is to curb democracy’s potential ambitions on them. Once again, the extreme danger posed by a wrongful interpretation of the

¹⁴⁶ As Honig points out in *Political Theory and the Displacement of Politics* (29-34), Kant believed that liberal “respect for persons” could never be legitimately taken away.

natural or fundamental law should give pause to all who *interpret* it, let alone to any deliberative democrats who claim that democracy should *create* it.

Overall, while democracy is a good institutional value, it fails as a normative value. It fails because of its theoretical incompleteness; even while proclaiming “justice”, “rationality”, “consensus”, and “the people” as great values, it never adequately or permanently defines them for use or otherwise. It also fails to grasp the need for an absolute, universal natural law that is not subject to the momentary whims and passions of the people. Finally, it fails because it fails to protect the rights and liberties of the people adequately. Even many of its own adherents admit its flaws, and tacitly admit the need for moral norms, rights, and a better theoretical foundation.

Natural law, by contrast, is not self-contradictory, and is not theoretically incomplete. It posits normative values that are intrinsic to humanity itself, and that cannot ever be altered by human means to oppress minorities. Its morality is universal and absolute, not relative. It is accordingly applicable to all people in all situations, at all times.¹⁴⁷ It is not “cowardly” because it limits the political; instead, it is prudent, believing that the “political” can often be extremely dangerous to morality and to humanity, and this belief is borne out by history.¹⁴⁸ Finally, it ensures the rights and liberties of the people. While these rights may be ignored, they never cease to be.¹⁴⁹

While the above picture of the natural law is intended to demonstrate its

¹⁴⁷ While Schneewind argues that Locke’s stance on natural law was shaky at best, even he admits that, according to Locke, “although men commonly look to the law of opinion and the civil law in framing their moral views, *the true law of morality is the law God has laid down for us.*” (205, emphasis added).

¹⁴⁸ As Locke argued in the *Second Treatise* (Chapter XI), the government is *never* allowed to violate the natural law; the instant it does so, it ceases to be a legitimate government and is subject to revolution.

¹⁴⁹ See Aquinas, *Summa Theologica*, Question 94.

superiority over deliberative democracy in its potential to protect rights, it must never be forgotten that it can potentially prove extremely destructive to them. The natural law is not fallible, but humans certainly are. If the natural law is seen as deriving from reason, as Locke and Kant pictured it, then humans must interpret it or, according to the latter, perhaps even generate it via “pure reason”.¹⁵⁰ The potential certainly exists for misapplication of the natural law, with potentially catastrophic results. Even if the natural law is seen as bestowed by God, as Aquinas, Martin Luther King, Jr., and to an extent Locke again argued, humans still help to interpret God’s commands, and disaster can likewise result again. Crucially, these disasters *are not the result of the natural law, but are instead the results of humanity’s wrongful interpretations of it*.¹⁵¹ Nevertheless, deliberative democrats from Jane Mansbridge to Benjamin Barber are fearful of the potential for grave danger inherent in the natural law, and seek to open up fundamental interpreting or creating processes to the people in order to seek greater accountability. While their goals are laudable and they serve to highlight the largest problems with natural law theories, the previous discussion has demonstrated that in the end, they still fail to provide the level of protections generated by natural law theories.

In the next chapter, we will apply these ideas regarding deliberative democracy and natural law to the United States Constitution, and discuss the arguments concerning the democratic nature of that governing document.

¹⁵⁰ Of course, this calls the very “pre-human” nature of Kant’s and Finnis’ natural law theories into question! On the other hand, Aquinas, Locke, and King all grounded their views on divinely *given* law, and allowed humans no role at *all* in generating the most fundamental law.

¹⁵¹ We know this because any misinterpretation brings harm to humans and to morality; for more detail, see the Conclusion to this thesis, 135-136.

Chapter 2

The last chapter has demonstrated the negative implications of taking democracy itself as the primary normative value for which society should be striving above all others; these dangers were demonstrated to be many and manifest. It also discussed how the deliberative democrats highlighted the main two difficulties with natural law theories. Considerations such as these figured prominently in the minds of the Framers of the United States Constitution as they designed their new governing document in 1787. Holding that democracy itself was *not* the prime value for which men should strive, they established a governing order that would allow for some input from the people while restraining them from the more radical and dangerous ideals and projects they might otherwise attempt. In so doing, the Framers took the classical concept of democracy (“rule by the people”), and redefined it to serve the needs of a mostly Lockean liberal order. As demonstrated in the last chapter, Plato and Aristotle had equated democracy with amoral anarchical rule of the mob. The Framers envisioned democracy as the rule of the popular will via politics *constrained within the bounds of a written constitutional order*.¹⁵² This order was formed very carefully, with elaborate measures being undertaken to best ensure the most reasoned, rather than impassioned, constitutional convention possible, since the Framers recognized the great danger of wrongly interpreting the natural law.¹⁵³

Accordingly, this chapter will demonstrate how the American framers “redefined” democracy. It will begin by reexamining the deliberative democratic theory of Benjamin

¹⁵² For this thesis’ definition of “politics”, see Introduction.

¹⁵³ Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (NY: Alfred A. Knopf, 1996).

Barber that was discussed in the preceding chapter, and will proceed to examine a “progressive” theory of democracy advanced by Charles Beard and other left-leaning scholars of the last century. Both of these conceptions of a “truly” democratic order have been used by their authors to heavily critique the American Framers and their written constitution. In contrast to these conceptions of democracy, this chapter will argue that the Framers intended the United States’ democracy to be a “constitutional” democracy. “Constitutional” democracy would operate within the boundaries of a single written governing constitution and its order. Democratic politics would still operate, but it would operate with certain restrictions placed upon it by the *a priori* written document. This chapter will conclude by examining the contrasting claims concerning the exact nature of the American constitutional order, utilizing the arguments of two of the leading schools of “constitutional democratic” thought: the “Princeton” school, focusing on the essential durability of the constitutional order, and the “constitutional change” school, which emphasizes the essential transmutability of the American constitutional order. Finally, and briefly, the implications of these arguments will be examined in light of the natural law perspective discussed in the last chapter, with the bulk of the argument reserved for the third chapter.

Charles Beard’s Conception: “Progressive” Democracy

Charles Beard was a well-known Progressive historian whose work spanned much of the early twentieth century. Like most Progressives, he strongly felt that the American constitution and its governing order were inherently undemocratic. Influenced by

Marxist ideals of economically-based democracy, Beard wondered how any order could ever declare itself truly “democratic” unless all of its citizens truly possessed an equal say in the government. After all, a millionaire and a pauper have the same formal legal rights, but is the American system really “democratic” if the rich man can buy influence with legislators or judges, or even use his millions to place himself or his favorites in office, while by contrast, the poor man is in reality without any means of influence or voice?¹⁵⁴ Thus, for Charles Beard, true “democracy” required economic equality; economic equality was a necessary precondition for any meaningful “democracy” to exist, for “the people” could not rule if the economic “elites” still opposed and blocked their wishes.

In accordance with these beliefs stressing the necessity of economic equality to establish “true” democracy, Beard famously declared that the Framers of the Constitution were in no way seeking to establish democracy; rather than promoting the rule of the people, they were merely seeking ways to protect their own landed property interests at communal expense.¹⁵⁵ He argued that the Framers, seeing the potentially devastating consequences of mob rule and, worse, a possible uprising by the common people against their socioeconomic “betters”, formed and pushed the Constitution largely to keep them subdued, and therefore from truly governing themselves, thus frustrating meaningful democratic transition.¹⁵⁶ For example, the new document forbade the states from

¹⁵⁴ Of course, contemporary advocates of campaign finance reform laws advance many of these same arguments.

¹⁵⁵ In *The Supreme Court and the Constitution* (NY: Paisley Press, 1938), Beard famously referred to the Framers as being dominated in their constitution-making by “conservative interests” (76). See also 74-112.

¹⁵⁶ Shays’ Rebellion in Massachusetts is the most often-cited of the common people’s unrest during the economic depression which followed the American Revolutionary War. See Beard, *The Economic Interpretation of the Constitution* (online; 1913), 58-61.

relieving war debtors or from interfering with the rights of contract.¹⁵⁷ Thus, Beard saw the 1787 U.S. Constitution as an attempt by the propertied classes to forestall a possible second revolution which might deprive them of their estates.¹⁵⁸ In Beard's own words, democracy was "something rather to be dreaded than encouraged."¹⁵⁹

In his book, *The Presence of the Past*, Sheldon Wolin agrees with Beard's argument, repeatedly stressing the existing inequities in the United States when the Constitution was drafted.¹⁶⁰ He even claims that the American Revolution was a "feudal revolution" against the "rationality" represented by the British government. With Beard, he concludes by arguing that the later 1789 Constitution simultaneously served to codify these inequities and to bypass them in order to create an "undemocratic" state.¹⁶¹ Thus, the Framers in 1789 were really solidifying the existing power structure and suppressing individuality, regional autonomy, and meaningful democracy.¹⁶²

Bruce Ackerman observes that much of Beard's complaint centers around the Marxist political idea of perpetual "progressive" revolutions whose ultimate end would be socialism; more immediately, the idea holds that any "truly" Lockean liberal

¹⁵⁷ U.S. Constitution, Article I, Section 10. See also *ibid*, 168-183.

¹⁵⁸ This fear was well-founded; towards the end of the Revolutionary War, the Continental Army nearly mutinied and overthrew the authority of the Congress because the soldiers were so angry over that body's seeming indifference towards them. See also Charles A. Beard, *The Republic* (NY: The Viking Press, 1943), 277-301.

¹⁵⁹ *Ibid*, 30.

¹⁶⁰ Sheldon Wolin, *The Presence of the Past* (Baltimore: Johns Hopkins, 1989). Wolin was classified in the previous chapter as a deliberative democrat.

¹⁶¹ *Ibid*, 120-150.

¹⁶² This last claim will be discussed below. It is unclear, however, if *any* existing order would meet Wolin's criteria for a "democracy", as he claims (*ibid*, 149) that "the idea of a democratic state is a contradiction in terms".

governing order must allow for constant revolution and re-revolution.¹⁶³ Since “true” democracy” in this conception requires economic equality, there can be no democracy in the existing world without a massive redistribution of property, and thus socialism must precede democracy. Coincident with this idea is that of an “inevitable” revolutionary path. In semi-Marxist fashion, such theory holds that revolutions and re-revolutions are bound by fate and history to keep occurring until they reach their inevitable end result, a radical transformation of all aspects of society.

In their writings, Theda Skocpol and Bruce Ackerman provide a strong critique of this “perpetual revolution” theory. They point out that any political order seeks to ensure its own survival, and that an openly self-destructive order is an absurd concept. Very early in the course of the new American republic under the new constitution, when faced with a similar question regarding the constitution, James Madison insisted that the document cannot be legitimately interpreted in such a way so as to destroy the document itself. Madison, a well-known spokesman for a limited federal government, nonetheless thus admitted the absurdity of writing a meaningless constitution whose only purpose was to be overthrown.¹⁶⁴ Ackerman further protests that the later French Revolution was seen by Beard and many others as a “model” revolution precisely because it was so radical, destroying the old order nearly entirely, wiping out the old monarchy and social system,

¹⁶³ Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press of Harvard University, 1991), 165-229. It accordingly emphasizes Locke’s allowance for revolution when the government no longer protected the rights of the people.

¹⁶⁴ James Madison, “Speech to the House of Representatives”, in Brest, Levinson, Balkin, and Amar (eds.), *Processes of Constitutional Decisionmaking: Cases and Materials* (NY: Aspen Law & Business, 2000), 8-11.

and even persecuting religion!¹⁶⁵ As Ackerman observes, states can in fact have democracy without perpetual revolution, and certainly without the very violent French-style radical revolution that he plausibly claims Beard so admired.¹⁶⁶ As will be discussed in more detail, Ackerman believes that the American political system, despite the presence of a written constitutional document, still contains institutions flexible enough to allow them and the people to deal with emerging issues without destroying the constitutional order. Thus, for Ackerman, the American Framers thus softened the risk of revolution by accounting for the possibility of “constitutional change”.¹⁶⁷

Thus, in sum, Charles Beard believed that any real “democracy” by definition included economic equality. No meaningful democracy could exist without a prior or a newly-rectified system of equal wealth and political power. Economic wealth translated into political power; accordingly, the more wealth a person possessed, the greater his/her political power and influence over the governing order. Thus, under the American system, it has always been the wealthy elites, who established the whole system to maintain themselves in power, who have always in reality been in true control of the government; the United States has always been an oligarchy of the wealthy, not a “democracy”.

¹⁶⁵ Ackerman does not name these “others”; he only remarks, “Even critics who have done the most to liberate us from particular mistakes remain entranced by Beard’s basic picture.” (223).

¹⁶⁶ As the discussions in the Introduction and Chapter 1 of this thesis have demonstrated, this restraint on “perpetual revolution” is especially poignant when one considers the great dangers posed by an unjust order cloaking itself behind a flawed interpretation of the natural law.

¹⁶⁷ Bruce Ackerman, *We the People: Foundations*, 200-229. See also discussion below.

Benjamin Barber's Conception: Deliberative Democracy

As discussed at length in the previous chapter, Benjamin Barber represents the most radical of deliberative democrats, but his views have been representative of the final normative implications of their arguments. Barber and other deliberative democrats such as Jane Mansbridge have insisted that “democracy” is, in and of itself, a normative value worth supporting. In fact, Barber and some others venture to claim that democracy itself should be the *primary* value that humanity and its governing orders should be striving toward.¹⁶⁸ After all, since the Enlightenment-based values of democracy assume that people are rational and capable of making their own informed judgments, does it not necessarily follow that they should make all of their own decisions? Additionally, since reason is assumed by the deliberative democrats to be advancing over time and via discussion, societies should support or even force their people to discuss politics and normative issues amongst themselves in order to reach reasoned consensus. By giving all power to the reason of the people, these scholars claim to be “truly” restoring democracy to the people, fully realizing “rule by the people”.¹⁶⁹

Since the people are entitled to form their own value judgments and to make their own decisions regarding their societies’ actions, it logically follows that written constitutions such as the United States Constitution can serve no legitimate or useful place in Barber’s “strong democracy”. Specifically, because they encode values and

¹⁶⁸ In Walter Murphy’s words, “*Democracy* has become as much a theological as a political term. To many people around the world, it has come to be seen as all that is good in governance”; see Walter F. Murphy, *Constitutional Democracy* (Baltimore: Johns Hopkins University, 2007), 4. For a partial listing of these authors, see Chapter 1.

¹⁶⁹ See Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California, 1982), and Chapter 1 of this thesis.

institutions for future generations, the United States Constitution and all other written constitutions are inherently undemocratic. After all, they constrain the processes of deliberation by limiting the range of acceptable topics and values that can be legitimately discussed, and thus place limits on the immediate application of “popular sovereignty”.¹⁷⁰ Thus, Barber would open up democratic debate even to patently dangerous and illiberal ideals simply to maintain a “stronger democracy”.¹⁷¹ Because any written constitution excludes such ideas, and thus limits the number of choices that the people can discuss to the “acceptable” ones, in Barber’s opinion, such documents are inherently undemocratic, and accordingly are undesirable, because for Barber, democracy itself is the primary value. In the end, Barber holds that it would even be left up to the people themselves to decide what “democracy” is; “rule by the people” would literally be recognized as an absolute form of everyday government.

Just as conceptions of natural law have no place in Barber’s “strong democracy”, neither do established written constitutional orders. Instead, Barber’s “democracy” would take the form of extreme republicanism, with all citizens being forced to participate in politics via discussion and very frequent voting. After all, according to Barber, one is only “truly free”, i.e. self-governing, at the moment of voting, and the primary responsibility of humanity is to establish democracy, or the rule *of* the people *by* the people. Barber’s direct deliberative democracy is thus radically different from the existing American constitutional order, but differs markedly from Beard’s economic democracy in not emphasizing material equality. As will be discussed below, it also

¹⁷⁰ Benjamin Barber, *Strong Democracy*, and Chapter 1 of this thesis.

¹⁷¹ See also Benjamin Barber, in Benhabib (ed.) *Democracy and Difference*.

differs markedly from the emphasis on constitutional stability as postulated by the “Princeton school”.

Edmund Burke’s Conception: Very Limited Democracy

Terrified by the coinciding spectacle of radical, perpetual revolution in France and by the idea of either radical economic equality or direct democracy, British eighteenth-century parliamentarian Edmund Burke wrote his *Reflections on the Revolution in France* to protest these developments.¹⁷² In this work, he set forth his own definition of “democracy” largely by denouncing the revolutionary French order, thus defining “democracy” negatively. Burke’s views echoed those of the classical Greek philosophers examined in the last chapter; he feared rather than loved democracy as a normative value, dismissing it as amoral “mob-rule”.¹⁷³ In Burke’s conception, “democracy” was itself an optional ruling order, not essential to “good” government. If “democracy” was to exist *safely*, it must be tightly restricted. Much of the government should be left undemocratic and accessible only via tradition, merit, or both. The range of topics that the people could legitimately discuss was likewise to be confined to a very much circumscribed set of limited issues, and the people were *never* to be trusted to directly rule themselves. Accordingly, Burke asserted that the people should place near-absolute trust in their representatives, who presumably would better know how to act on policies than the common people would.

¹⁷² Although Barber nor Beard had yet been born, the events and ideologies Burke was protesting were quite similar to the definitions of democracy that they would advocate.

¹⁷³ See Plato, *Republic* (trans. Alan Bloom), Aristotle, *Politics* (trans. Carnes Lord), and the discussion in this thesis, Chapter 1.

In the *Reflections*, Burke turned specifically to the frightening specter of “democratic” mob rule, as was being dramatically demonstrated in radical, revolutionary France in 1789. In that work, he pointed out the rampant abuses of power by the radically democratic post-Revolution governments; these included the killing of many churchmen and some businessmen who expressed doubts about the new political order or who were identified, however indirectly, with the old order.¹⁷⁴ By contrast, he approved of the American Revolution precisely because it maintained moral order and stability, involving controlled gradual change and placing some restraints on the will of the people without crushing their liberty. While Burke was not a supporter of many of Locke’s views, including the idea of an extensive natural law, his ideas still found credence with many of the Framers, expressing as they did the “worst-case scenario” of mob rule and flagrant rights violations by a democratic majority.¹⁷⁵ As Burke expressed it,

It is said, that twenty-four millions ought to prevail over two hundred thousand. True; if the constitution of a kingdom is to be a problem of arithmetic. This sort of discourse does well enough with the lamp-post as its second: to men who *may* reason calmly, it is ridiculous. The will of the many, and their interest, must very often differ; and great will be the difference when they make an evil choice.¹⁷⁶

To Burke and to the Framers, the *quality* of a democracy was much more important than the *quantity* of its voters; it was far better to have a more responsible, better-informed,

¹⁷⁴ The revolutionaries went beyond confiscation of the Catholic Church’s lands; many priests and preachers of the Catholic faith and other Christian denominations were killed, and there were motions to ban all religious imagery, to close all churches, and even to kill all ministers as supporters of the old monarchy and thus “enemies of democracy”. These events are disturbingly foreboding of similar, later events in Nazi Germany and the Communist Bloc. See Burke, *Reflections*, 103-105.

¹⁷⁵ Burke lists many of these violations in *ibid*, 49-52. Hamilton had famously advocated installing George Washington as the first king of the United States, claiming that such a move would increase stability.

¹⁷⁶ Burke, *Reflections*, 64 (*italics in original*). See also 75.

albeit smaller, electorate than a vast ill-informed voting populace who only voted because they could.¹⁷⁷

Constitutional Democracy: A General Definition

Despite the very real dangers that unrestrained democracy possesses, few scholars or leaders have been willing to embrace Edmund Burke's extremely hostile view of rule by the people. Rather than totally removing control of the government from the people, such "constitutional democrats" have emphasized the need for neither total democracy nor extremely limited democracy, but rather for *somewhat* controlled democracy. They have chosen in most cases to achieve this restraint via written constitutions.¹⁷⁸ These written constitutions then serve to establish the general boundaries or framework within which politics takes place. Thus, the new political order is a "constitutional" democracy. As Walter Murphy, defines it, "constitutionalism" is

a special kind of political creed, one whose principal tenet is as follows: Although government is necessary to a life that is truly human, every exercise of governmental power should be subject to important *substantive* limitations and obligations.¹⁷⁹

Thus, constitutionalism by its very nature involves a concept of a government possessing limited powers over the people, and a "constitutional democracy" places limits on the reach of democratic processes. The American Framers established such a governing order in 1787, setting up a government in which the people would have a democratic

¹⁷⁷ For a listing of some of the Framers and their similar views on the subject, see Beard, *An Economic Interpretation*, 193-203.

¹⁷⁸ Of course, the United Kingdom stands as the major exception, relying on an "unwritten constitution" based largely on tradition, to curb potential democratic excesses. This approach has been the exception rather than the rule; see Murphy, 68-146.

¹⁷⁹ Ibid, 6 (*italics in original*).

voice, but a voice whose extreme limits were dictated by the governing document. Although it is important to note that “constitutions” may or may not be single written documents, they must be seen as possessing at least *some* binding power on future decision-making to be considered true “constitutions”.

Thus, by definition, “constitutional” democracy is opposed to the radical direct democracy advocated by Benjamin Barber. As Walter Murphy expresses it:

Constitutionalism agrees with versions of democratic theory that hold respect for equal human dignity, defined to include a wide range of available liberty, to be the fundamental value of any just society. All constitutionalists, however, agree that there are some things that government cannot do, no matter how exactly it follows procedures specified by a constitutional text and/or a larger constitutional order, even if those actions mirror the deliberate judgment of a charismatic leader, a benevolent junta, or the overwhelming majority of voters...it coexists uneasily with its usual bed partner, representative democracy, which would impose few substantive limitations on the people’s freely chosen representatives.¹⁸⁰

Because some absolute limits are placed on the people’s choices, “constitutional” democracy is far more restrained than Barber’s “strong” democracy, in which the people may continually be debating, deciding, and reconsidering potentially *every* act of government.

What justifies this restraint on the people’s right to make its own decisions? After all, as was seen above, “constitutional” democracy agrees that people possess inherent value and should be seen as autonomous and morally responsible, capable of making their own decisions. The Framers held such Enlightenment-based views of rational man,

¹⁸⁰ Ibid, 6-7 (emphasis added). It is important to note that Murphy equates “representative democracy” with this thesis’ previous definition of “direct” or “deliberative”, Barber-style democracy.

and respected that the people had the right to make their own political and moral choices for themselves.¹⁸¹ However, they shared Edmund Burke's fears that, while reasoned deliberation would in the end produce just outcomes in disputes, that the populace was so susceptible to being swept away by the "desires of the moment" that they would inevitably wreck their own democracy if they were given the political power to do so.¹⁸² A popular majority would sweep into power and utilize its popular mandate to oppress all dissenting opinions. Thus, in the Framers' minds, unrestrained democracy was inherently self-destructive.

Hubert J. Storing argued that the Framers limited American direct popular participation not to *destroy* democracy, as Beard and Barber had insinuated, but instead in order to "save" it from itself.¹⁸³ As Storing pointed out, many of the Anti-Federalists opposed the drafting and ratification of a single governing document by citing arguments very similar to those of Barber and other contemporary deliberative democrats. Like Barber, the Anti-Federalists argued that democracy was a good in and of itself, and that the primary goal of a government was to ensure popular sovereignty in the literal sense.¹⁸⁴ Foreshadowing *Strong Democracy*, the Anti-Federalists insisted on a government in which most of the power would be held by local assemblies in which all voting citizens would be forced to participate. Overall, these thinkers saw the new

¹⁸¹ For more on Enlightenment rationality, see Immanuel Kant, "An Answer Concerning the Question: What is Enlightenment?"

¹⁸² Unrestrained direct democracy would thus suffer from the fatal risk of coercion discussed in Chapter 1.

¹⁸³ His works are collected in Joseph M. Bessette (ed.), *Toward a More Perfect Union: The Collected Writings of Hubert J. Storing* (Washington, DC: American Enterprise Institute, 1995).

¹⁸⁴ Ibid, 37-76. Here Storing rendered an especially invaluable service by dissolving many of the popular illusions of the Anti-Federalists as simplistic parochial "hicks" who were "behind the times", and whose works were thus either unwise or unintelligent, and therefore not worth reading. Probably very few of the Anti-Federalists would have embraced the whole deliberative democratic argument (see discussion above).

constitution very similarly to Barber, as a threat to both democracy and the development of “democratic” citizens.

Storing disagreed with both Barber and the Anti-Federalists. While the Federalist arguments in favor of the Constitution were far from perfect, Storing believed they were superior to those advanced by the Anti-Federalists.¹⁸⁵ In this, he was joined by Harvey C. Mansfield, Jr.¹⁸⁶ Both writers insisted that the Framers were not simplistic idealists attempting to impose a lofty version of Lockean liberalism upon an unwilling society. Instead, these men were trained, observant political scientists attempting to put Locke’s ideals into real-world practice. They agreed with Locke in regarding human nature as *potentially* evil, and calculated that it was safer to assume that men in power would be ambitious and greedy than otherwise.¹⁸⁷

Walter Murphy examines this question as well, and concludes that any “real” democracy must in fact exclude certain nondemocratic viewpoints from the realm of which views are considered “acceptable” if it is to endure long. After all, many groups ranging from neo-Nazis to ultra-orthodox Marxists have put forth ideals that would eviscerate democratic institutions and practices if ever carried into fruition. For Murphy, constitutional democracy represents the freedom of rational humans under the law, just as it did for Locke and Immanuel Kant, whose writings inspired the Framers.¹⁸⁸ It is a liberal “constitutional democratic” government’s responsibility to maintain this

¹⁸⁵ In Storing’s words (68), the Anti-Federalists “possessed the weaker argument”.

¹⁸⁶ Harvey J. Mansfield, Jr., *America’s Constitutional Soul* (Baltimore: Johns Hopkins University, 1991).

¹⁸⁷ Ibid, 128-134, and Bessette (ed.), 77-107. Locke is often misconstrued as presenting a “lofty” view of human nature. In fact, he recognized that humans have the potential for great evil, especially in mass numbers (see discussion in previous chapter).

¹⁸⁸ Of course, Locke and Kant focused on the natural law, which should *not be seen* as identical to the U.S. or any other particular written constitution; this topic will be discussed in more detail below.

intellectual and political freedom. When people begin circulating illiberal, democracy-destroying ideas, they are advocating “slavery”.¹⁸⁹ As Locke had recognized long ago, the natural law states that liberty has its limits; it *cannot* be used to sell its possessor into slavery.¹⁹⁰ Thus, the natural law forbids any person to choose to sell himself/herself into slavery to another. As Murphy insists, illiberal ideals advocate precisely this kind of a return to slavery that Locke argued so strenuously against, and as such could and should be legitimately prohibited by a “constitutional democracy”. If “constitutional democracies” allow flagrantly undemocratic messages to be openly proclaimed, they are allowing their people to surrender their natural rationality and sowing the seeds of their own destruction; they would accordingly be self-negating as soon as an illiberal ideology’s supporters swept to power.¹⁹¹ Murphy’s analysis thus points out that “constitutional democracy” not only *can* legitimately prevent certain opinions from being heard, and that it may well in fact become *imperative* for it to do so in order to protect the rationality of its people.

Because it claims that democracy may exist even in conditions of profound economic inequality, “constitutional democracy” violates Charles Beard’s stated preconditions for “democracy”. As Murphy’s characters demonstrate in his *Constitutional Democracy*, constitutional democrats believe that economics takes a position of only secondary importance to politics; the people must be made politically and formally free as a *first* priority, with the distribution of relative wealth left for future

¹⁸⁹ Murphy, 514. While the American Framers tolerated (and many practiced) racial slavery, as Storing Bessette, ed., 131-205) pointed out, they never advocated slavery on moral grounds.

¹⁹⁰ Locke, Chapters IV-V.

¹⁹¹ Of course, the best-known example of this is Weimar Germany (1932-1933).

problem-solvers, if at all. Indeed, some constitutional democrats believe that the government has very little legitimate business at all in welfare, claiming that welfare only increases the risk of undermining “real” democracy by making the people dependent on the government’s whims for their daily sustenance.¹⁹² Regardless, all constitutional democrats are united in believing that, while democracy may be *hampered* by severe economic inequity, that it is *possible* for democracy to coexist at least in some form even with such inequity.

Given its restrictions on the voice of the people and upon redistribution of income, how is “constitutional democracy” different from Burke’s concept of radically restricted democracy? Firstly, unlike Burke’s *Reflections*, written constitutions such as the U.S. Constitution are not opposed to “rights talk”; they mention definite rights and privileges possessed by their peoples.¹⁹³ Secondly, “constitutional democracy” does not necessarily equate popular control of the government with mob rule, as Burke did. Finally, and most importantly, “constitutional democracy” is willing to cede a final ultimate decision-making power in the people that Burke was never willing to do. This last factor is most clearly seen in the constitutional democrats’ positions regarding law

¹⁹² Harvey J. Mansfield, Jr. is one such scholar, as can be seen in Mansfield, 84-97. He also claims that such programs create the false impression that the government exists to provide the “wants” of the people rather than their *needs*. Sheldon Wolin (*The Presence of the Past*, 151-179) possessed similar reservations regarding welfare, but, as previously noted, he objected to any state at all as inherently “undemocratic”.

¹⁹³ While it is true that the original American document did not possess a “bill of rights”, one was added shortly, with the express purposes both of political expediency (for the Federalists) and of creating *legally enforceable* written rights. See Bessette (ed.), 108-128. Although Stephen M. Griffin laments this action as rendering the Constitution “irrelevant” to most Americans, he admits that it did take place. See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University, 1991), 9-31. As discussed below, some Federalists such as Madison and Hamilton believed that the structure of the new American government removed the need for a bill of rights.

and politics.¹⁹⁴ As previously mentioned, echoing the classical Greek philosophers, Burke's *Reflections* repeatedly praised tradition and authority while denigrating politics and political discussions as somehow “dirty” or “filthy”. By contrast, without investing in politics the extreme virtues that deliberative democrats are wont to do, constitutional democrats still believe that politics is quite valuable for both practical and normative reasons. After all, politics allows for input from all (eligible) people from all sectors and income levels in society, and thus allows “democracy”, “rule by the people”, and *popular* sovereignty. In fact, the people have so much power that they can even alter their constitution under set conditions.

The American System

The Framers of the United States Constitution shared the “constitutional democratic” position; that democracy is valuable, but that it is inherently self-destructive if seen as an end in itself or if it is uncontrolled. To control democracy and thus “save it from itself”, the Framers relied on the establishment of constitutional institutions. The Framers were far too profoundly distrustful of popular passions to routinely entrust such matters to the mass of people, so they established a system designed to be largely self-correcting. Each branch in the American system is accordingly designed to act as a check on the powers and actions of the others to prevent them from exceeding their mandates and threatening tyranny, either of a single official or a legislature. Accordingly, the Constitution provides some definite answers to certain questions.¹⁹⁵

¹⁹⁴ For a definition of “politics”, see the Introduction to this thesis.

¹⁹⁵ The “forbidden powers” and any overt attempt by any of the branches to openly abolish another branch of the government qualify as examples; see James Madison, *The Federalist* 47-51.

In the case of most constitutional questions, however, the written document does not provide any specific answers, especially on such issues as the separation of powers, and the Framers intentionally left such matters to ordinary politics.¹⁹⁶ Rather than providing a single all-encompassing system of minute detail for the new government, then, the 1787 Constitution legally and morally establishes the political and normative background upon which politics will be practiced. The system requires politics to keep it functioning, but the document places absolute limits upon certain types of politics, thus implicitly distinguishing the mass of “healthy” politics, stressing accommodation, deliberation, and compromise, from the minority of violent or overtly harmful politics that emphasize denigration of human rights or complete overthrow of the constitutional order. The Framers wanted their system to endure, because they felt that only a stable governmental order could ever reliably protect rights. Accordingly, the American constitutional order allows the people to create minor laws via politics, but reserves the right to create or amend fundamental constitutions or values to the order and to natural law.¹⁹⁷

In their writings, Neal Devins and Louis Fisher, and Keith Whittington emphasize this interplay of law and politics in American history.¹⁹⁸ In these writings, they stress that the American constitutional order allows for and even emphasizes that certain matters of the law must be settled not by the judicial branch, but *by the people*. For

¹⁹⁶ Thus, Murphy (487) describes the document as requiring “much (and frequent) interpretation”.

¹⁹⁷ Hence Madison’s claim in *Federalist* 40 that revolutionary experiences such as that of 1775-1783 were “too dangerous” to be “oft repeated” because of their potentially destabilizing effects that could prove threatening to both the law and the rights of the people.

¹⁹⁸ Neal Devins and Louis Fisher, *The Democratic Constitution* (NY: Oxford University Press, 2004), and Keith Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999).

instance, Devins and Fisher examine a wide variety of topics ranging from the war-making power to privacy rights and conclude that the prevailing orthodox view of American law as being “judge-made” or “court-made” is false. Likewise, Keith Whittington examines four case studies including two impeachment proceedings. In all cases, the elected branches of government, Congress and the presidency, solved the pressing matters of law, not the judiciary. In particular, the impeachment procedure was decided in 1804-1805 to be a fundamentally *political*, not *legal*, matter, and it was decided to be so by the *Congress*, not the *courts*, and it has remained primarily a political matter ever since. In 1804, Associate Justice Samuel P. Chase was impeached by the new Republican House of Representatives for alleged misuse of his office to aid the Federalist Party. Certainly, politics had been quite vigorous in the 1800 election that awarded the House to the Republicans, and despite Chase’s motions to the contrary, it was decided that he and other officials could in fact be impeached and removed from office for political offenses that were not technically *illegal* ones. In the end, Chase was narrowly acquitted by the Senate, but the impeachment attempt helps to demonstrate the vigorous nature of American politics, permeating even those offices popular opinion often wrongly considers “above politics”. At the same time, however, it also reveals that Murphy’s ideal of constitutional restraint possesses great applicability to the American case, as even the Republican House and Justice Chase were obligated to conduct their affairs and cases within the absolute overall boundaries set by the governing document. The people’s will was restrained, not thwarted; Chase was not simply dismissed as

“against the people”, but instead was dealt with according to the (admittedly vague) rules set down by the U.S. Constitution.¹⁹⁹

Indeed, in every major dispute in American constitutional history, it has been the people and their elected representatives, not the appointed legal scholars and justices of the court systems, that have decided the outcome. In those cases in which the judicial branch’s decisions counteract those of the majority of the people, there are inevitably cries of “judicial tyranny” and judicial “usurpation of power”, and such claims have resonated since the time of Thomas Jefferson. Constitutional democrats emphasize that the American political *culture*, created and/or protected by the Constitution, maintains popular suspicion of appointed over elected officials and encourages all Americans to play at least *some* role in interpreting the Constitution.²⁰⁰ In sum, “constitutional democracy” is in some ways a self-explanatory term. It is a political order whose boundaries and powers are limited by a usually written governing constitution and its accompanying political order. Within the confines of this order, “democracy” takes place; the people are free to hold or advocate any opinions and to vote as they please provided their opinions do not represent a small range of illiberal and anti-democratic values. Thus, this order is both *constitutional*, constraining the government and the people with a constitutional order, and is also a *democracy*, for within the general backgrounds and frameworks of the constitutional order, the people are free to rule themselves and hold their own value systems. In the contemporary world, the United

¹⁹⁹ For more detail on this particular case, see Whittington, *Constitutional Construction*, 20-71.

²⁰⁰ In Murphy’s (463) words, “ ‘Just about everybody’ is an appropriate response to the question *who interprets*” (*italics in original*). See also Murphy, 463-471.

States is usually held up as the prime example of a constitutional democracy, possessing a written constitution with an accompanying limited, but still quite lively, democracy.²⁰¹

Of course, the American “constitutional democracy” has faced criticism, mainly from leftists such as Beard, Barber, and Wolin, but also from some rightists such as Harvey Mansfield, Jr. Beard, Barber, and Wolin argue that the American system, while claiming to operate and depend on “politics”, is in fact “apolitical” because its rules either favor the wealthy or stifle “true dissent”, or both. In Wolin’s words, by reducing “Pluribus” (multiple opinions) to “Unum” (the single basic framework discussed above), the American order has stifled “true democracy” by limiting the range of “acceptable” topics and views that the people can legally hold and advocate.²⁰²

Simultaneously, Mansfield argues that the contemporary American system is far *too* democratic, and that the Framers would never have approved such mass democracy as exists in the United States today. He claims that the Framers were “expert political scientists” who carefully established an excellent system that was designed largely to limit politics to the “best” few. Thus, the Framers greatest error was possibly that they failed to foresee the rise of plebiscite politics.²⁰³

Constitutional democrats, however, hold that the American system is largely and safely democratic because its democracy is *curbed*, but not *controlled*, by the limits of the written Constitution. In response to deliberative democrats such as Barber and Wolin, for example, Ackerman carefully categorizes the American system as “dualistic”, possessing

²⁰¹ Indeed, the characters in Murphy’s hypothetical constitutional drafting sessions (36-323) use the United States as their prime example of a “constitutional democracy”.

²⁰² Wolin, *The Presence of the Past*, 120-136.

²⁰³ Mansfield, 115-134.

meaningful inputs by both the people *and* their officials, and agrees with natural law theorists and with the Framers that deliberative “monistic” democracy is impractical at best and frightening at worst.²⁰⁴ Additionally, because this democracy has persisted despite changes in class structure and differences in the distribution of income, Beard’s thesis is likewise untenable.²⁰⁵ In response to Mansfield, constitutional democrats are divided, differing according to their particular empirical interpretations of the Constitution and American history, as discussed below.

Under the American system, thus, how much power do the people possess relative to their written constitution *in empirical reality*? This empirical question has served to divide constitutional democrats into two broadly defined “schools” regarding the nature of the U.S. Constitution. One “school”, the Princeton School, holds that the written constitution is still quite immediately relevant to contemporary American life and governance. The other “school”, which this chapter labels the “constitutional change” school, claims that the written American Constitution is not still literally applicable to contemporary American life and governance as originally understood, because the mores and values have changed so much that the original text is either rendered superfluous or is given entirely unintended meanings. In particular, it holds that the Constitution’s Article V, which purports to prescribe a set amendment process for the document, has proven to have been the exception rather than the rule in American history, as many if not most changes to the Constitution have occurred outside its formal boundaries, and have

²⁰⁴ Ackerman, *We the People: Foundations*, 3-33; see also Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (NY: Alfred A. Knopf, 1996), 35-56, and the previous chapter of this thesis.

²⁰⁵ Ackerman, *We The People: Foundations*, 201-228.

been no less binding on American law and life because of them. These differences of opinion have influenced the exact nature of the views each school holds concerning the definition of “democracy”; while each view continues to express many or most of the overall “constitutional democratic” views explained above, they differ in emphasizing either the “constitutional” or the “democratic” portions of them.

The “Princeton School”

The “Princeton School” holds more closely to the “*constitutional*” portion of “constitutional democratic” definition of democracy explained above. This school emphasizes that the U.S. Constitution of 1787 is still the “supreme law of the land”. Indeed, Keith Whittington opens his *Constitutional Construction* by insisting that “(T)he Constitution is a governing document. It defines and constrains the way government operates and politics is conducted in the United States.”²⁰⁶ Under this conception, the United States’ written constitution is still just as relevant over two centuries later as it was in 1787. Its meanings can be deduced with reasonable certainty, and they are legally binding above all subsequent acts of the people or the legislatures, excluding formal amendments.²⁰⁷ As for formal amendments, only they are awarded the status of “equal footing” with the Constitution.

In response to “constitutional change” scholars’ claims that the U.S. Constitution has been so often interpreted, reinterpreted, amended, and informally changed that the present governing order cannot be deduced from the words in the written 1787 Constitution, the “Princeton school”, distinguishes different “intensities” of constitutional

²⁰⁶ Whittington, *Constitutional Construction*, 1.

²⁰⁷ For some historical problems with this approach, see Jack Rakove, *Original Meanings*.

change. As Whittington has phrased it, constitutional “creation” lies at one end of a spectrum; at the other end lies “policymaking”. Constitutional “creation” literally involves supplanting an existing political order and replacing it with a new order, while “policymaking” involves the ordinary everyday minor procedures and practices of governing. “Constitutional construction” and “constitutional interpretation” lie between these extremes, and they include formal and informal amendments as well as judicial decisions between them.²⁰⁸ Here the “Princeton” school distinguishes Whittington’s “creation” from “construction” or “interpretation”. “Creation” does *not*, in fact, take place in response to judicial decisions, whenever a new constitutional amendment is adopted, or even when new mores and values assume power without altering the written document or institutions. In all cases, then, short of complete overthrow of the system, the written constitution still stands, “interpreted” and “constructed” differently at different times by different people, but it *still stands*.²⁰⁹

Therefore, according to the Princeton school, since the U.S. possesses a single written constitution that has been accepted and continues to propagate its political and moral tenets to the people, the American constitutional order is relatively stable. In his “Constitution and Revolution”, for example, Jeffrey Tulis argues that the United States Constitution has been sufficiently consolidated in the “hearts and minds” of the people that the United States need not fear the prospect of violent revolution to overthrow the existing constitutional order. After all, despite more minor political differences, most Americans continue to believe in the *system of government* established by the

²⁰⁸ Whittington, *Constitutional Construction*, 3-19.

²⁰⁹ In Whittington’s words (ibid, 9), “interpretation need not give way to construction, but construction will be necessary to elaborate fully the *governing Constitution*” (emphasis added).

Constitution, and few actually seriously advocate total overthrow of the whole system with all of its accompanying values. Accordingly, Tulis concludes, the U.S. Constitution successfully precludes the possibility of real “revolution” because its values are both widely held and sufficiently flexible to be interpreted and reinterpreted to cope with changing mores and political circumstances. In all cases, however, the governing document and its accompanying order will remain viable and relevant.²¹⁰

Furthermore, as Walter Murphy and others have argued, the United States possesses an additional advantage in constitutional stability because it possesses what he refers to as a “complete” written constitution. The empirical fact of the 1787 document’s written existence makes it far easier to refer to and draw authority from than unwritten constitutions based on tradition such as that of the United Kingdom. Even though, in his words, the Constitution’s “capacious language demands much (and frequent) interpretation”,²¹¹ the American document and other written constitutions still possess definite and definitive power not always found in unwritten or in “partially written” constitutions.²¹²

As seen by such scholars, the American constitutional order is seen as being vibrant, but constrained within certain absolute limits by the written Constitution. For example, Whittington demonstrates how the Nullification Crisis of the early 1830s revealed this essential democracy with absolute limits. Andrew Jackson had become president pledging to limit government and expressed some sympathy for the economic

²¹⁰ Jeffrey Tulis, “Constitution and Revolution”, in Sotirios Barber and David George (eds.), *Constitutional Democracy* (Princeton, NJ: Princeton University, 2001), 115-127.

²¹¹ Murphy, 487.

²¹² Ibid, 482-489.

position of the Southerners in the dispute. However, once the Southerners began threatening the very constitutional order by openly defying the national government, he promised to use force if necessary to compel their compliance.²¹³ Thus, Southerners were free to express their opinions and press for peaceful change in their favor, but they were not permitted to defy the legitimacy of the Constitution or the national government. Had he written specifically about this incident, Benjamin Barber would likely have complained that the 1787 generation of Southerners had, albeit illegitimately, conceded their rights to the federal government, but it did not follow that the Southerners of the 1830s had done likewise. He accordingly would have called for a new constitutional convention to settle the problem.²¹⁴ In the end, the South did back down, and the constitutional crisis did not turn violent. Thus, the “Princeton” school’s argument that the American constitutional order has been basically stable in spite of crises seems justified.

In summary, the “Princeton” school and other affiliate scholars emphasize the essential durability of the written United States Constitution. Even though it was drafted in 1787, they claim that it still holds the ultimate legal authority over two hundred years later. It has been and will be interpreted, reinterpreted, added to, and subtracted from, but the *basic groundwork* of the document and its constitutional order remain largely unaltered and intact. This order is both sturdy enough and flexible enough on its minor elements to change to meet new demands, exigencies, and mores, but its core values remain safe from complete overthrow via revolution, unlike its predecessor. Finally, the

²¹³ For a summary, see Whittington, *Constitutional Construction*, 72-112.

²¹⁴ Of course, he called for periodic constitutional conventions anyway; see Barber, *Strong Democracy*, 308.

mere existence of a single *written* constitution provides that document with a singular authority not easily found in constitutions that are partially or wholly unwritten. All in all, according to the Princeton school, the American constitutional order is inherently stable and relatively unchanging, and resists the influence of the people without destroying their voice, thus emphasizing the “constitutional” aspect of “constitutional democracy”.

The “Constitutional Change” School

In contrast to the “Princeton” school, which emphasizes the relative stability and durability of the written American Constitution and its accompanying order as these were envisioned in 1787, the “constitutional change” school focuses on the drastic ways in which the current American political order *differs* from that drafted in 1787. These scholars point out the huge apparent changes and expansions in American government and mores since that period, and ponder how the written document’s mores and values could ever mean the same things to contemporary Americans as they did to the Framers. In particular, “constitutional change” scholars focus on the various and multiple “crises” in the course of American political and constitutional history, and stress that the political order that emerged from the crises differed drastically from the order that prevailed before the crises forced it to change itself in order to survive. In particular, they hold that the document’s built-in change mechanism, Article V, which deals with the formal amendment procedure, is itself inadequate to explain these tremendous changes. Finally, and most fundamentally, “constitutional change” scholars emphasize the “democratic” portion of “constitutional democracy”; to them, the written constitution is not entirely

irrelevant, but its importance is near-miniscule compared with the vast influence of the people on their government and its underlying values.

In this view, written constitutions such as the U.S. Constitution face the inherent weakness of being bound to a particular time, place, and moral outlook. Their drafters were only human beings, not gods, and as such did not possess either absolute wisdom or the ability to foretell the future. Because of this, their documents and written words will always become somewhat archaic as time passes, because the meanings of words change, and the values of the people change as well. Additionally, and more drastically, unforeseen disasters, crises, and threats will inevitably arise in the physical world to threaten the constitution, its order, and its people, and any viable written constitution must be flexible enough in language to meet these developments. Any governing order that fails to fundamentally change itself to account for these aspects of the empirical world will find itself becoming increasingly irrelevant in the mores and the lives of the people. Since neither the American Framers nor the drafters of any other written constitution possessed superhuman abilities, their works must of necessity be imperfect, and it would be almost impossible for them to be up to the task in *every* conceivable situation.²¹⁵

In author Stephen Griffin's view, the U.S. Constitution has accordingly undergone several "crises", almost from the year it was formally ratified. Griffin believes, as did several of the Federalists, that the Bill of Rights' attempt to perpetually

²¹⁵ See Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University, 1991), 11-26.

enshrine certain values as *legally* enforceable necessarily ensured that the written amended U.S. Constitution would have to be ignored in the course of American history.²¹⁶ After all, over the centuries, a *huge* number of things have occurred or arisen that the Framers either could not or did not foresee, ranging from the onset of political party politics to the major national and international crises such as the Civil War and the Great Depression. In the end, Griffin even argues that the original meanings of the written constitution have become irrelevant, because it has had to be “reinterpreted” so many times to cope with the crises, and because its very “legal” nature ensured that it would bear little resemblance or relevance to everyday political life and practice. Additionally, the simple progression of the English language has made many words and usages of words automatically antiquated and obsolete.²¹⁷

In fact, Griffin claims that each new generation of Americans is involved in “rewriting” the Constitution, because its meanings must “change with the times” if its words are to remain relevant; that is, if they are to have meaning for new generations. While advocates of the empirical view of American written constitutional stability concede that all Americans, not only the judiciaries, must constantly interpret and reinterpret their Constitution, Griffin thus expands this argument far beyond those of most of these scholars. Though he agrees with them that the basic constitutional order remains essentially intact in the United States, Griffin insists that the written document itself is not, in fact, still applicable today unless it is interpreted to fit contemporary

²¹⁶ Ibid, 26-31.

²¹⁷ Ibid, 9-31. On page 165, Griffin writes that “constitutional history is more of an ongoing argument than a set of received understandings.” Of course, the argument concerning the changing meaning and epistemology of language is quite interesting; consider the many changes in the English Bible to keep abreast of an evolving language.

empirical *realities*, and that these empirical realities are so far different from those of 1787 as to make such application highly difficult and even improbable. In particular, given this view of the Constitution, Griffin fears that Americans are actually *losing* their capacity to engage in constitutional politics, which, as discussed above, was seen by the Framers themselves as necessary to its continued maintenance.²¹⁸

In his *We the People: Foundations*, Bruce Ackerman focuses on Griffin's basic argument. Unlike Griffin, though, Ackerman does not believe that *every* new generation "rewrites" the Constitution. In Ackerman's view, American "democracy" is defined as "dualist", or as inclusive of both Lockean-style liberal ideals and more Rousseauian-style republican ideals. According to Ackerman, then, Americans exist in an order that is neither as restrictive as purely "rights-based" discourse advocates would like, nor is it wholly communitarian, as Edmund Burke, with all his emphasis on tradition and national history, might have advocated. In the other hand, it does not represent the "monist" democracy of direct democrats such as Benjamin Barber. Instead of any of these, it stresses a conception of democracy that is both open to the people and at the same time is often closed to them via direct means. While this conception accords closely with the general "constitutional democrat" sentiment outlined in the above discussion, Ackerman, like Griffin, believes that the American people have ultimate control over the meanings and even sometimes the words of the Constitution.²¹⁹

Given such "political" control over the meanings of the Constitution, Ackerman claims that in the American context that purely legal approaches to the Constitutional text

²¹⁸ Ibid, 192-211.

²¹⁹ Ackerman, *We the People*, 3-33, 295-322.

or subsequent constitutional history is bound to be incomplete. Again, in the end, the people themselves control the meanings of their written constitution, and they will change them to suit their desires once they feel strongly enough about a particular issue or a certain need arises. At no time does a “certain need arise” more strongly than during periods of immense constitutional, legal, moral, or political crisis. During such periods, Ackerman claims, people will be inclined to forget formal constitutional and legal “niceties” and undertake a wide variety of measures to protect themselves and/or their nation from potential ruin or violent revolution.²²⁰ Thus, the continuance and even existence of the U.S. Constitution are and have been the result of acts that were technically illegal.²²¹

For scholars of “constitutional change”, what counts as law is always determined by politics.²²² In writing about the U.S. Constitution, for example, these writers stress the huge number of compromises that entered into the actual written text, and remain there to this day.²²³ Indeed, they claim, very few if any empirically enacted, written laws of *any* political order are *ever* grounded purely in normative conceptions of right and wrong.²²⁴ While the “Princeton” school agrees that it is never *entirely* possible to separate law from politics, they believe it to be possible insofar as the written Constitution has outlived

²²⁰ One of the most commonly-cited examples of this was the 1933 New Deal legislation, which drastically, and perhaps unconstitutionally in the formal sense, expanded the role of the federal government into the people’s everyday lives; perhaps the same could be said of the 2001 and 2006 PATRIOT Act.

²²¹ Ibid, 34-57. On the particular claim regarding the illegality of the original drafting and ratification of the 1787 Constitution, Jack Rakove has explicitly disputed Ackerman, claiming that the proceedings were technically legal. While this may be true, Rakove is forced to admit that purely pragmatic concerns weighed heavily on the Framers, as evinced in their physical actions and the first thirty *Federalist Papers*.

²²² For a definition of “politics”, see the Introduction to this thesis.

²²³ For a detailed accounting of some of the many compromises, see Rakove.

²²⁴ Of course, James Madison (*The Federalist*, 47-51) surrendered attempts to induce public “virtue” with the above-discussed institutional “conflict of ambition against ambition”. Thus, normative concerns, although they should never be entirely dismissed, are not immediately relevant to such constitutional questions.

particular political debates and partisan disputes to stand at least marginally above politics. Neither school views politics as “filthy” as Burke did, but “constitutional change” scholars embrace the above-discussed “illegality” and political-centeredness of the contents of what counts as law.²²⁵ Accordingly, they argue that the people have agreed, ignoring the details and sometimes even the letter of the written law when the need arises.²²⁶

These acts of the people in emergency situations are almost always technically illegal, but they serve the immediate practical need, and as such are undertaken and then subsequently legitimized to the people and to future generations after the fact, and after the crisis has passed. Ackerman accordingly believes that the United States has really had three constitutional orders, each inaugurated largely illegally and justified after-the-facts, and certainly outside the formal amendment structures of Article V.²²⁷ The first spanned the period from the document’s drafting in 1787 to the Civil War, the second lasted from the Civil War to the New Deal in the 1930s, and the third and final constitutional order has been in place since the New Deal.²²⁸ Each of these periods was begun by a great crisis that shook the existing constitutional order apart. The “new constitutions” were “written” to deal with these crises. In so doing, they have irrevocably altered the

²²⁵ While Burke did not specifically use the word “filthy”, he clearly regarded mass politics as a practice best avoided if possible; see discussion above.

²²⁶ See Ackerman, *We the People*, 34-57.

²²⁷ He never claims, however, that the entire Constitution was completely overthrown.

²²⁸ Ibid, 58-130. Ackerman’s work is extremely ambiguous and perhaps even contradictory on this point; while he claims in *We the People* that the first “constitutional period” started in 1787, his *Failure of the Founding Fathers* (Cambridge, MA: Belknap Press of Harvard, 2005) insists (245-266) that an entirely new constitutional order was established in 1800-1809 by the Republicans! He emphasizes that the maneuvering that placed the Republicans in power in the first place was itself of highly questionable legality as well; see discussion below.

American political and constitutional landscape, generally expanding the federal government's power at the expense of the states, and forever altered the nation itself.²²⁹

Although Griffin alludes to the 1800 “crisis”, Bruce Ackerman examines it in much greater detail, and reveals that the new U.S. Constitution did in fact come very close to outright collapse. In so doing, he illustrates the main argument put forward by scholars of “constitutional change”: that the U.S. Constitution and its “constitutional democracy” are best understood as practical responses by the Framers to pressing political issues, and that these responses were driven by the realities of democracy and politics, not by legalistic considerations about the exact meaning of the Constitution's written text. He begins by demonstrating again the crucial emphasis upon the fallibility and period-centered contingency of the Framers, as less than a decade passed from 1787 until a major development arose which they could never have foreseen, namely the rise of political-party-dominated partisan politics.²³⁰

As Ackerman records, in the *Federalist Papers*, James Madison had warned his countrymen of the deadly danger posed by “faction”.²³¹ Griffin, Ackerman, and other scholars take Madison to have been meaning “political parties” when he denounced “factions”. Indeed, Ackerman provides convincing evidence that the Framers never intended their new constitutional order to allow for the existence of parties.²³² When parties developed around John Adams and Thomas Jefferson, and their respective ideas,

²²⁹ Ackerman devotes a great deal of space to his discussion of the struggles justices face when “reconciling” the different ideals of the three periods in order to maintain some constitutional continuity; this strongly implies that he believes the ideals to be radically different from each other.

²³⁰ See Griffin, 61-68, and Bruce Ackerman, *The Failure of the Founding Fathers*, all.

²³¹ *Federalist* 10.

²³² Ackerman, *Failure of the Founding Fathers*, 16-35.

the electoral system the Framers so carelessly devised was transformed into a potentially fatal liability, as the presidential race of 1800 ended in a potentially government-shattering runoff vote, since no candidate won a clear majority. The people's wishes were threatened, and some contemplated revolt from the Union. In the end, the crisis was very narrowly averted by the sound decisions and statesmanship of both Adams and Jefferson.²³³

Once in power, Ackerman argues, Jefferson's Republican Party set about recreating the constitutional order to suit its particular philosophy. It forever changed the governmental institutions, drafting a Twelfth Amendment to legitimize the general electoral processes it wanted. It purged much of the judiciary of Federalists, thus ridding the nation of their "backward" philosophy. In the end, it established a more open and egalitarian order, an order that lasted until the next "constitutional founding" in the 1860s. In fact, Ackerman argues, the new Republican political order was so different from the old Federalist-dominated one of the 1790s that the United States should be viewed as having gained a completely new constitution in 1800. The extreme "crisis" had ended in a new constitutional order, an order that prized democracy above meritocracy and politics above law, thus firmly seating "democracy" ahead of the supposedly nonpartisan "constitution".²³⁴

Overall, Ackerman claims that the American governing *system* never failed; it was the "*Founding Fathers*" who failed. They failed for a variety of reasons, but as discussed above, they failed largely because they did not and could not foresee even ten

²³³ Ibid, 36-108.

²³⁴ Ibid, 111-223.

years into the future. While Ackerman heavily criticizes them for this, he applauds the American constitutional system for being flexible enough to accommodate the flagrant illegality that in his view it *had* to tolerate in order to survive in a fundamentally “illegal” politics-dominated world. As the discussion above illustrates, the checks and balances of interests, institutions, and powers in the American system has greatly aided its overall stability.²³⁵

In *America’s Constitutional Soul*, Harvey Mansfield, Jr. reluctantly agrees with the “constitutional change” school that the present-day American Constitution is *not* the same as the 1787 document, but he is bitterly critical of the changes. In his opinion, the American constitutional order of 1787 was *supposed* to be perpetual, but the Progressive Movement of the early twentieth century and the radical movements of the 1960s and early 1970s had forever radically altered the Constitution. Whereas before, the American political order had emphasized the “constitutional” portion of “constitutional democracy”, the contemporary order, with its focus on minorities, radical individualism, and populist appeals, emphasizes the “democratic” portion.²³⁶ In Mansfield’s opinion, this change was deplorable, since the Framers had been “expert political scientists” who had studied human behavior and constructed a near-ideal political order. Thus, while Mansfield agrees with Griffin and Ackerman that the contemporary U.S. Constitution

²³⁵ In the 1800 crisis, this was most dramatically demonstrated by Vice President Thomas Jefferson’s acceptance of Georgia’s electoral votes, even though these were, to say the least, presented in a highly irregular fashion, thus preventing a possible civil war over the thwarted voice of the people. See *Ibid*, 55-76.

²³⁶ He is thus very critical not only of leftist movements, but also of the populist appeals made by Ronald Reagan and other conservatives in the 1980s and hereafter; see Mansfield, 21-69.

represents “constitutional change” rather than stability, as the “Princeton school” claims, that this change has been largely harmful to the nation itself.²³⁷

Thus, overall, the “constitutional change” school holds that the written U.S. Constitution of 1787 as it was originally understood is not as binding in 2007. Indeed, they argue that it was not totally binding as soon as its drafting generation, who presumably knew at least something about which they were writing, died off, and possibly even before then, as the 1800 case demonstrates. Despite the shortcomings of written constitutions, “constitutional change” scholars such as Griffin and Ackerman still argue that the overall American “constitutional democratic” *system* is likely to remain intact. Indeed, the American system in their view is far more “democratic” than “constitutional”, because at any time the *people* must define, redefine, and live by the Constitution, a constitution that is truly “theirs” precisely because they have all played and still play crucial roles interpreting it.

Conclusion: Implications of the Definitions of “Democracy”

Each school discussed in the above discourse has contributed valuable insights to any empirical understanding of the United States Constitution of 1787. While some may be closer to empirical reality than others, all contain compelling scholarship and provocative views that help to explain their longevities, and the longevity of the ongoing debate itself. Firstly, while Charles Beard’s “economic democracy” empirical theory has been widely discredited because of its claim that the 1787 events represented little more than an attempt by the propertied elites to maintain their power and prevent a “true” or “social” revolution, he was correct to notice that economic circumstances often play very

²³⁷ Ibid, 73-219.

large roles in determining politics. Since Rakove, Ackerman, and others make the political nature of constitution-making very clear, it logically follows that economic conditions played a role, albeit not a *decisive role*, in the 1787 convention and the order it created.

While, as was noted in Chapter 1, Benjamin Barber's and Sheldon Wolin's deliberative democratic theories are normatively quite dangerous, they also help scholars to better understand the U.S. Constitution. Specifically, by emphasizing the multiple points at which the Framers decided to *limit* immediate popular participation in government, the deliberative democrats serve to highlight these undemocratic features. Whatever position other scholars take as to the normative desirability or practicality of these features, the deliberative democrats' efforts illuminate and provoke debate on them. In so doing, they too contribute to the ongoing discussion.

Finally, the two schools of "constitutional democrats", who between them possess the strongest empirical support from American history, have served to carefully and thoroughly emphasize both the legal and the political aspects of the Constitution. Truly, the written document is still quite relevant, even as understood in 1787, as least to many. When seen from a natural law perspective, the idea of a fixed written constitution seems appealing, especially when such documents offer legal protection of the rights originally granted by the natural law. The danger with such perspectives is the temptation to identify the written constitutions as *being themselves the natural law*. While it is certainly true that the natural law is capable of great harm if it is misinterpreted, it is still supposed to stand outside politics and thus serve as a criterion for evaluating the justice

of the political order in question. If it is seen as identical to the constitution, it loses this vital function in the eyes of the people, and furthermore, can readily be used to support absolutist tyranny, for if anything the constitution says is morality itself on par with the natural law, then there can be no recourse for those who are unjustly oppressed.

At the same time, the remarkable flexibility and often apparent illegality of the American constitutional order has provided strong empirical support to the “constitutional change” school. Upon first glance, it would seem that this school’s insistence on a malleable constitution is anathema to the absolutist prescriptions of the natural law. In fact, once again, no human constitution is ever the equal of the natural law; if such documents violate that law, it becomes humanity’s *duty* to change them. As St. Thomas Aquinas said,

Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Proverbs viii. 15: ‘By me kings reign, and lawgivers decree just things.’ ...

On the other hand, laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above- either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws, because, as Augustine says, “A law that is not just seems to be no law at all” ...

Secondly, laws may be unjust through being opposed to the divine good(.)²³⁸

²³⁸ Aquinas, *Summa Theologica*, I-II, Question 96, Fourth Article.

Thus, the natural law may in fact depend on the malleability of constitutions in order to be increasingly better recognized and implemented by humanity.

Within empirical research, the debate between scholars of constitutional stability and constitutional change has served to illustrate the extent of what Murphy referred to as the document's inherent "capacious language". Whatever the exact nature of the United States Constitution or any other human-created constitution, the natural law will never match it exactly, and it is humanity's obligation to make these documents' precepts conform as closely as possible to the natural law. This process will never end, due to human fallibility and the natural law's infallibility, but this does not mean that it should not continue.

Thus, each of these definitions of democracy, and its occasional manifestations in physical reality, bears normative implications as well. They also raise questions regarding the nature and source of true "justice", and it is to these considerations that we now turn.

Chapter 3

Introduction: Constitutions, Laws, Democracy, and Justice

The preceding chapter reviewed various views concerning the nature, intended or real, of the United States constitutional order, and emphasized the differing definitions raised by legal theorists concerning how “democracy” should be best defined. It will be recalled that while advocates of Barberian deliberative democracy utilized the absolute participation of the common people in lawmaking, economically-centered democrats focused on the distribution of wealth in society, and constitutional democrats of both the “Princeton” and the “constitutional change” schools, while disagreeing on the specific nature of the American constitutional regime, agreed that it was at heart a democratic one at least broadly constrained by a constitution. As discussed, they differ markedly on how “democratic” or “constitutional” the American governing order really is. The question of “justice” affects each of these perspectives, as presumably “justice”, whether political, social, economic, or some combination thereof, is what any governing order should strive to achieve.

Clearly from the natural law perspective discussed in Chapter 1, some of the visions of constitutionalism discussed in Chapter 2 are more desirable than others. Liberal democracy’s relationship to Barber has already been explained in detail. As for the others, the natural law is by its very nature prepolitical and not reliant on the distribution of material resources; this renders Beard’s Marxist-inspired economic criticism of American constitutionalism a moot point from the natural law perspective.²³⁹

²³⁹ Some deliberative democrats raise the issue of “basic (usually economic) opportunity” in discussing democratic justice, as discussed in detail below.

Clearly, the notion of a single absolute law that binds all people at all times is most comfortable with the written constitutional devices embraced normatively and empirically by the “constitutional democrats” such as Walter Murphy and Bruce Ackerman.

Crucially, however, the natural law *must never be confused with the written constitution of the United States or of any other nation-state or political organization on Earth.*²⁴⁰ This is so for a wide variety of reasons. Firstly, while written constitutions are difficult to formally amend, they can still in fact be formally amended, while humans in can never alter the natural law using any method.²⁴¹ Secondly, as the “constitutional change” scholars discussed in the last chapter have demonstrated, written constitutions often do not seem to include within them all governmental and societal activities within a nation-state. “New Deals” and other laws and institutions are often passed and created without ever changing the written words on the written documents themselves. Finally, and most fundamentally, written constitutions are created by humans via deliberation and politics, while the theoretical natural law never was, and never will be.

All written constitutions attempt, at least formally, to create or maintain a “just” sociopolitical order. While a natural law perspective admires these attempts to enshrine certain rights and responsibilities by encoding them in written laws, it finds the idea that these ideals were generated via politics disquieting. It is true of course that humans had

²⁴⁰ Plato’s Socrates made this grave mistake in the *Crito*, and paid the price with his life. The issue of whether the natural law is identical with certain religious creeds is a related and highly important issue, but one which cannot be adequately addressed in this chapter or even this thesis.

²⁴¹ Although Aquinas held that people can alter the natural law by changing their own natures, i.e. habits and customs, it must be remembered that he claimed the existence of an absolute “divine”, or “eternal” law above the natural law, and this latter law was certainly not alterable by humans. Thus, for Aquinas, the end result is the same; absolute, universal morality. See Aquinas, *Summa Theologica*, I-II, Question 97.

to either receive the natural law via divine revelation or discover it through their reason, and then, either way, to write it down, but advocates of the natural law strongly feel that, because of the extreme danger of wrongfully interpreting the natural law via human legislation, human agency in lawmaking should be as minimal as possible unless reasoned deliberation is taking place. Even this “reasoned deliberation” is restricted against patently and obviously immoral or amoral thoughts and ideas. Once a written constitution has been drafted, natural law advocates stress two factors concerning it. Firstly, the written constitution must pass the same test applied to “ordinary” laws, namely that of whether it conforms to the preexistent natural law, and secondly, if it does conform to the natural law, then for safety’s sake, it should be changed or amended in fundamental ways absolutely as little as possible. After all, since the natural law never changes, any written law that conforms to it should not markedly change either. It does not follow, though, that procedures and structures of governments will never change; quite the contrary, they may change drastically to meet the dictates of the natural law. It is the moral legislation and guarantees of rights in written constitutions that are to resist change, not the details of governance itself. Thus, natural law posits a definition of “justice” as “conforming to the dictates of the natural law”, and claims that all constitutions should be debated, approved or disapproved, amended, and if necessary, even discarded, with these dictates in mind.²⁴²

Deliberative democrats, by contrast, are deeply divided over questions of justice.

Can democracy itself create true justice? As discussed in Chapter 1, advocates of

²⁴² See John Locke, *Second Treatise of Government*, Chapter IX, Thomas Aquinas, *Summa Theologica*, I-II, Question 96, Fourth Article, King, “Letter From a Birmingham Jail”, and the discussion in the Introduction of this thesis.

deliberative democracy have long contended that democratic procedures, rules, and most importantly mindsets, should in fact be the standard of criteria by which to assess the legitimacy of any given political regime or decision.²⁴³ When the above question is raised, however, some of the variations in deliberative democratic theory are more fully manifested.²⁴⁴ At one end of the spectrum, some Ian Shapiro follows Benjamin Barber's views concerning the appropriate normative value of democracy, asserting that all morality is fundamentally relative, and thus that democracy alone or nearly alone should solve humanity's problems.²⁴⁵ At the other end of the deliberative democratic spectrum, Frank I. Michelman attempts to cling to certain liberal, natural-law-derived values such as basic liberties and responsibilities, and expresses considerable doubts about deliberative democracy's attempt to add "democracy" to the Lockean list of "liberties".

This chapter will examine these deliberative democrats' views in turn. It will discuss Michelman's grave doubts concerning the viability of "soft" deliberative democratic claims on justice, such as that of Amy Gutmann and Dennis Thompson, and demonstrate with him why these views are untenable. The chapter will then discuss how radically participatory deliberative democrats, such as Ian Shapiro, compensate for the problems identified by Michelman by relying on moral relativism and disdain for natural law or written constitutional claims on justice. This chapter will then discuss Jon Elster's work in democratic constitutional formation, a work which Elster himself claims should give rise to caution for both natural law advocates and deliberative democrats in turn.

²⁴³ Deliberative democrats wish to teach people to "think democratically" as a top priority. In practice, this often means allowing "politics" to penetrate into areas of life previously thought separated from democracy or any other sort of politics; see Chapter 1.

²⁴⁴ For more on the variations within deliberative democratic thought, see *ibid.*

²⁴⁵ See Ian Shapiro, *Democratic Justice* (New Haven: Yale University, 1999), 9-10.

The second part of this chapter will comprehensively compare these claims to the empirical constitutional argument advanced by Keith Whittington in the preceding chapter, and the normative claims of justice he advanced in Chapter 1. It will be demonstrated that Whittington's claims regarding the nature of the U.S. Constitution place it far closer to the natural law perspective than the deliberative democratic one. Finally, the chapter will explain why even Whittington's reliance on written constitutions as the only reliable source of justice fails in comparison with the natural law. It will attempt to demonstrate that the natural law is a better source of true justice than either deliberative democracy or constitutionalism, even with its attendant risks of misinterpretation.

Deliberative Democratic Views: Justice Through Democracy

As discussed in Chapter 1, not all deliberative democrats embrace Benjamin Barber's radicalism in their advocacy of democracy as society's main normative value. Some of them, such as Amy Gutmann and Dennis Thompson, and Frank Michelman, still cling to some of the same values as Lockean liberals, such as individual-based liberty and limits on that part of life that can be designated "public" or "political". While they agree with fellow deliberative democrats that democracy should be seen as a high moral value by itself, they see it as one among the other liberal values. They thus simply attempt to "add" democracy to the natural law's list of human rights and responsibilities. In Michelman's words:

Consider a class of views according to which rightness in civil affairs consists in the prevalence of justice, where (1) the requirements of justice are conceived to be accessible by right reason, (2) determinations of right reason are conceived as process-independent, that is, standing free and

apart from any democratic process, and (3) popular government is not itself, at any level or in any degree, conceived to be a dictate of justice as process-independent right reason determines it. Such a view would not care in any crucial way about democracy at all, much less about deep or deliberative democracy. But now suppose a right on the part of everyone to participation in government is found to be a part of justice as process-independent right reason determines it. And even suppose, further, that right reason's conclusion in support of popular government, as a component of justice, hinges on a favorable assessment of the possibility of deliberativeness in politics, somehow more or less concretely understood.²⁴⁶

The first part of this quotation sounds very much like the liberal, natural-law-derived conception of justice. Michelman simply attempts to add "democracy" to natural law's list of rules, responsibilities, and regulations discoverable through the use of reason. In so doing, Michelman attempts to ensure a society in which democracy is inextricably linked to traditional liberal rights and responsibilities; if democracy is limited, then those more traditional freedoms are being limited along with it.

However, while embracing this position, Michelman admits its "fundamental tension."²⁴⁷ At heart, such an attempt to merely include democracy alongside natural law's other rights and responsibilities is bound to fail, or at least to include considerable confusion as it attempts to coexist with the traditional set of rights granted by that law. As Michelman frames his definition, once one accepts that democracy is one prime value among many, then one is encouraged to base assessments of the moral legitimacy of

²⁴⁶ Frank I. Michelman, "How Can the People Ever Make the Laws? A Critique of Deliberative Democracy", in James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT, 1997), 145-171, 155.

²⁴⁷ Ibid, 149-151. Michelman's personal beliefs are not given in his essay, but as he identifies himself in it along with the deliberative democrats as "liberal-minded devotees of deliberative democracy" (153), it is assumed here that he is in fact a deliberative democrat.

regimes on the level of democracy their respective procedures do or do not contain, among other things. Thus, regimes are assessed on how much confidence “reasoning” people have in the level of democracy their respective governing institutions possess.²⁴⁸ This process, however, begs the crucial question of what scholars and political theorists mean by the words “reasoning”, and “democratic”. Since liberalist-leaning deliberative democrats such as Michelman have already committed themselves to “democracy” as a fundamental value alongside the other fundamental values, it logically holds both that fundamental, absolute values do in fact exist, and therefore they provide some criteria with which to test the moral legitimacy of any given governing order. As discussed both by Michelman and at greater length in Chapter 1, democracy is by its very nature disruptive of absolutist conceptions of morality; it follows logically that it is also disruptive of justice claims.

The result of all these factors is what Michelman identifies as liberalist-leaning deliberative democracy’s “infinite regress” problem. Since democracy is seen as a prime value, the laws must be democratically enacted in order to be truly legitimate. With regard to what counts as “democratic”, since democracy is best understood as a *means and not a moral end-in-itself*, it can only answer such a question by referring back to itself. In the end, according to Michelman, laws are legitimized because they are enacted via democratic procedures. Democracy is itself legitimized to society by means of regular and established procedures of governance. In order to be legitimate, since democracy is a prime value, these establishment procedures must likewise have been established in a democratic way. This previous democratic way must likewise have had

²⁴⁸ Ibid, 155-156.

legitimizing procedures, and so on the chain of infinite regress persists into theoretical infinity.²⁴⁹ Thus, as Michelman demonstrates, any attempt to simply “add” democracy to an existing list of absolute values or to use it alone as an absolute value is doomed to theoretical failure.

In part, this failure stems from the insistence by Michelman that moral absolutes still exist. In his words:

Before proceeding, I have to say something about how I use the terms “valid”, “just”, and “right” in this essay, as applied to fundamental laws...Very roughly, “rightness” in a regime means the regime as it morally ought to be. “Justice” in fundamental-legislative outcomes refers to a set of process-independent standards for the treatment (“concern” and “respect” that is morally due to affected persons or groups...According to this cluster of definitions, *justice* (if there be such a thing) is inalterably what we may call a “perfectly” process-independent standard: in judging whether fundamental laws are just (if such judgements be possible at all), no reference can ever be called for to the process of their legislation.²⁵⁰

If morals did not in fact exist in the absolute sense, then there would be no need to discover any ultimate principles for any extant practice. Democracy might just be “what works right now for us” and not an absolute value in any sense of the term.²⁵¹ For the same reason, it would simply “exist” without needing to be a means to some other moral end, for no absolute universal moral ends would exist for it to strive toward. Infinite

²⁴⁹ Ibid, 162-165. In his words (165), “Where in history can this ‘originary’ constitutive moment ever be fixed or anchored? Granting that it is necessary, how may it be possible?”

²⁵⁰ Ibid, 147.

²⁵¹ In his “Foundationalism and Democracy” in Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, Princeton, NJ, 1996), 348-359, Benjamin Barber makes strongly implies such a claim when he suggests that democracy should be valued in-and-of-itself even if it does in fact vote to destroy itself if the people should decide it no longer serves their needs. While he believes such a possibility extremely remote, he is willing here to acknowledge it.

regress would then be perfectly acceptable and even encouraging, since moral relativists see morals as constantly evolving and re-evolving already.²⁵²

However, the natural law perspective provides another alternative to resolving Michelman's infinite regress problem. As explained in Chapter 1, Lockean natural law perspectives advocate absolute morals and values, but subtract democracy from that list. At best, democracy is only a means to achieve true justice, and is not to be exclusively identified with producing justice, and it is *never* to be equated with justice, as Gutmann and Thompson, and Shapiro, have attempted.²⁵³ While it is true that natural law-derived justice is most likely to be achieved within democratic regimes, the law and its definitions of justice always exist *outside* the democracy itself, and provide its missing legitimacy, thus solving the infinite regress problem.²⁵⁴ At the same time, as demonstrated in Chapter 1, absolute morals logically *must* in fact exist, contrary to moral relativists.²⁵⁵

This conception of the “infinite regress problem” of attempting to combine natural law or liberal conceptions of justice with a conception of a high moral right to democratic governance was not lost on Keith Whittington. In his *Constitutional Interpretation*, Whittington discusses the motives behind the American Framers' words

²⁵² In particular, morally relativistic deliberative democrats such as Benjamin Barber believe that direct democracy would be “self-correcting” over time. See *ibid*, and the discussion in Chapter 1.

²⁵³ In Shapiro's case, this is especially explicit; see Shapiro, 11-13.

²⁵⁴ This raises the question of whether the natural law's definition of justice is outside “politics” as well. Quite the contrary; much of politics should concern itself with debating the exact meanings and applications of the natural law, but that law should always function as an absolute boundary for legitimate political discussion. For example, while wishing to end world hunger is a laudable goal approved by the natural law, raising the possibility of forced sterilization of certain races or income groups would violate that law. Mostly, human reason is relied upon to discover the dictates of the natural law, and to be exercised most effectively, it should be given space to meditate and reconsider all factors before legislating. The conclusion to this thesis deals with this particular issue more in-depth; see also Finnis, *Natural Law and Natural Rights*, Chapter XII.

²⁵⁵ See Locke, Chapters II-IX.

and works as expressed in the written Constitution of the United States, and pictures them as being confronted with the failed remnants of a system of extremely flexible unwritten British constitutional law. While this constitution was not “democratic”, it was seen as self-justifying, and its provisions were and still are alterable at any time by a mere parliamentary majority. According to Whittington, this self-justifying infinite regress had led by 1775 to a near-total abandonment of the principles of the “Glorious Revolution” of 1688, and the replacement of those principles by moral relativism and corruption. The system’s self-legitimizing, pseudo-absolute claims interfered with any attempt at anti-corruption reform, while a veneer of justice was maintained. According to Whittington, the American Framers decided early on a *written* constitution for exactly this reason; to avoid a never-ending spiral of unpredictable popular passion and the high likelihood of corruption beneath superficial claims on true justice.²⁵⁶

It should be reemphasized, as Whittington does in both his normative and empirical works, that the American Framers were in fact presented with the option of choosing moral relativism over constitutional law in order to solve their problem, but that they recognized the potential for infinite regress inherent in any attempt to simply include democracy as one of many coequal core values:

Fixing constitutional principles in a written text against the transient shifts in the public mood or social condition becomes tantamount to an originalist jurisprudence. As storms of popular passion sweep across the political landscape, it is to be expected that rapid and extreme shifts in public attitudes will guide political action. Further, such shifts may lead political actors some distance

²⁵⁶ Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas, Lawrence, KS, 1999), 50-61. As discussed below, he used these aspects of the written U.S. Constitution to argue in favor of an originalist approach to interpreting it.

from the founding principles of the republic, as short-term considerations temporarily obscure principles that would otherwise be revered and followed. In order to prevent government actions, which may have significant and lasting consequences, from being taken in pursuit of momentary interests, a written constitution, properly construed, serves as a reminder and a barrier, constraining politics within a relatively narrow range of deliberatively chosen rights, powers, and institutions.²⁵⁷

As Chapter 1 discussed, democracy is inherently at least somewhat disruptive of absolute notions of morality, and it follows that it adversely affects universal justice claims also. Logically, democracy thus cannot be coequal with existing liberal natural law-inspired values; it either must be seen as a means to achieve liberal ends of law and justice, or as an end-in-itself that determines the existence and nature of laws and justice. Natural law advocates such as John Locke choose the former definition of democracy, while radical deliberative democrats choose the latter definition, a definition that, as has been seen, depends on moral relativism, as taking democracy as one's sole value amounts to moral relativism.

Michelman's postulated "infinite regress" affects other liberal-leaning deliberative democrats' arguments, such as that of Amy Gutmann and Dennis Thompson. In their *Democracy and Disagreement*, Gutmann and Thompson advance their deliberative democratic views of politics and justice claims. In their opinion, democracy, taken as the "best" form of governance, must always be balancing two basic types of claims: "basic liberty" and "basic opportunity". They define "basic liberty" as those liberties most immediately essential to human life, such as freedom from physical or

²⁵⁷ Ibid, 53.

mental slavery, and “basic opportunity” as “equal chance”; that is, the idea that, as far as physically possible, every person should be granted an equal chance to live a “normal” life with “normal” sociopolitical and economic opportunities. They convincingly demonstrate the folly of both a libertarian “rights-only” approach that strictly limits the extent of government while trumpeting absolute individual sovereignty, and the egalitarian approach that seeks to force all people to be exactly physically equal. Given that libertarians’ liberty claims and egalitarians’ opportunity claims clash on more occasions than otherwise, any democratic regime must find a balance between their respective claims, each of which is quite valuable if respected in moderation.²⁵⁸

Because of their attachment to some liberal norms and values, Gutmann and Thompson are unwilling to embrace the radically participatory democrats such as Barber and Shapiro, who see democracy as humanity’s highest aspiration or as the only path to true justice, respectively. In fact, according to Gutmann and Thompson:

We have already suggested that deliberative democracy needs principles that extend beyond the conditions of deliberation to its content. In the democratic search for provisionally justifiable policies, the content of deliberation often matters at least as much as the conditions. The deliberative perspective we develop here, then explicitly rejects the idea, sometimes identified with deliberative democracy, that deliberation under the right conditions—real discourses in the ideal speech situation—is sufficient to legitimate laws and public policies. We open the door to constitutional principles that both inform and constrain the content of what democratic deliberators can legitimately legislate.²⁵⁹

²⁵⁸ Ibid, 201-223.

²⁵⁹ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press of Harvard, 1996), 200.

Thus, deliberations about the exact extent of “liberty and opportunity” are to be constrained by final appeals to some overarching constitutional values.

Nevertheless, from a natural law perspective, Gutmann and Thompson still place a great faith in the ability of democracy to satisfactorily solve the crucial issues of determining how much “liberty” and how much “opportunity” people have. In doing so, they somewhat unfairly categorize all “rights-talkers” as holding extreme, libertarian views, when only a minority of even Lockean liberals have ever embraced the libertarianism of Robert Nozick.²⁶⁰ For natural law advocates, the prospect of allowing only somewhat controlled democracy to determine the liberties and opportunities of the people, while less frightening than Shapiro’s position discussed below, is still quite disquieting. Instead, their preferred conception of a truly “just” political order would restrain the people’s passions and wishes in favor of the law.²⁶¹

Additionally, Gutmann and Thompson have not escaped from the “infinite regress” problem postulated by Michelman. While they claim to advocate “constitutional principles” to determine legitimate boundaries for democratic debate, they never explicitly mention how these principles are to be derived. In fact, later, when discussing how “basic opportunity” is to be defined, Gutmann and Thompson tacitly admit that their “constitutional principles”, which they claimed preceded and restrained deliberation, are in fact themselves determined by it:

²⁶⁰ Ibid, 201-208. As Chapter 1 pointed out, John Locke is sometimes unfairly construed as a libertarian, when his notion of a natural law included both rights *and* responsibilities.

²⁶¹ See Locke, *Second Treatise*, and Dr. Martin Luther King, Jr, “Letter From a Birmingham Jail”, partially reprinted in Robert L. Hayman, Jr., Nancy Levit, and Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* (St. Paul, MN: West Group, 2002), 46-52.

Although the content of the basic opportunity principle is subject to changes...its moral authority is not dependent on public opinion. Social expectations should not be confused with responses to opinion polls, electoral results, or individual preferences that utilitarians would aggregate. The substance of social expectations must be morally defensible, and the process that shapes them should be deliberative, not coercive or manipulative. *What counts as a basic opportunity-both the scope and the level at which it is funded-is to be determined through democratic deliberation.* A standard for basic opportunities must be publicly defended on moral grounds, consistent with the requirements of reciprocity among citizens. Through public deliberation among accountable agents, a democratic government should aim at finding a level and a scope of basic opportunities that are mutually acceptable to morally motivated citizens, regardless of their differences in income or wealth, race or ethnicity, health or disability.²⁶²

In this passage, although Gutmann and Thompson begin with a statement very much akin to a natural law advocate, “moral authority is not dependent on public opinion”, they soon render this phrase largely meaningless via their dependence on deliberation. In the end, the preexisting law is not really “preexisting” at all; the people themselves determine the “scope and funding” of basic opportunities. Since Gutmann and Thompson have tacitly identified “constitutional norms” as including “basic liberty” and “basic opportunity”, it follows that since the people are here deciding what “basic opportunity” means, that the state in question is ultimately very much like an unfettered deliberative democracy. As Michelman’s theoretical construction pointed out, in attempting to add “democracy” to a liberal norm of fixed, constitutional law, Gutmann and Thompson have encountered a fundamental legitimacy problem. As in Michelman’s writing, the only way for Gutmann and Thompson to solve this problem and establish the legitimacy of

²⁶² Gutmann and Thompson, 218-219 (emphasis added).

their regime is to render it democratic in all things. While they may still attempt to retain certain “basic” values, these too must be democratically derived if they are to be legitimate, since they have seen democracy as a core value. Overall, thus, Gutmann’s and Thompson’s work illustrates the “infinite regress” of trying to mix deliberative democratic ideals with natural law liberalism’s ideals that Michelman identifies.

While Gutmann and Thompson’s work thus falls into Michelman’s “infinite regress”, their normative perception comes fairly close to the empirical description of the United States constitutional order advanced by the “constitutional change” scholars discussed in Chapter 2. After all, Bruce Ackerman and Stephen Griffin argue that the American constitutional system is best described as transitory with regard to its written constitution. The meanings of the document and its words change over time, rendering absolute law somewhat moot, while simultaneously preserving a constitutional order that seeks to distribute and redistribute basic liberty and opportunity among the people. Just as Gutmann and Thompson argue that while constitutional norms should theoretically exist while simultaneously arguing that the people should decide and alter even their fundamental law via deliberation, so the American people have done according to Ackerman and Griffin.²⁶³ Thus, Gutmann and Thompson’s work provides some normative defense to legitimize the “constitutional change” empirical governing order, and Ackerman’s and Griffin’s empirical arguments regarding their perception of the real

²⁶³ See Bruce Ackerman: *We the People: Foundations* (Cambridge: Belknap Press of Harvard, 1991), and Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, Princeton University Press, 1996). See also the discussion in Chapter 2.

American constitutional order provide a tangible image of Gutmann and Thompson's picture of democratic justice and constitution-making.²⁶⁴

Since Gutmann and Thompson's normative prescriptions conform so closely to the empirical arguments advanced by the "constitutional change" school, it follows that they differ more markedly from the empirical arguments of Keith Whittington and his "Princeton" school colleagues. According to Whittington, the U.S. Constitution was written to establish the "basic liberty" and "basic opportunity" of the justice claims in American society. While words change, the document's possible meanings are not nearly as flexible as some "constitutional change" scholars claim.²⁶⁵ While Whittington would agree with Gutmann and Thompson that everyday American politics and judicial decisions do in fact settle certain matters of liberty and opportunity, he does not share Gutmann and Thompson's great faith in the ability of democracy alone to settle these disputes, especially not the more fundamental ones. Hence, in his normative work, Whittington appeals to a modified form of constitutional originalism, and in his empirical work, he argues strongly that constitutional change has strict limits if the constitution is to have any meaning at all.²⁶⁶ Thus, for Whittington, moral relativism and democracy are poor foundations for justice.

²⁶⁴ Of course, they may also be expressing the natural-law-based critique of unjust constitutions and laws advocated by writers such as Martin Luther King, Jr.

²⁶⁵ In both his empirical and his normative work, he decisively rejects what he calls "textual indeterminism". For an example of his empirical work, see Keith Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999), all. For an example of his normative work, see Whittington, *Constitutional Interpretation*, 68-71.

²⁶⁶ For an example of his empirical work, see Keith Whittington, *Constitutional Construction: From Theory to Politics* (Cambridge: Harvard University Press, 1999), all. For an example of his normative work, see Whittington, *Constitutional Interpretation*, 68-71. See also discussion below.

By contrast, according to Ian Shapiro, even Gutmann and Thompson's conception of justice, which as has been seen, is in fact highly dependent on politics, fails the test of "true" democratic legitimacy.²⁶⁷ Agreeing with Barber, Wolin, and other radically participatory deliberative democrats examined in Chapter 1, Shapiro insists that "politics is everything"; that is, every human endeavor is contained within the boundaries of what should count as "political" or "public". The so-called "private" sector is only so declared because of previous political agreements about what should be so considered, and usually these agreements were made to create or perpetuate unequal relations of power.²⁶⁸ Shapiro emphasizes the first great problem of natural law theory, that of its great intangibility, and explicitly rejects natural law theories of justice as "unrealistic" and "too limiting" of the "public" sphere, and argues on behalf of near-total moral relativism.²⁶⁹ In fact, he argues that dissent and deliberation are all that one can expect in order to establish what "justice" really is. After all, since there is no absolute morality, there are no "right" or "wrong" answers, and therefore no intrinsic reason why anyone's opinion should prevail over anyone else's except via persuasion and bargaining.²⁷⁰

²⁶⁷ In Shapiro's words (15): "Even Amy Gutmann and Dennis Thompson, who concede the inevitability of a degree of dissensus in politics (concerning matters of justice), propose a deliberative model that is intended to minimize it." For a definition of "politics", see the Introduction to this thesis.

²⁶⁸ Shapiro, 5-10. Shapiro's analysis thus has much in common with feminist criticisms of paternalistic and patriarchal relations within the home, as well as postmodernists' focus on power relations as the true determinants of what passes as "truth". Shapiro (10) specifically acknowledges Michael Foucault's work as heavily influencing his views.

²⁶⁹ As Chapter 1 pointed out, there is no such thing as "relative relativism", but many scholars still persist in relativizing morality for some nations or peoples and not for others, or in claiming they embrace moral relativism while retaining the idea that certain values or practices are morally "right". Although he never explicitly advances such a claim, it follows logically from Shapiro's argument that he sees democracy at least as somewhat morally valuable, which is itself a form of moral absolute that contradicts his overall moral relativism.

²⁷⁰ As discussed above, Shapiro points out the first great problem in natural law theory, but here he is largely silent on the second, the problem of "Who interprets the natural law?"

For Shapiro, it is not enough that democracy merely establish the “happy medium” between other values and be hampered, at least theoretically, by constitutional norms, such as Gutmann and Thompson’s ideal of democratic “basic liberty” and “basic opportunity” attempts to do. Instead, for Shapiro, democracy must be free to define itself as well. Rather than fearing Michelman’s infinite regress, then, Shapiro embraces it, insisting that democracy must be free to define and redefine itself as time and humanity progress and popular values change. He is not particularly concerned with the possible normative and empirical consequences of “too much democracy”, because he does not believe in moral absolutes:

Rather than join a vain search for the true essence or site of politics, the account of justice developed here rests on the view that politics are both nowhere and everywhere. They are nowhere in the sense that there is no specifiable political realm—not religious practice, not buildings in Washington, not modes of production, not gender relations, not any bounded domain of social life. Politics are everywhere, however, because no realm of social life is immune from relations of conflict and power. The significance of this truth will vary, to be sure, with time and circumstance, and even from person to person. Yet the appropriate constitution of any aspect of collective life is always open to dispute; people benefit and are harmed in different ways by prevailing practices, and there is the ever-present possibility that these might be ordered differently than they are. Politics conditions everything we do, yet it is never simply what we do...That politics is ubiquitous to human interaction is neither good nor bad; it is part of the reality from which we are bound to begin.²⁷¹

²⁷¹ Shapiro, 10. Immediately before these words (10), in describing attempts to theorize about natural law as “reductionist” for politics, Shapiro concludes that “By the end of the twentieth century there are good grounds for skepticism towards *every essentialist venture of this sort.*” (emphasis added).

With no moral absolutes, the people are totally free from all constraints and can utilize their democratic processes and decisions to take full and immediate control over every aspect of their own lives. This radical notion of popular sovereignty, explained at length in Chapter 1, is seen by Shapiro as essential to legitimacy; he identifies legitimacy with popular government.²⁷²

It follows, then, that democracy must be free to decide what “justice” really is. Shapiro is once again relatively unconcerned with the image of the constitution of justice that democracy will produce. In all cases, the democratic construction of justice is to be prioritized above other competing values. Even though he recognizes that certain empirical realities, such as military hierarchies and governmental intelligence-gathering, might be compromised by democratic justice, Shapiro remains committed to democracy absolutely whenever possible:

Although there is never a guarantee that trade-offs between democratic justice and other goods can be avoided, the argument for democratic justice bids us to try to find ways to avoid them... To reiterate, *the general point is that the presumption is against undemocratic ways of doing things. It is only a presumption and it can be overcome, but reasons should always lie with those who would limit democracy's operation.*²⁷³

Despite his claims to moral relativism, then, Shapiro still clings to a single main value, namely, democracy itself. He is even willing to let democracy determine the extent of

²⁷² Ibid, 29-45.

²⁷³ Ibid, 49 (emphasis added). Shapiro does not expressly mention how it is to be “overcome”.

certain religious freedoms because they threaten their members or outsiders' democratic potential.²⁷⁴ After all, Shapiro argues, only democracy can produce true justice for all people, and any natural law concerns are antiquated and unrealistic.

Since only democracy can determine true justice, then for justice to be as near as possible to total involvement in the lives of the people, democracy must be spread to all possible facets of life. This holds for traditionally "private" relations such as those within the home, and in the realm of recognized "public" governance. For example, like most deliberative democrats, Shapiro harbors deep suspicions of written constitutions, because they limit the powers of the people to make their own decisions. As Shapiro phrases it:

Most liberals accept my claim that disagreement is endemic to social life, but they see this as a reason for escaping the political, or at least minimizing its reach via "gag rules"-constitutional constraints on the range of decisions that legislatures should be free to enact. Whether defended in contractarian or utilitarian idiom, all such attempts to fly from politics are chimerical, as we have seen. They rest on implausible assumptions about precollective or perfectly private states of affairs, and as a result they depend on misleading views of political reality.²⁷⁵

Even if written constitutions are as pliable as Griffin and Ackerman claimed, they still somewhat limit the exercise of immediate radical popular sovereignty, and as such should be avoided. Instead, dissent and deliberation should be the defining features of moral and

²⁷⁴ Ibid, 43-47. These actions range from forcing members to withdraw from society (as in the case of the Amish) to outright acts of physical terrorism and violence as seen near-daily in the Middle East. To say the least, while natural law opposes terrorism, such restrictions on religion in the name of democracy rather than morality are completely anathema to natural law's prescription of rights and responsibilities. In part, Shapiro's statements may derive from his great faith in deliberative reason as a way to solve societal problems; he views certain practices as potentially threatening to such deliberation. As discussed in the Conclusion, such views express far more faith in human reason than even Locke, who only trusted reason to *discover* the natural law, never to *make* the natural law.

²⁷⁵ Shapiro, 15. Contrast these views with King's views on the natural law as a basis for opposing unjust laws; see King, in Hayman, Levit, and Delgado (ed.), 49.

political life, and there should be no recourse attempted to absolute or prepolitical principles. In the end, Shapiro admits that since there is no absolute morality or standard by which to judge the validity of arguments, his arguments are just that; they are not final conclusions, since these are impossible to reach.²⁷⁶

In accordance with his views concerning written constitutions, Shapiro, while not as radical as some deliberative democrats on this issue, prefers that legislatures, and not courts, settle controversial questions of justice. After all, courts are usually not democratically elected, and never have to answer to the people to the extent that legislators do. Therefore, Shapiro believes the courts' most legitimate function is to demonstrate to democracy the cases in which it "misdefines" itself; that is, since democracies are occasionally known to make undemocratic decisions that effectually exclude certain people from the franchise, the courts need to act in the interest of maintaining democracy.²⁷⁷ They need not act to uphold some pre-existing natural law or its claims of justice, because these things do not really exist. Instead, they simply need to help ensure that democracy is adequately protected.²⁷⁸

Shapiro's conception of democratic justice, like that of Gutmann and Thompson, thus bears some similarities to "constitutional change" conceptions of justice, focusing on the immediate power of the people to decide how their lives and constitutions will be defined and redefined. However, with its explicit denunciation of all written constitutions, Shapiro's argument is more similar to the most radically participatory

²⁷⁶ Ibid, 62-63, 230-234.

²⁷⁷ Because of the natural law's potential for misuse, it is urgent that someone, either the courts or another body, perhaps the people themselves, keep examining the interpretations their societies and leaders enact to make sure they are truly in accord with it.

²⁷⁸ Ibid, 59-62. He refers to this as the Ginsburg-Burt view" after Ruth Bader Ginsburg and Robert Burt.

arguments for deliberative democracy advanced by Benjamin Barber and Sheldon Wolin.²⁷⁹ Ian Shapiro may thus be seen as presenting the most radical deliberative democratic definition of justice.

Keith Whittington correctly postulates that the American Framers, having lived under a regime that possessed an unwritten constitution, explicitly adopted a written constitution for the very purpose of enshrining a single conception of the requirements of morality and justice.²⁸⁰ While Shapiro would expressly agree that such was the purpose of the Framers, he disputes any such formal or legal cordoning-off of norms and values from democratic debate as inherently undemocratic and therefore illegitimate. His objections would likely also be raised regarding the very thinly democratic way in which the American constitutional regime was drafted and subsequently enacted, as a small group of elites met in secret and drafted the governing document and then pushed it through the state legislatures without any time in many cases for proper deliberation.²⁸¹

In his work, Jon Elster has focused on this very aspect of constitutional formation; namely, he writes of the various aspects of constitutional conventions.²⁸² Being a deliberative democrat, he strongly believes in the value of democracy as a source of legitimacy. However, he does not share the great faith that Gutmann and Thompson have

²⁷⁹ See Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, CA: University of California, 1982), and Sheldon Wolin, *The Presence of the Past* (Baltimore: Johns Hopkins, 1989).

²⁸⁰ Whittington, *Constitutional Interpretation*, 47-61.

²⁸¹ For a fascinating account of the drafting and ratification of the United States Constitution, see Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (NY: Alfred A. Knopf, 1996).

²⁸² Jon Elster, "Deliberation and Constitution Making", in Jon Elster (ed.), *Deliberative Democracy* (Cambridge, UK: Cambridge University, 1998), 97-122.

in democracy, let alone the enormous faith of Ian Shapiro.²⁸³ In Elster's opinion, while deliberation is to be highly valued as a source of discerning reason and law, one must also be acutely aware of the potential dangers that democracy can pose for deliberation. Hence, "deliberative democracy" might well be inherently self-destructive, as the American Framers feared.²⁸⁴ Even though open deliberation does, as Gutmann and Thompson, and Shapiro, claim, force people into making more defensible arguments than they might otherwise advance, dangers aplenty are found in too much public openness.²⁸⁵

In Elster's opinion, for deliberative democracy to have any real chance at successful constitution-building or legislation, then it must make as certain as possible that real reasoned deliberation is in fact taking place. Even though open threats are not usually tolerated in a democratic setting, thinly-veiled threats are still made, and various forms of power still hold disproportionate sway in deliberation. Elster claims that such threats, whether implied or explicit, severely hamper attempts to create and nurture the kinds of reasoned debate and deliberation necessary to "make democracy work". Thus, society needs to avoid "bargaining", defined as the exchanging of threats and counterthreats, and instead should encourage "arguing", where "arguing" is defined as clean, reasoned public debate in which all sides and viewpoints receive equal and fair hearings:

Deliberation about constitutions requires the creation of what I have called a deliberative setting.

The procedure must go beyond the simple recording of votes and allow for communicative

²⁸³ Shapiro never asserts that "anything goes" with his afore-mentioned distrust of "essentialism" (10), but he does possess a great deal of confidence that expanded political democracy will be the best means to ensure "just" outcomes. See Shapiro, 238-240.

²⁸⁴ See Joseph M. Bessette (ed.), *Toward a More Perfect Union: The Complete Writings of Hubert J. Storing* (Washington, DC: American Enterprise Institute, 1995), 17-103.

²⁸⁵ *Ibid.*, 100-105.

interaction. Also, the setting must steer this interaction toward arguing and away from threat-based bargaining.²⁸⁶

As he phrases it, successful democracy needs to make sure that more “arguing” than “bargaining” is taking place in order to better ensure just constitutions.²⁸⁷

Because of this, several factors must be taken into consideration when a society is attempting to forge a democratic constitution. Elster examines such empirical factors as the size of the assembly, the publicity granted to the general public by those writing the document, the force or implicit threat of force that overshadows the constitution-making process, and the impacts of interest on the deliberation process. Like Gutmann and Thompson’s more explicitly normative formula for moderation in constitutional politics, Elster argues that all of these factors must be present in constitution-making, but all must be controlled and used in moderate amounts. For example, if a constitutional assembly were too large, deliberation would take too long, and one should not ignore empirical necessities for the sake of “more democracy”. Likewise, too much publicity may well increase the “democraticness” of the constitutional convention, but it can also render the convention little more than a demagogic popularity contest as speakers will be less willing to retract their views and engage in public debate if their reputations hang on every position they have previously taken. Finally, although force and interest are inescapable realities of everyday social and political life, they can markedly impede reasoned deliberation, and accordingly should be controlled.²⁸⁸

²⁸⁶ Ibid, 105.

²⁸⁷ Elster himself admits that his formula is quite “unrealistic” to achieve; see *ibid*, 116-118.

²⁸⁸ Ibid, 107-118.

In many ways, Elster's discoveries and recommendations are in accordance both with Keith Whittington's work and with natural law's requirements. Although the 1787 Constitutional Convention in the United States was not open to the public, and the document it produced was never submitted to popular ratification as Elster recommended, he still approves of the discussions, the compromises, and the comparative absence of physical force at Philadelphia in 1787.²⁸⁹ Whittington records that the Framers were firm believers in the Enlightenment and Lockean concepts of reason, and deeply respected Locke's ideal of discovery of the universal natural law through the use of human reason, while also recognizing the enormous dangers that could result from its wrongful application.²⁹⁰ Accordingly, the delegates in Philadelphia, while not totally distancing themselves from their passions and their constituencies, were sufficiently shielded from the outside world to engage in reasoned deliberation and debate. While they were never completely shielded from their own passions either, they did in fact engage in deep thought, deliberation, and debate over fundamental aspects of political thought, bearing in mind that they were *discovering* the law rather than *creating* it. In such a setting, they could hope to better approximate the natural law in written constitutional law, because their reason could function in as unfettered an environment as humanly possible.²⁹¹

Elster's research into constitutional conventions illustrates many of the dangers of deliberative democracy discussed in Chapter 1. While the most radically participatory democrats, such as Barber and Shapiro, assume that enough deliberation will inevitably

²⁸⁹ Ibid, 115-116.

²⁹⁰ Locke, *Second Treatise*, Chapters II-III, IX-XII.

²⁹¹ For details of the deliberations, see Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (NY: Alfred A. Knopf, 1996), 131-338. For a detailed discussion of the "outside" of politics, see the Conclusion to this thesis, 127-128.

reach a reasoned conclusion, Elster's evidence suggests otherwise. It is not enough that democracy exist; it must be at least somewhat restrained if its inherent moral ambiguity is to be directed towards the good and just rather than the patently evil and unjust.²⁹² Michelman's work illustrates the difficulties of attempting to provide this restraint via appeals to more democracy; as in Gutmann and Thompson's work, it leads to a chaotic infinite regress in which no one is finally anywhere near certain from where true justice or true legitimacy derives. Thus, Elster's, Michelman's, and Gutmann and Thompson's works may be seen as the admissions of less radical deliberative democrats of possible theoretical and concrete problems with unfettered democracy, and Shapiro's work as attempting to present a justification for such unfettered democracy.²⁹³

Whittington's Conception: Written, Concrete Constitutions Establish Justice

By contrast, Keith Whittington believes that the best form of constitutionalism is not advocated by any of the deliberative democrats, however moderate or radical their respective views. As has been alluded to, Whittington's conception of constitutions and their purposes bears more resemblance to Michelman's and Elster's than to that of either Gutmann and Thompson, or of the more radically participatory democrats. Whittington believes strongly in the utility of a single written constitution as a foundation for claims

²⁹² In the very end, even Shapiro (240) admits the need to control democracy: "Important as it is to control democracy's wild instincts by insisting that it operate as a subordinate good, we should not forget that it is a good." One wonders how Shapiro could ever make such a claim after showing such disdain for absolute truths, norms, and values; from where is he deriving his conception of "the good" if not from democracy or from natural law?

²⁹³ As indicated in the preceding note, even Shapiro refrained from the totally relativist focus on democracy exhibited by Benjamin Barber, "Foundationalism and Democracy" in Benhabib (ed.), *Democracy and Difference*, 348-359, and Wolin, *The Presence of the Past*, all.

of justice, and this belief colors his normative writings and his empirical work on the United States Constitution.²⁹⁴

Empirically, Whittington argues that the American constitutional system represents his claims of constitutionalism better than those of the “constitutional change” school. Like the “constitutional change” school, Whittington concedes that the American people must daily reinterpret their constitution, and that the Framers expected and even encouraged debate and dissent over the issues, making the system depend on politics for its very existence. However, he feels that none of these popular, democratically-derived changes or interpretations is equal to the original meanings and words of the written document. Instead of merely establishing the framework upon which relatively unfettered politics takes place, the written U.S. Constitution of 1787 still stands as the authoritative source for lasting political legitimacy in the United States, to set real limits on the types of issues and ideas that may be discussed, and to establish absolute limits on what democratic processes and peoples may legitimately do.²⁹⁵

For any written constitution to serve such a purpose, Whittington believes that the best form of constitutionalism is one in which the written governing document is seen as having immediate and relevant power to settle disputes and to limit the legitimate scope of democratic deliberation. Far from favoring the democratically-determined “basic liberty and opportunity” of Gutmann and Thompson, he insists that the written

²⁹⁴ Whittington’s *Constitutional Construction* serves as an example of his empirical work, and his *Constitutional Interpretation* serves as an example of his normative work.

²⁹⁵ Whittington, *Constitutional Construction*, 1-15. Here, as noted in Chapter 2, he distinguishes between constitutional “creation”, which is the forging of entirely new constitutional material, constitutional “construction”, defined as the larger theories implicit in the document’s words, and constitutional “interpretation”, the daily work that all people from presidents to the common citizens are continuously engaged in doing of deciding the exact meanings of more specific constitutional passages.

constitutional document, not the people, must determine the extent of liberties and opportunities. While he opposes the strict originalism of the type advocated by Judge Robert Bork in the 1970s and 1980s, he still advocates a weaker form of originalism that constantly keeps both the 1787 U.S. Constitution and the intentions of its drafters in mind as being relevant today even as they were originally understood.²⁹⁶ After all, he reasons, the Framers deliberately chose a written constitution over an unwritten one precisely to grant their new government real and specified authority, not as merely a recommendation for how they should be governing and exercising their powers of political thought.²⁹⁷

Thus, overall, from the normative perspective, Whittington favors written constitutions over unwritten ones for many of the same reasons that Walter Murphy does; they establish fairly concrete limits on government and grant it certain relatively undisputed powers to ensure the protection of the rights of the people.²⁹⁸ Whittington abhors the dangers inherent in moral relativistic claims such as those advanced by Shapiro, Barber, and Wolin, and insists that written constitutions, if not completely necessary, are certainly quite conducive to the meaningful postulation and fulfillment of justice claims.²⁹⁹ Thus, his empirical argument claims that the American Framers realized this, and wrote their governing document accordingly. For Whittington, justice

²⁹⁶ Whittington, *Constitutional Interpretation*, 110-159. As noted in Chapter 2, this view contradicts that of the “constitutional change” empirical scholars.

²⁹⁷ Whittington, *Constitutional Interpretation*, 51-73.

²⁹⁸ See Murphy, 68-146. While the American presidency has been marked by expansion of its powers that many have deemed unconstitutional, even the most active presidents have always felt compelled to defend their actions in light of the Constitution. This has been true of all officials, even though, due to their differing offices, political affiliations, and responsibilities, they often possess widely varying specific views as to the exact meanings of the document’s words.

²⁹⁹ Whittington, *Constitutional Interpretation*, 27-30.

is found via a modified form of originalist constitutionalism.³⁰⁰ On the surface, such a view is quite similar to the insistence on the universality and the permanency of law postulated by natural law theorists.

However, Whittington does not ground his views on justice in natural law.³⁰¹ In fact, he opposes all such attempts, for the same reason he opposes unwritten constitutions; he emphasizes the first great problem in natural law theory, namely that the natural law is too often seen as being impossibly vague and hence completely impractical as a source of law. Thus, he poses the familiar question of how justices and officials can reasonably be expected to know the dictates of the natural law.³⁰² He is even quite critical of John Locke himself, claiming that Locke's famous *Second Treatise* was actually written to give nearly-unlimited power to the central government and in so doing smother justice claims instead of promoting them, Whittington implicitly accuses Locke of committing the second great problem of natural law theory, that of defining himself and his class as the sole interpreters of an absolute law which they subsequently used to squash the aspirations of less-privileged groups.³⁰³ In these writings, Whittington's views bear some similarity to those of moral relativists, especially Sheldon Wolin, who claims that liberal ideals were, and are, nothing more than a failed justificatory scheme by

³⁰⁰ This originalism allows for "textual indeterminacies" (ibid, 206) while still insisting that "the Constitution is not radically indeterminate" (207). As will be discussed below, this weakness of written constitutions as the basis for justice claims is highlighted by natural law theory.

³⁰¹ This stands contrary to Murphy's view; Murphy believes that "constitutional democracy itself is only an instrumental good" (449). While Murphy is not a natural law theorist, he is thus more favorable to its view on the values of democracy and of constitutions than Whittington is.

³⁰² Whittington, *Constitutional Interpretation*, 30-32. He sees natural law as inherently hostile to all constitutions, since it threatens to render them meaninglessly redundant. In his words, natural law "cannot fit with the experience of possessing a constitution at all (31)".

³⁰³ Of course, this view would reduce the crucial differences between Locke and Thomas Hobbes' "Leviathan" to an insignificant status, and as such, is unsupportable; although a full refutation is beyond the scope of this thesis, see the discussion in Chapter 1.

landed elites and other wealthy white males to keep themselves in power by legitimizing their rule as justified by “the natural law”.³⁰⁴ Overall, Whittington, while an originalist, is also somewhat positivist in his insistence on written law in all things. While he shares natural law liberalism’s distrust of unfettered democracy, he also resists any notion of a single absolute natural law accessible by reason or revelation.³⁰⁵

For Whittington, justice claims are thus dependent on written constitutions. He argues that these written guarantees of rights and liberties provide the only relatively sure and consistent protection against violation.³⁰⁶ He does not feel that democracy can provide these protections, nor does he possess confidence in natural law’s promises of natural rights and responsibilities.³⁰⁷ Overall, Whittington proposes a very legalistic approach to constitutions and notions of justice, a view that does not coincide with either the deliberative democratic view of constitutions or the liberal, natural-law-based view.³⁰⁸

The Natural Law Perspective: Only the Universal, Absolute Law Can Bring Justice

Most natural law theory profoundly disagrees with both the deliberative democratic viewpoint, and with Whittington’s focus on written concrete constitutions as the only reliable source of true justice. For natural law advocates, justice can only be

³⁰⁴ Sheldon Wolin, *Politics & Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press, 2004). Wolin sees this as inevitable, while Whittington does not.

³⁰⁵ Whittington, *Constitutional Interpretation*, 18-30. See also the discussion of positivism as an overall legal philosophy in Robert L. Hayman, Jr., Nancy Levitt, and Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* (St. Paul, MI: West Group, 2002), 74-80.

³⁰⁶ This view is quite similar to that of Stephen Holmes and Cass R. Sunstein, who argue in *The Cost of Rights: Why Liberty Depends on Taxes* (NY: W. W. Norton & Company, 1999) that legally unenforceable rights are not really “rights” at all; people have no rights unless the law tells them so.

³⁰⁷ Whittington, *Constitutional Interpretation*, 18-32.

³⁰⁸ In part, this has to do with Whittington’s primary focus on legal theory rather than political theory; see the Conclusion to this thesis.

reliably found via correct recourse to a single, absolute, unwritten natural law, a law directly at odds with moral relativistic claims such as Shapiro's and Barber's.³⁰⁹ This law decrees and establishes a definitive standard of morals and values; it creates definite standards of "acceptable" and "unacceptable" behavior, and then expects them to be followed. True, the natural law can be catastrophically misapplied or even ignored, but the following discussion will highlight its promised features. Natural law theory holds that these features will characterize any regime that is correctly founded on a true understanding of its precepts.

Natural law is not very tolerant of competing viewpoints or of dissent about the fundamentals of morality, but it is *not* a totalitarian or a fascistic order *when the law is correctly interpreted*, for several crucial differences separate its views from those of fascists.³¹⁰ Firstly, natural law advocates since John Locke have held that humanity is capable of discovering the dictates of the natural law via the utilization of human reason, while fascist ideologies reject all reason and base their appeals on complete rejections of intellectualism and reason in favor of pure emotionalism.³¹¹ The purpose of natural law's restrictions is to allow reason to function more freely, and allowing certain ideologies to be seriously considered would threaten that freedom. As Locke himself expressed it, no

³⁰⁹ Aquinas, *Summa Theologica*, II-II, Question 56. Not all viewpoints fall into one "camp" or the other; as Chapter 1 points out, most deliberative democrats have been unwilling to follow Benjamin Barber's radically participatory lead, preferring instead a normative "mixture" like that advocated by Kwame Anthony Appiah. By its very nature, however, natural law posits an absolute morality, a morality that logically doubts the feasibility of many more moderate claims; see Chapter 1.

³¹⁰ Of course, the first great problem of natural law theory, that of its intangibility, renders the correct perception of it an impossible matter to fully accomplish in perfection by humans, but King and Locke help to provide some criteria for discerning a correct interpretation from an incorrect one; see King, "Letter From a Birmingham Jail", and Locke, *Second Treatise*, Chapter II. Finally, the difficulty of the search for the best interpretation of the natural law does not mean that humanity should abandon the attempt.

³¹¹ Even Aquinas did not wholly reject human reason for complete otherworldliness, as evinced by his reliance on such classical authorities as Aristotle and Cicero.

human has the right to submit himself/herself or other people to slavery.³¹² The natural law forbids such actions and even thoughts, because these things are inherently harmful, and it holds that “no one ought to harm another in his life, liberty, or possessions”.³¹³

Secondly, natural law only restricts debate over *fundamental* issues, and is not opposed to democracy as long as that democracy is not seen as a value-in-itself, and is restrained accordingly; fascists, by contrast, are innately hostile to *all* democracy, however it may or may not be restrained.³¹⁴ By contrast with totalitarian or other fascist thought, Locke stresses that his state is a *minimal* state, whose primary function is simply to arbitrate disputes over the exact meaning of the natural law.³¹⁵ Locke assigns most legitimate governing powers to the legislature, not the king or other single executive. In the end, of course, Locke’s subjects always retain the right of revolt to overthrow a regime that violates their fundamental rights, which, as with all other regimes, it *did not create*, but only *recognized* or *failed to recognize*.³¹⁶ All of these facets of liberal natural law theory are vastly different from fascism, with its absolute single-minded devotion to a single leader and disregard for human rights.

By restraining debate over “fundamental” issues, natural law advocates mean to prevent certain patently harmful views and ideologies from replacing the natural law in the minds of the people with another, more harmful law. Walter Murphy’s argument concerning written constitutions applies especially to those based on natural law theories:

³¹² Locke, Chapters IV-V. See also Immanuel Kant, “What is Enlightenment?”, and discussion below.

³¹³ Ibid, Chapter II.

³¹⁴ “Primary value” is simply the main normative criterion or basis for a society’s morals; see Chapter 1.

³¹⁵ Locke, Chapter VII.

³¹⁶ Ibid. Even Aquinas, famous for upholding near-total monarchical power, declared that the kings were subjected to the natural law and the divine law; see Aquinas, *On Kingship*, Chapter Six.

Because constitutional democrats believe, or should believe, that all sane adults partake of their capacity to reason, they can debate and decide what sort of regime best suits their needs. It follows that they can *morally* bind themselves to each other, to general normative principles, and to the more specific regulations of a political order. This justification, however, limits consent's legitimating power. To entirely surrender one's capacity to make choices would be to commit moral suicide. Consent to a political system that denies its citizens are rational, largely morally autonomous human beings is to consent to a system that denies the basis on which the validity of consent itself rests. No one has the authority to destroy his or her own consent or right of others.³¹⁷

It follows, then, that natural law theories, when correctly applied, are not in fact inherently hostile to or destructive of written constitutions, as Whittington claims. It is true that, just as with democracy, natural law theory does not see written or unwritten constitutions as ends-in-themselves, but only as a means to some other end. Whittington claims that such viewpoints pose a grave risk to the authority of written constitutions, and he is not alone in this view.³¹⁸ On the contrary, though, the natural law can drastically *empower* written constitutions when those constitutions are in accordance with it, as it lends its all-encompassing absolute standards of "good" and "bad" to the written constitution itself. In theory, this should establish a very just and stable political order.³¹⁹

Whittington's conception of written constitutions as the only guarantees of justice, though, is seriously flawed both empirically and normatively. Empirically, one need only survey the long history of horrific abuses that were long allowed in the United

³¹⁷ Walter Murphy, *Constitutional Democracy* (Baltimore, MD: Johns Hopkins, 2007), 514.

³¹⁸ Notably, the late distinguished historian Hubert J. Storing agreed with Whittington, opposing appeals to the natural law as inherently dangerous to constitutional and legal integrity; see Bessette (ed.), 236-258.

³¹⁹ See Locke, Chapter XI, and Finnis, *Natural Law and Natural Rights*, Chapter XII.3. The potential for abuse is highest, though, when this is so; see Chapter 2.

States and defended precisely on “constitutional” grounds to see that constitutions alone cannot ensure absolute justice.³²⁰ If, on the other hand, “justice” is whatever the written constitution deems it to be, then the nation-state in question is trapped in yet another example of moral relativism, as it becomes impossible to legitimately protest any evil practice or act as long as that act is protected by the written constitution. Dr. Martin Luther King, Jr. grasped this problem:

...there are two types of laws: just and unjust. I would be the first to advocate obeying just laws.

One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that “an unjust law is no law at all”.

Now, what is the difference between the two? How does one determine whether a law is just or unjust? *A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law.*³²¹

The natural law can thus provide a crucially-needed defense against cruelty and injustice, and it can do so more plausibly than mere reliance on written constitutions, which may well contain “unjust laws”.

Additionally, Michelman’s “infinite regress” problem indirectly affects Whittington’s argument as well as that of the deliberative democrats, because one must still question from whence the written constitution came from.³²² There are only three possibilities: it must either have been generated in a wholly democratic way by the people at large, or by a small assembly convened for that purpose, or some combination thereof.

³²⁰ Even Hubert Storing admitted this; see Bessette (ed.), 131-205. One can also survey the history of political philosophy itself; recall that the “laws of Athens” condemned Socrates to an unjust death. See Plato, *Crito*.

³²¹ King, 49.

³²² See Michelman, 162-165.

Whittington, and indeed Gutmann and Thompson, are quite suspicious of the first possibility as being highly dangerous, with good reason.³²³ If Whittington wholly embraces the second possibility, then he must be willing to endow the small group of constitutional drafters with near-divine wisdom, something he admits he is unwilling to do by his rejection of pure originalism.³²⁴ Finally, although the third option is the safest course for Whittington to pursue, any such attempt will be highly complicated for the same reasons highlighted by Jon Elster, namely such concerns as publicity, force, and interest.³²⁵ These questions confront all constitutions and their drafters, but the questions they raise present much greater challenges to those who rely solely upon them for justice than they do upon those who see written constitutions as but imperfect, man-made reflections of the absolute natural or divine law.

For these reasons, written constitutions *cannot* be wholly relied upon to protect human rights or to establish morality by themselves. By contrast, the natural law, which is *discovered* by humans and is not *created* by them, has a chance to escape either moral relativism or “infinite regress”. Hopefully, any written constitution will correctly reflect the dictates of the natural law, but in any case, the natural law still remains outside the document as an overarching objective criteria for criticizing and even resisting it when it makes mistakes, as all human beings and all human creations are wont to do.³²⁶ It thus

³²³ Whittington, *Constitutional Interpretation*, 22-27, and Gutmann and Thompson, 200.

³²⁴ See Whittington, *Constitutional Interpretation*, 49. This also touches upon the second great problem of the natural law theories, but as discussed above and below, they offer a more hopeful rights outlook than constitutionalist theories such as Whittington’s.

³²⁵ See Elster, 105-116.

³²⁶ See King, 41-60.

serves to ensure that the concept of law is not seen as morally neutral and hence not subject to higher laws of morality; as John Finnis expressed it:

...one cannot begin to understand what law is about without ever noticing, not merely that it shares much of the same action-guiding vocabulary as morality, but- overwhelmingly more important- that it does so because it purports to occupy *the same place in the world* as morality: the decisive framing of the options for choice at the point where deliberation is ending in decision about what I should do and what kind of person I should be.³²⁷

Likewise, in St. Thomas Aquinas' words, even in an unjust governing order, "those general principles, the natural law, in the abstract, can nowise be blotted out from men's hearts".³²⁸

While Whittington makes a valid and pointed criticism when he claims that the natural law is intangible and as such can be interpreted in a great variety of ways by a great variety of peoples, any interpretations should not be confused with being the natural law themselves or as being somehow equal "additions" to it, as he himself points out with regard to the United States Constitution.³²⁹ Instead, in Finnis' words,

Natural law could not rise, decline, be revived, or stage 'eternal returns'. It could not have historical achievements to its credit. *It could not be held responsible for disasters of the human spirit or atrocities of human practice.*

...anyone who considers that there are principles of natural law, in the sense already outlined, ought to see the importance of maintaining a distinction between discourse about a natural law and

³²⁷ Finnis, "Law and What I Truly Should Decide", 126.

³²⁸ Aquinas, *Summa Theologica*, Question 94, Sixth Article.

³²⁹ See J. B. Schneewind, "Locke's Moral Philosophy" in Vere Chappell (ed.), *The Cambridge Companion to Locke*, 199-225. Whittington himself emphasizes this in his empirical writings; in defending the authority of the original written U.S. Constitution and its formal amendment procedures, he insists that interpretations and informal amendments do not carry the fundamental weight possessed by the original text; see Whittington, *Constitutional Construction*, 1-15.

discourse about a doctrine or doctrines of natural law. Unhappily, people often fail to maintain the distinction.³³⁰

However it is interpreted, the natural law still remains as a possible source of morality even in immoral and unjust times and circumstances. As such, it remains a more sure foundation for lasting constitutional democracy, and for justice itself, than either democracy or constitutionalism.

³³⁰ Finnis, *Natural Law and Natural Rights*, Chapter II.1 (emphasis added).

Conclusion

Normative Conclusions

It is hoped that this thesis has demonstrated some of the problems inherent in deliberative democratic theory. When taken in unrestrained form, democracy such as deliberative democrats advocate can be quite dangerous. However, democracy should not be seen as always or necessarily “bad”; its bad tendencies only become prevalent when they are allowed to run totally unchecked. Democracy can be rendered much safer, and indeed very desirable, if it is properly controlled. In order to achieve this restraint, written constitutions have emerged as the instrument of choice for political societies. For example, while “Princeton” and “constitutional change” scholars have debated the intent and the efficacy of the written United States Constitution’s apparent checks on democracy, most would agree that the document was in fact designed to limit democracy at least to a degree, and that it has fulfilled at least some part of this task. In the case of the United States, then, democracy is constrained in such a way so as to make it consistent with constitutional values.³³¹ When it is controlled in this way, democracy’s dangers are ameliorated, and societies can enjoy its benefits without needing excessive and constant vigilance against every momentary passion that threatens their rights, because such passions are far less likely to gain and retain success.

Why is it so necessary to have constitutions to restrain or at least guide democracy? First, as Chapter 1 demonstrated, the ideals of unrestrained deliberative democracy are incomplete and self-contradictory. They are inherently destructive of any idea of an absolute, universal moral standard, because deliberative democrats wish to

³³¹ See Chapter 2.

make morality itself dependent on majority opinion. To assert that “democracy” should be a prime value is to potentially invite moral and political anarchy in which “anything goes”, and no objective standard remains to judge whether any conduct or ideals are “right” or “wrong”, or even whether they are harmful or not. Fearful of such a terrible potential, even most deliberative democrats have shied away and attempted to insist that certain restrictions on democracy must remain even in a deliberative setting.

Chapter 3, however, has demonstrated that all such attempts to partially limit democracy while still retaining it as a primary value are doomed to theoretical and practical failure, because of democracy’s inbred destructiveness to other values. After all, to summarize Michelman’s “infinite regress”, if democracy is taken as a core value, then all things must be ultimately justified by how “democratically” they were enacted, and this includes any attempt to restrain the democracy itself via written or unwritten constitutions. Democracy cannot coexist on an equal plane with other absolute values without destroying or severely distorting them to conform to its values. Since the majority will prevails, the other values must be made to conform to the majority’s preferences in order to be “legitimate”. If one insists on achieving “consensus”, one is either faced an impotent government or a totalitarian one, as shown in Chapter 1.³³²

Additionally, because democracy tends to reach differing conclusions at different times and in different places, one is faced with the question of which conclusion is the “right” one. To escape this conclusion, one can attempt a “relatively relative” solution

³³² See Chapter 1.

such as “It was/is right for those people in that situation, but not for us”.³³³ As Chapter 1 illustrated, all such attempts at “relative relativism” are doomed to logical failure. Given such a logical and practical problem, those who attempt to simply add democracy as a core value while keeping any other core values cannot maintain their position. They must either embrace “pure” moral relativism, in which all values and morals are seen as place-and-time-specific and never as universal or absolute, or the absolute and universal morality of the natural law perspective. As discussed above, the completely moral relativistic perspective is too frightening for most scholars and philosophers to consider, and rightfully so.

Perhaps fearful of such dire consequences, as discussed above, Kwame Anthony Appiah attempts to fuse aspects of universalist natural law theory with debate and democratic norms similar to those advocated by deliberative democrats. Logically, his position appears somewhat tenuous in regard to specifics, for the reasons discussed in Chapter 1; however, his recognition of moral absolutes is quite heartening from a natural law perspective, since he advocates that while it may be recognized in different ways, the natural law does in fact exist. It remains unclear, though, what his conception of this natural law, which all humans have apparently arrived at via practicality and consensus, prescribes for humanity.

Natural law, thus, remains as better basis for morals and values than the above alternatives. However, it is undeniably true that natural law is not to be taken lightly. Its

³³³ See Benjamin Barber, “Foundationalism and Democracy”, in Seyla Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, Princeton, NJ, 1996), 348-359. To be sure, natural law’s two great problems reveal that this consideration affects natural law theories as well, but these theories possess a notion of the existence of a “right” answer.

intangible nature leaves open the great questions of how it is to be discovered and interpreted. The interpretation itself of the natural law raises an even greater problem; if it is wrongly interpreted or is left undiscovered, enormous disaster may result, as tyrannical regimes acquire the force of the absolutist morality. While it is still in fact advocating what is morally good and postulating human rights, those who claim to be its interpreters are in fact saying that it legitimates their horrific order as “natural” or “the will of God”. Overall, natural law should be recognized, but great care must be taken.

Given this perspective, one hopes that the United States Constitution was correctly and carefully founded on true natural law principles. The discussion in Chapter 2 has demonstrated that the American governing order definitely does not reflect the deliberative democrats’ normative recommendations for a truly “democratic” society. However, the exact nature of the U.S. “constitutional democracy” remains hotly disputed. Did the Framers intend to create a written constitution whose dictates they expected the people and their leaders to follow for centuries to come exactly as they intended? On the other hand, did the Framers recognize that they were only human, and expect and even desire that the American people should continually reinterpret and fundamentally change their constitution to reflect changing times? While it is clear that the natural law more closely resembles the first description of the Constitution, the written document should never be confused with being identical to it, and the debate continues.

In addition to arguing that democracy itself is a normative value worth upholding in its own right, deliberative democrats naively assert that affairs will “just turn out all

right” if only society is “democratic enough”.³³⁴ They rely upon lofty views of human nature that are unsupported and unsupportable by the history of the human race.³³⁵ Whatever their exact intentions regarding the nature of their new government, the American Framers reserved no doubts concerning humanity’s basically evil nature. They accordingly designed their document to take advantage of inevitable human “interest” rather than more elusive “virtue”, and once again, all but the most radical deliberative democrats are in agreement; they too fear unrestricted human nature.³³⁶ Human nature cannot be relied upon to produce morals and values, because humans are basically greedy, subjective, and self-interested.³³⁷ Thus, morals and values must stem from a nonhuman source to be universal and unchanging. Because it posits the existence of such a source, the natural law theorized about by philosophers as different as St. Thomas Aquinas, John Locke, Immanuel Kant, Martin Luther King, Jr., and John Finnis provides a more secure way to discover lasting universal norms.

As previously discussed, natural law posits that morals and norms exist “outside” politics. This means that democracy or any other kind of politics can never change their contents. They remain unchanged by political outcomes and majority opinions. The business of politics to find the best ways to *discover* this law rather than attempting to

³³⁴ Examples of this include Benjamin Barber, and to a lesser extent, Ian Shapiro. They do not represent the views of most deliberative democrats, but their views are logical extensions of those of the less radical ones.

³³⁵ See Chapter 1, and John Locke, *Second Treatise of Government*, Chapter IX.

³³⁶ As Hubert J. Storing and others have pointed out, the Anti-Federalists hotly criticized the Federalists for their use of “interest” rather than attempting to encourage the development of “virtue” in their new constitution; see Joseph M. Bessette (ed), *Toward a More Perfect Union: The Complete Writings of Hubert J. Storing* (Washington, DC: American Enterprise Institute, 1995), 37-76.

³³⁷ See Locke, Chapter IX, Aquinas, *Summa Theologica*, and Chapter 1.

create it.³³⁸ Whatever the people may decide, it remains unmoved, and as such serves as a universal, nonsubjective criterion for the assessment of the “goodness” of the laws enacted by humans.³³⁹ The source of this law existed before mankind, either in nature itself, which displays remarkable order in most cases, or by God Himself.³⁴⁰ As such, they are supposed to apply impartially to all people in all places at all times, and thus provide a universal standard for justice.

In contrast, Chapter 3 has demonstrated that democracy and written constitutionalism cannot be relied upon by themselves to fulfill the demands of justice. While it has been physically impossible to exclude humans entirely from the process of constitution-making, for the above-mentioned reasons, every precaution needs to be taken to make sure that the natural law is upheld in the resulting written documents and unwritten sociopolitical and legal orders. To accomplish this, it helps to do as the American Framers did and shield the proceedings from the public-at-large. It is not *always* true that the public’s interests and goals are not in line with the natural law’s regulations, but they often are. In the same way, the drafters themselves are not and must not be seen as divine; they make mistakes and can fail to obey the natural law just as the masses can, but shut off from popular and unpopular passions, and given time for reasoned deliberation, they possess a rare opportunity to understand what the natural law

³³⁸ See Locke, Chapter XI.

³³⁹ See Martin Luther King, Jr., “Letter From a Birmingham Jail”, partially reprinted in Robert L. Hayman, Jr., Nancy Levit, and Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* (St. Paul, MN: West Group, 2002), 46-52, Aquinas, *Summa Theologica*, Questions 90-95, and Finnis, *Natural Law and Natural Rights*, Chapter II.1.

³⁴⁰ As noted in Chapter 1, Locke himself strongly believed that God instituted the natural law; see *ibid*, Chapter II. For a secularist view of the natural law, see John Finnis, *Natural Law and Natural Rights*. In *Democratic Justice* (New Haven: Yale University, 1999), 6, Ian Shapiro asserts that recent skepticism of natural law theories stems in part from their secularization, a claim this writer agrees to be a sound one.

demands, an opportunity that is impossible to achieve in continuous public deliberation with its attendant hazards, as identified by Elster and discussed in Chapter 3. The *drafters* are not themselves necessarily better, but their *environment* is. Since the natural law is either discoverable through reason, reason must be as unfettered as possible in order to decipher it.

Indeed, without universal and objective norms, it becomes nearly useless to even consider the feasibility of achieving any kind of justice. If all morals and values are relative, “justice” becomes purely the creation of a democratic majority, or of a panel of judges or some other political entity. In Locke’s words, “every man becomes a judge in his own case”, and revenge replaces justice as the order of society.³⁴¹ Such a society becomes a Hobbesian “war of all against all”, and quickly disintegrates into anarchy.

All in all, it can thus be concluded that the natural law, correctly interpreted, provides a suitable foundation for a desirable political order. It allows us to escape our particular prejudices and desires in order to aim at a prepolitical, higher standard for morals and values. It provides the foundation for morals and values that is so sorely lacking in democracy alone, and it provides the guide for democracy that keeps it from its potentially hideous excesses if left unchecked. It also strengthens the claims for justice that are so often heard and too often ignored around the world, and it gives humanity the surest means for providing impartial justice that is truly worthy of the name. Finally, it bestows humanity with both rights *and* responsibilities, thereby helping to ensure happiness while guarding against pure self-centeredness and harmful behavior.

Ultimately, the natural law should provide the standard by which to judge when a

³⁴¹ Locke, Chapter V.

democracy or any other type of government has become “bad”. It is crucial that it be correctly interpreted and always kept at least remotely in sight of the people.³⁴² Correctly applied, natural law is not hostile to either written constitutions or democracy. It simply views these things as *instrumental* goods rather than goods-in-themselves. Because they prioritize reason and humans’ independence from the decrees of absolutist leaders, constitutions and democracy are in fact the safest and surest ways to promote the correct recognition of the natural law by humanity, and as such they should be encouraged. Natural law theorists have recognized this; even Aquinas, who was known for his usual defense of absolutist monarchy as the surest means for recognizing the natural law, wrote:

If to provide a king belongs to the right of a given multitude, it is not unjust that such a multitude is acting unfaithfully in deposing the tyrant, even though it had previously subjected itself to him in perpetuity, because he himself has deserved that the covenant with his subjects should not be kept, since, in ruling the multitude, he did not act faithfully as the office of a king demands.³⁴³

In most democratic situations, “constitutions” were often intended to stop “democracy” in any “constitutional democracy” from violating the natural law, but often the natural law itself will have to stop constitutions from violating it and compromising the people’s

³⁴² As discussed in Chapter 2, Stephen Griffin’s empirical picture of the American constitutional order as being continually defined and redefined via politics may render this task far easier than it would be under a more “stable”, but possibly unjust, system such as that posited by Whittington. Natural law advocates would insist, however, that the politics restrict its questions according to the natural law, and exclude potentially harmful viewpoints.

³⁴³ Aquinas, *On Kingship*, Chapter Six. Later on in this chapter, Aquinas famously held that people who could not thus justly remove a tyrant were “stuck” with him, but even in this instance, he was never to be allowed to circumvent the commandments of God.

rights.³⁴⁴ At the same time, the democracy can provide the people with the chance to exercise their powers of reason and their right to controlled popular sovereignty.³⁴⁵

How would the people know if and when a particular government or law was unjust under the natural law? A full answer to this question would occupy again as much space as this entire thesis, but some general points can be made from natural law theory. First, those leaders who exceed their agreed-upon powers are often violating the natural law.³⁴⁶ Secondly, any law whose obvious purpose is to denigrate or deny the humanity or the human rights of the people is patently unjust.³⁴⁷ Thirdly, in reason-based accounts of the natural law such as Locke's and Finnis', any law that violates the dictates of human reason is unjust. Finally, in revelation-derived accounts such as Aquinas' and King's, any law whose observance would require disobedience to the divine law as revealed by God is unjust.³⁴⁸ Such laws may range from commandments to partake in or at least to acquiesce in genocide to prohibitions on religious freedom or even more banal matters such as unequal representation or taxation.³⁴⁹

Overall, the natural law order would rely on the supremacy of the absolute natural law, but also provide the people with a voice in less fundamental matters of government. More specifically, the people would still deliberate, but they would be doing so in order

³⁴⁴ King, 49. Thus, the natural law bears certain affinities to Stephen Griffin's empirical argument that the United States Constitution is in fact readily alterable by use of public reason; see discussion in Chapter 2, 81-89.

³⁴⁵ See Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999), 110-159.

³⁴⁶ See Aquinas, *On Kingship*, Chapters III-VI, and Finnis, *Natural Law and Natural Rights*, Chapter XII. Of course, any attempt by any leader or people to violate the natural law automatically exceeds the limits of legitimate authority, for no human has the right to violate the natural law or to attempt to change it.

³⁴⁷ See King, "Letter From a Birmingham Jail".

³⁴⁸ Aquinas, *Summa Theologica*, II-II, Question 104, Articles Four-Six.

³⁴⁹ Many, such as Aquinas and Finnis, refer to such laws as "contrary to the common good".

to discover how their society could *better* match the dictates of the prepolitical natural law, and *never* attempt to promote their desires and decisions to an equal level with that law. Thus, their deliberation would discuss the means to reach the moral ends of the law, and not debate the merits of the natural law's moral ends themselves. This thesis strongly suggests that such an order provides a secure way to achieve lasting rights protection and true justice, a more secure way than deliberative democrats have yet offered.

Afterword: Research Notes

This thesis has been a remarkable experience. It has demonstrated several important aspects of scholarship and research that had not been considered before by this author. Firstly, it has granted renewed appreciation of the considerable work that must be done to produce a serious scholastic work. From research and reading to writing and revising, this thesis has been the largest scholastic undertaking the author has yet attempted. Numerous philosophers and scholars of political and legal theory have had to be found, read, re-read, and consulted, their works scanned carefully for key phrases and suitable quotations, and then documented in a coherent and persuasive fashion. Altogether, this author has gained a renewed appreciation for the political philosophers and legal theorists who have made the study of the issues and questions presented here their life's work, a dedication that takes a great deal of intelligence, hard work, discipline, and skill. After all, unlike more quantitative-based social science works, political philosophy and legal theory must stand on their own merits in scholastic argument; they cannot merely present statistical figures and even partially leave the reader to reach

his/her own conclusions. Because of this, they require a developed literary and argumentative skill.

Despite the similarities with the overall qualitative approach that political philosophers and legal theorists may take, great differences have emerged between the subjects of their studies, and this author was surprised at just how different they are.³⁵⁰ One need only witness the differences between Chapters 1 and 3, and Chapter 2, of this thesis, to see that political theory and legal scholarship often ask very different kinds of questions. Political theory is usually preoccupied with value-laden normative questions, and asks what values society *ought* to be pursuing, while much legal scholarship is not as explicitly concerned with normative issues, and instead directs its attentions to discovering how morals and values *have been* observed in the past. Legal scholars thus tend to value written documents and records far more than do political theorists. Even in normative works written by legal theorists, such as Keith Whittington's *Constitutional Interpretation*, this trend is apparent, as Whittington prefers to rely on written constitutions alone for guarantees of rights and justice, and regards nonwritten emphases on norms, morals, and values as too intangible to be reliable or useful. This trend is even apparent in the natural law legal theory of John Finnis, as he regards purely abstract or divine versions of the natural law as legally useless.³⁵¹

These differences have also affected the author's perspective on political and legal scholarship. While he has a marked preference for normative arguments, he has learned that one cannot scholastically ask such questions concerning purely empirical

³⁵⁰ By "qualitative", it is meant that both political theorists and legal scholars rely on written texts and verbal argumentation as opposed to statistics and numerical data.

³⁵¹ Finnis, *Natural Law and Natural Rights*, XII.3.

arguments. Asking purely normative questions of empirically-based arguments usually results in missing the author's objectives and perhaps even dismissing his/her argument before consideration of the empirical evidence. One's beliefs are driving reality, rather than the reverse. Such concerns as morals and values must always be kept at least remotely in view; they simply cannot be used in the evaluation of certain types of arguments. These differences have rendered apparently value-deprived content of much legal reasoning more understandable, as before it was difficult to comprehend why justices and judges were apparently willing to violate all moral standards in certain decisions, such as *Dred Scott v. Sanford*. To the author, this difference also serves to highlight the potential danger of taking a purely or perhaps even a mostly positivist approach to matters of law and morality.

Finally, this experience has demonstrated the true complexity of scholastic arguments and argumentation. It is not enough to assert one's beliefs, or even to logically defend these beliefs; instead, one must be very well-read and well-versed in a scholarly literature embracing a vast number of diverse viewpoints. To say the least, this exercise broadens one's intellectual and conceptual horizons. It can even be somewhat overwhelming at first glance, but detailed study soon leads one to learn to "think scholastically" as the scholars do who have written the older works being studied. All in all, the author regards the experience of researching and writing this thesis as a great accomplishment, and hopes that this experience will prepare him well for future success in academic and extra-academic pursuits.

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