

"Manifestly for the Good of the People": Elections and Democratic Legitimacy in Locke's *Two Treatises*

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Abstract: This paper presents a critique of contemporary democratic theory, using a line of argument drawn from Locke's *Two Treatises*. We argue that democracy cannot be the ultimate ground of legitimacy; it must serve some larger norm. If political legitimacy were ultimately grounded in democratic processes, no one could have authority *over* democratic processes ♦ and thus no one could legitimately institute them where they did not already exist, or resolve disputes about them where they do. Democratic theory must address this problem before it can be said to provide a complete theory of political legitimacy.

In this paper we use a line of argument found in the democratic theory of John Locke to offer a critique of contemporary democratic theory. We argue that there is an important and unacknowledged deficiency in the current discussion over democratic theory. This deficiency concerns the degree to which the mechanisms of democratic government ♦ the procedures by which democratic decision-making occurs, such as election procedures ♦ can themselves be said to possess democratic legitimacy. Though for most of this paper we focus on elections, the traditional mechanism of democratic government, the problem we raise is relevant to any theory that makes political legitimacy contingent on any kind of democratic process.

The problem is this: in practice, where democratic processes do not exist they can only be brought into existence by prior processes that are not themselves democratic. Similarly, where

democratic processes exist but malfunction or experience a crisis, some process is needed for resolving that malfunction or crisis that will not itself be democratic. In other words, the process of creating and maintaining the democratic process is itself outside the democratic process. For this reason, democratic processes must ultimately acquire legitimacy from some normative value other than democracy. Failure to explicitly examine and evaluate these pre-democratic norms creates a gap in democratic theory and encourages false expectations for democracy in practice. Democratic theory dissipates its energies chasing the false hope of designing democratic processes that will be entirely democratic. We conclude that normative grounds other than democracy are ultimately essential for a complete theory of, and successful practice of, democracy. Democracy, as both a process and an ideal, cannot be an end in itself (an "ultimate good" or "metanorm"); it can only be a means to other ends (an "instrumental good").

What ultimate good democracy should serve is a question beyond the scope of this paper. But we cannot discern any explicit metanorm in contemporary democratic theory. Cohen claims, for example, that "outcomes are democratically legitimate if and only if they could be the object of free and reasoned agreement among equals."ⁱ [1] This seems to reflect the view that freedom and consensus among equals, not democracy as such, may be the ultimate norm. Rawls prudently avoids detailed discussion of political mechanisms and defers instead to other routes for "public reason." It may be that Rawls's concepts of equality or public reason are the ultimate norms to which contemporary democratic theory implicitly appeals, rather than democracy as such. We can't tell; our reading of the literature has revealed nothing precise or explicit. Without an explicit discussion of what the ultimate grounds of democratic legitimacy are, we cannot find justification for democratic theory's multitude of prescriptions for democratic processes.

Our status as outsiders to the contemporary discussion of democratic theory puts us in a position to offer something unique to the insiders ♦ we can tell those theorists who specialize in democratic theory how their theories sound to those who are not themselves specialists in democratic theory. We have been unable to find any democratic theorists who address this problem with anything like the urgency that (it seems to us) the problem demands. Because we are outsiders, we readily admit that our whole critique may be a big misunderstanding ♦ but even if this is the case, the existence of the misunderstanding itself says something important about democratic theory. It has failed to communicate its solution to this problem in a way that those outside its own professional circles can detect. Or so, at least, it seems to us.

The paper begins by stating the problem we see in contemporary democratic theory. It then reviews certain current events to show the practical urgency of the problem, and examines the content of a set of contemporary democratic theories to show how the problem is manifested there. From there, it turns to a similar problem raised and answered in the democratic theory of John Locke. We believe that Locke succinctly states the case that democracy cannot be an end in itself, but must serve a metanorm. We are not advocating Locke's whole theory of democracy; we are not even advocating the particular metanorm (natural law) that he favored. Instead, we are appropriating one argument he makes as a valid statement of the case that democracy can never serve as an ultimate norm of political legitimacy, and must therefore serve some metanorm that stands above it.

Elections and the Infinite Series Problem of Democratic Legitimacy

It seems to us (from our perspective as outsiders) that the conversation among contemporary democratic theorists is surprisingly blind to the problem of where democratic processes come

from in practice. Saward, for example, simply brushes aside as "self-evident and uncontroversial" the fact that any deliberative procedure must necessarily be instituted by a prior non-deliberative procedure.ⁱⁱ [2] But isn't it necessary for democratic theory to justify these non-democratic, non-deliberative processes before proceeding to argue over which particular democratic process or mechanism is best? Skipping this first step seems to make all subsequent theorizing suspect, on grounds that the democratic theorists cannot justify a process that could legitimately bring into being their various favored democratic processes.

To state the problem more formally, we think any theory that makes "democracy" the ultimate basis of legitimacy ◆ as opposed to an instrumental norm in the service of some higher metanorm ◆ must at least confront and respond to the following counterargument:

1. If democracy is the ultimate basis of legitimacy, no political institution can be instituted except through a democratic process.
2. Democratic processes, including both traditional elections and alternative mechanisms of "deliberative democracy," are themselves political institutions.
3. It follows that democratic processes cannot be instituted except through a democratic process.
4. It is impossible to have a democratic process by which to institute democratic processes prior to those democratic processes being instituted.
5. It follows that if democracy is the ultimate basis of legitimacy, democratic processes cannot be instituted.

This argument focuses on the institution of democratic processes where they do not already exist. However, a similar argument could be made that would apply to democratic processes where they do already exist:

1. If democracy is the ultimate basis of legitimacy, political disputes must be resolved by a democratic process.
2. The democratic process itself can be the subject of political dispute.
3. It follows that when the democratic process is the subject of a political dispute, that dispute must be resolved by a democratic process.
4. It is impossible for a process to resolve a dispute of which it is itself the subject.
5. It follows that if democracy is the ultimate basis of legitimacy, political disputes over the democratic process itself cannot be resolved.

We do not put these arguments forward as unanswerable; it may be that democratic theory can develop a sufficient answer to them. But we think contemporary democratic theory has neglected these challenges. Until these problems are addressed, we do not see how democratic theory can claim to provide a complete theory of legitimacy.

So far we have spoken only of "democratic processes" generally. In this paper we mostly focus on elections as the paradigmatic example of a democratic process. Election rules seem to be the most prominent (and perhaps inevitable) institution of a democratic polity. Many theoretical forms of democracy, and all existing forms of democratic polity, promise a

"democratic" regime through the mechanism of elections. Even many deliberationists ◆ those who oppose making elections the central focus of democratic theory in favor of more "deliberative" processes ◆ concede that voting and elections may be necessary even under ideal circumstances.iii [3]

We understand that there are important critiques by democratic theorists of elections as amalgamating mechanisms. There are also problems such as strategic voting, which can be viewed as "undemocratic" acts.iv [4] But unlike Miller, for example, our concern is not whether one rule or another is "repugnant to our sense of what a democratic decision should be."v [5] "Democratic" critiques of "democratic" processes are necessary enough, but are insufficient. How can democratic processes be democratically evaluated and chosen? We are not asking whether this or that election rule is sufficiently democratic. We are asking how it is that democratic processes can claim, in any fundamental way, to be chosen by a democratic process or evaluated against the norm of democracy.

It is a fact that the processes immediately preceding the institution of elections are in almost every case not democratically chosen. Even if the process immediately preceding elections is itself democratic, there must be a process before that process, and eventually we must come back to the origin of democracy in some non-democratic process. We think democracies should recognize this fact and defend (on grounds other than "democracy") the legitimacy of instituting elections in this way. The alternative seems to be to raise questions about the idea of democratic legitimacy altogether.vi [6]

The problem is obscured by the use of the term "democracy" to refer to both means and ends. Our reading of democratic theory is that "democracy" is used imprecisely to refer to a variety of

norms and processes. Consider the traditional democratic nomenclature, for example.

"Constitutional government," is a process, "equality" or "the preservation of rights" are norms; yet the term "democracy" might be used to refer to any of them. The concept of "consent" refers to both a norm and a process. Some democratic objectives may be potentially contradictory, such as minority rights and majority rule. In more recent democratic theory, democracy may refer to processes such as "Deliberation Day" or to elections. It may also refer to principles such as "reciprocity" or "inclusive discourse."

The Problem of Democratic Legitimacy Manifested in Current Events

The question of where democratic legitimacy ultimately comes from is more than an academic one. Encouraging the creation of democratic institutions abroad is currently one of the top priorities of American foreign policy.vii [7] In the past two years the issue has been one of crucial importance in Iraq and Afghanistan . We take no position on the legitimacy of the wars that removed the prior undemocratic regimes in those countries. But given the status quo once the prior regimes are gone, the question then becomes: who has the right to institute elections, determining the rules by which they will be conducted? The United States claimed to have the right to do so in both countries, with or without anyone else's approval. Some claimed only the U.N. had the necessary moral authority (read: legitimacy) to institute elections; allowing one nation to unilaterally design and establish the political institutions of other nations would run the risk of setting that nation up as an imperial power. Others made the implicitly communitarian argument that only "the Iraqis" or "the Afghans" themselves could legitimately create the rules for elections.

If democratic theory does not provide some reply to the infinite series problem we have outlined, no democratic government could legitimately be instituted in either country. No conceivable set of events could circumvent this problem. The new regime would have to be established by one of the following:

1. The United States and its allies, acting without anyone else's approval
2. An agency or a coalition of nations acting under U.N. approval
3. Some person or group or set of groups from within the nation itself (Iraq or Afghanistan),
selected by #1 or #2 above
4. Some person or group or set of groups from within the nation itself, seizing power without
having been selected by foreign powers

In none of these cases is democracy instituted by an actor who can make a claim to possess democratic legitimacy. There is no democratic means by which those who institute democracy can be selected.

Because the institution of democracy must occur without any clearly discernable democratic mandate, the steps to establish these new governments can be met with a high degree of cynicism regarding their supposedly democratic character. In cases #1 and #2, the challenge to the democratic legitimacy of the new regime is obvious: it was undemocratically designed and established by a foreign power. The United Nations is just as foreign to Iraq and Afghanistan as the United States , and whatever claim to legitimacy it possesses, there are no grounds for characterizing that legitimacy as "democratic." In case #3 the challenge is equally obvious; while

the power to institute democracy has been handed to Iraqis or Afghanis, the crucial question of *which* Iraqis or Afghanis were selected to wield this power was determined by a foreign power. Case #4 may appear to give us a way out since it excludes foreign powers, but this solution is illusory. As in case #3, the crucial question of *which* Iraqis or Afghanis institute democracy has been settled undemocratically. Communitarians or believers in Wilsonian ethnic self-determination might ascribe to these actors some other ground of legitimacy besides democracy. But if we wish to make democracy the ultimate standard of political legitimacy, case #4 is no more helpful than cases #1-3.

The 2000 presidential election in the United States offers another practical example of the infinite series problem of democratic legitimacy. Many democratic theorists conclude that the outcome of that crisis lacked democratic legitimacy. For example, Calabresi asks, "How did a nation committed to democratic rule come to have such faith in the role courts could play as umpires of the political process? Were there no elected officials who could have legitimately umpired the decision dispute in place of the U.S. and Florida Supreme Courts?"^{viii} [8] Why, Calabresi asks, were all such candidates (Harris, canvassing boards, Florida state legislature, Congress) given so little deference in the court of public opinion? According to the logic of democratic theory, then, the solution to the crisis would have been more democratic if its outcome had been determined by elected officials. But we are not persuaded that such a solution would in fact have been more democratic.

We are not concerned here with whether the law was properly followed in *Bush v. Gore*. That is, we are not asking whether the high court reached the right verdict in this case once it had been determined that the high court, rather than elected officials, should determine the outcome. The

issue here is the claim that settling political crises in the courts is illegitimate (or less legitimate) because it is "undemocratic," and undemocratic because the judges are not elected. We take issue with this claim because we think it invites the infinite-series problem. If democracy is the ultimate ground of legitimacy, political outcomes become less legitimate to the degree that their arbiters are more removed from the democratic process. Legitimacy, in other words, is directly proportional to the degree of control by democratic processes. On this view, democracy is the end rather than the means. The alternative is to say that democracy is the means to one or more higher metanorms; in this case let us stipulate for the sake of argument that the relevant metanorm was the "rule of law." In this crisis, the rule of law and democracy were in conflict. At some point, one must give way to the other in the course of governing. We cannot avoid this necessity even by the desperate expedient of holding a new election, because the decision to hold a new election must be made by either judges or elected officials, and whichever set of actors makes it, the other set must give way to their authority. Which ought to have given way?

Calabresi's "democratic" solution is to have elected officials decide the outcome. But elected officials, by Calabresi's admission, could have imposed their own partisan agendas in the determination of the outcome. This casts doubt on whether their being democratically elected gives them sufficient democratic legitimacy to exercise power even over elections themselves. Elected officials possess democratic legitimacy because they are subordinate to the democratic process, subject to its control. If you raise them above the democratic process by giving *them* control over *it*, they can no longer claim democratic legitimacy on grounds that they are subject to the democratic process. In other words, Calabresi's position rests on the assumption that elected officials are more trustworthy because we can remove them from office if they abuse power, while we usually cannot remove judges; however, if elected officials abuse their power to

tamper with the electoral process, we can no longer remove them from power because our only means of doing so is the electoral process. So simply having democratically elected officials make the call would not necessarily make the outcome more democratic.

When the democratic process is itself in crisis, solving that crisis requires someone to claim authority *over* the democratic process as opposed to having authority derived from it. We do not see how, on the face of it, the less democratic selection process of judges makes their solving the crisis any more contrary to democracy than elected officials' solving the crisis. Either way, someone is stepping outside democracy and acting on the basis of some other metanorm. Perhaps it is still the case that elected officials should have resolved the crisis on grounds that they are better at discerning and implementing the metanorms that stand behind democracy. But in that case it is the metanorm, not their having been elected as such, that is the basis of their claim to have the legitimate authority to resolve the crisis.

Calabresi hints at this problem when he suggests that courts were given deference over elected officials because we have "become very used to judges supervising in minute detail the drawing and redrawing of election district lines. They have become the umpires or tiebreakers in our system of government in place of democratically elected officials."ix [9] But somebody has to serve as an umpire and tiebreaker. Of course, that role could be played by elected officials just as easily as by judges. But what Calabresi fails to see is that whoever plays the role of umpire and tiebreaker will be standing outside the democratic process and passing judgment upon it, and therefore cannot claim to possess legitimacy based on the democratic process.

Finally, we cannot leave this point without noting an internal contradiction in Calabresi's argument. He asserts that the conclusion was undemocratic, but his opening question is why (as

he says himself) the people deferred to one party over another. But if the decision was made by the set of officials (judges) to whose judgment the people chose to defer in this type of case, was this not in one sense a democratic outcome after all? Calabresi has reduced the concept of "democracy" to merely "rule by elected officials." We wonder how it is that Calabresi can argue from the position that democracy is the basis of legitimacy, acknowledge that the people decided to defer to the courts in this matter, and then so cavalierly dismiss their decision as undemocratic. This is as much as to say, "The decision of the people was illegitimate because they did not realize that the mechanism to which it deferred was *insufficiently* democratic. Democracy is only legitimate when people use this mechanism but not that mechanism." We think that such arguments undermine the very legitimacy of democratic institutions in the long run, and compel us to reexamine the metanormal priorities of democracy's proponents.

Electoral Legitimacy in Dahl's Democratic Theory

Within democratic theory that is characterized a traditional concern with elections, our critique can be applied to the landmark work of R. A. Dahl. Dahl's theory implies that any good democracy has preconditional and non-democratic (not themselves subject to democracy) norms establishing and preserving the "democratic" nature of the system. Consider his landmark definition of democracy (now perhaps seen as somewhat quaint) as the study of the "processes by which ordinary citizens exert a relatively high degree of control over leaders."x [10] While he has elections in mind, this traditional mechanism is legitimized by important meanorms. "Ordinary citizens" implies a fundamental equality among citizens or persons within a democracy, what Dahl calls "inclusive citizenship."xi [11] Dahl appeals to another norm when he

argues that persons in a democracy must be part of a coherent "people" entitled to "autonomy."xii [12]

Democratic government, especially variants of election, come in many varieties. There are a number of different processes intended to satisfy democratic goals and thus create democracy. Dahl's taxonomy of Madisonian Democracy, Polyarchy, and Populism demonstrates that the ideal of "democracy" includes a variety of ends that cannot all be satisfied simultaneously, and thus there are inevitable and illogical inconsistencies in any democracy. He explains that such logical confusion is sometimes necessary to satisfy "some deep-seated social need"xiii [13]

This means there are two goals in any democratic system, particularly as it confronts the institution of elections. The first goal, more familiar and characteristic of early modern democratic theory, is the question of how to insure that there is equal representation in a system that establishes control over leaders. The second goal is the "deep-seated social need" that will regulate, define, and justify the process of democracy itself. The first goal regulates the process for electing and governing. The second requires that there be popular agreement on the "deep-seated social need" preconditioning the process for electing and governing. For example, Dahl writes, "In actual practice◆a viable system of democracy would undoubtedly require extensive social indoctrination and habituation."xiv [14] We think that here Dahl is bumping up against the problem we are raising in this paper: how to ensure that the prime democratic process (elections) is itself established by a democratic process.xv [15]

Dahl handles this problem by arguing that no one would want to fanatically maximize goals such as popular equality or sovereignty at the expense of other important civic goals. Dahl prescribes such "trade-offs" as the principle for navigating between the value judgments inherent

in democratic theory and the "real world" of elections.xvi [16] By thus truncating or compromising democracy's claim to serve as a basis of legitimacy, he appears to implicitly concede that democracy relies on metanorms. Dahl admits that the most "democratic" government in terms of popular sovereignty is too unpredictable in terms of marginal costs and benefits to "assist us much in the real world." The practical difficulties of such idealistic systems become too great, and Dahl is forced to choose between cynicism about popular sovereignty as "an exercise in axiomatics" or an admission that elections do not ensure the implementation of popular will.xvii [17]

We are back to the original problem. Every election mechanism must reflect trade-offs, but how are these trade-offs to be decided? How can we say the decision to trade off this for that was made "democratically" when democracy itself is the thing we are building by making the trade-offs? Dahl acknowledges as much in an illustrative dialogue between "Critic" and "Advocate." The critic's argument is that democracy is inherently self-contradictory because non-democratic means are necessary to achieve democratic ends:

Critic: Yet if imperfections in the democratic process prevent a majority of citizens from bringing about the necessary conditions for political equality, then wouldn't the only way to bring them about be through some nondemocratic process? Likewise, if a majority of citizens don't want to create the conditions necessary for the democratic process, then isn't it also true that the necessary conditions can't be created except by a nondemocratic process?"xviii [18]

The advocate's response provides some insight into the apparent contradictions of democracy as an ideal, and the infinite-series problem inherent in any democratic process:

Advocate: I suppose they can't, at least in the short run. In the long run, beliefs do change◆Take the first alternative you just proposed. In that case, the minority that is capable of preventing the majority from governing must also be opposed to further democratization. So these putative guardians surely can't be counted on to

bring about greater democracy. In the second case, the minority favorable to greater democratization would have to impose its rule on the reluctant majority. Paraphrasing Rousseau, the minority would have to force the majority to be free. But in a generally democratic system, I don't see how that would be politically feasible❖ First, I'm prepared to accept some failures and violations as a tolerable price to pay for the democratic process, even in its imperfect realization❖. Second, a moment ago when I agreed with you about the short run, I brought up the possibility of long-run changes in public opinion. I think that public opinion in democratic countries tends to move toward an ever more inclusive commitment to ideas like intrinsic equality and equal consideration. Democratic cultures have considerable capacity for correcting their own failures."xix [19] (emphasis added)

Put another way, Dahl is arguing that the non-democratic processes that are necessary to democracy can be gradually democratized. Unfortunately, this fails to address the fundamental problem: how do you legitimize the non-democratic processes in the first place? Dahl has tried to follow democracy "all the way down," so to speak, and discovered that it doesn't in fact go all the way down. So he stops short with what is, at least implicitly, an admission that his theory of democracy is incomplete.

Deliberative Democracy's Attempt to Transcend the Election Problem

Something like our concerns about the infinite-series problem appear to be shared by democratic theory's contemporary focus on "deliberative democracy." By focusing on some kind of community deliberation as a substitute for elections, there is a tacit admission that there is something insufficiently democratic about elections as aggregative mechanisms.

We should state for the record our general skepticism toward the whole idea that democracy can transcend elections. We agree with what Seward claims about elections: "Majority votes must decide democratic outcomes where, even after deliberation, views conflict."xx [20] Przeworski puts it more bluntly: "deliberation theorists❖wish away the vulgar fact that under democracy deliberation ends in voting."xxi [21] While deliberation is an important ingredient in

the democratic process, there is no resolution to the inevitable necessity of the "aggregative" process of voting.xxii [22] In fact, it seems that even "transformed" preferences must be registered in some definite way before any discourse can begin, never mind the challenge of implementing public policy.xxiii [23] Therefore, we are not in agreement that the liberal constitutional model of democracy is obsolete or fundamentally undemocratic. We are especially pessimistic about Miller's hope to reshape liberal democracy while fundamentally denying its basic assumptions about human nature.xxiv [24]

It seems to us that the new wave of democratic theorists, in their desire to move away from "aggregative" processes and toward some more deliberative process, skip the same step that they criticize their predecessors for skipping. They recognize that elections are a problematic process for implementing democracy, but when other processes are substituted for elections, the awkward need for a preliminary process of implementation remains.xxv [25] How will the processes of deliberative democracy be selected and implemented democratically?xxvi [26]

To argue, as some do, that one will innovate within the democratic framework can mean two distinctly different things.xxvii [27] On the one hand, it may mean that the innovations will be entirely subject to popular deliberation and approval. In this case "the people," whatever that means, must create a process *ex nihilo*.xxviii [28] On the other hand, it may mean that the innovations will be consistent with a given set of metanorms. We do not see a consensus among theorists of deliberative democracy on what metanorms would govern the implementation of the process. Bohman's definition of deliberative democracy seems neither inclusive of all democratic principles nor precise enough for implementation.xxix [29] More importantly, how will these democratic principles be democratically implemented as processes? This is Rattila's challenge to

Benhabib.xxx [30] How can one expect a mechanism conform to particular standards of rationality (for example) without being open to the charge of undemocratic elitism? It seems to us that even in this attempt to be increasingly democratic, the problem of the infinite series is resolved by the imposition of norms other than democracy without the acknowledgement that "democracy" has ceased to be the ultimate ground of legitimacy.

Some deliberationists thus find themselves in the same position as Dahl, and perhaps even a worse position. In an attempt to transcend the problem of the aggregative model, and hence undemocratic imposition at some level, they create a model that is itself no less susceptible to criticisms on democratic grounds.xxxi [31] In attempting to directly engage democracy's infinite series, they demonstrate the necessity of either an undemocratic self-mover or metanorms other than democracy to solve the infinite series problem.

So long as the problem of institutionalization remains, democratic theory must face the necessity of legitimizing a non-democratic process. Choosing among "deliberative" mechanisms such as deliberative polls, citizens' juries, or consensus conferences rather than among election mechanisms such as winner-take-all or proportional representation does not do away with the problem.xxxii [32] Neither do theories that focus on siting the process.xxxiii [33]

It seems to us that deliberationists have traded in one set of problems for another set of problems that look different, but turn out to be essentially the same. They have given up on the old challenges, like reconciling majority sovereignty with minority rights, in order to face new challenges, like reconciling inclusiveness with quality of deliberation. Both will require implementation. Both will have to appeal, at some level, to a non-democratic process of institutionalization justified by metanorms. This process can only be "democratic" if the word

"democracy" is redefined to include metanorms other than democracy; democratic legitimacy no longer implies having been chosen through a process of popular consent in any sense of that term.

Electoral Legitimacy in Locke's Thought

We can gain a different perspective on the problem of electoral procedures and democratic legitimacy by seeing how it is handled by the theorist rightly considered the godfather of liberal democracy, John Locke. As it happens, his *Two Treatises of Government* takes up this very problem, and his argument provides us with an important corrective to current democratic theory. Locke critiques a view of the matter that he describes as being the prevailing view in his time, but which he finds seriously deficient. Obviously the view Locke critiques in the 17th century is very different from the position held by today's democratic theorists. Nonetheless, his argument against the prevailing view of his time does suggest an important critique along the same general lines that could be made of the prevailing view of democratic theory in our time.

Using Locke's thought to illuminate current debates has always been controversial. By far the most prominent voice opposing such analysis, at least in most circumstances, is the Locke scholar John Dunn. In his major work on Locke, Dunn went so far as assert that Locke had no relevance whatsoever to contemporary political theory.^{xxxiv} [34] In a later article, which unfortunately has not received the attention it deserves, he moderated his position, acknowledging several points of contemporary relevance (e.g. Locke does not take social trust and civil order for granted, as many contemporary theorists do; Locke portrays the civil order as a contract, a method that many still find plausible; Locke treats social institutions as the result of messy historical processes rather than as naturally or divinely ordained).^{xxxv} [35] However,

these points of relevance are strictly on the level of method; Dunn continues to deny Locke any relevance to substantive political issues. He argues that today's political worldview is too different from that of the late 17th century for the substance of Locke's political positions to have continuing relevance.

Dunn lists several major political issues on which our worldview has allegedly departed radically from Locke's. One of them is electoral legitimacy. Obviously, if Dunn is right that Locke's society and ours have radically different understandings of electoral legitimacy, this presents a roadblock for our plan to apply Locke's theory of electoral legitimacy to contemporary problems. Dunn's objection must be surmounted before we proceed.

Dunn argues that people today do not really think of elections as the foundation of a government's political legitimacy:

It is apparent enough that these ceremonies [that is, elections] play an exceedingly tangential role in determining the direction in which political power is exercised ♦ and no modern thinker has really contrived to indicate how human beings today could hope to have good reason to appreciate through time the consequences of their playing a more salient role. (The politics of existing within a world economy are alienated beyond redemption.)xxxvi [36]

Back in the 17th century, it was plausible to people that legitimate governments might have their origins in some kind of express or explicit act of consent by at least some members of society, though not necessarily all of them. This original act of express consent was not understood to have been an election as such, but it was the act from which elections sprang and which gave subsequent elections their legitimacy. (Here "express" consent is distinct from the idea of tacit consent, a separate subject that Dunn also addresses but that does not fall within the scope of this paper). Today, he says, broader changes in our general philosophical outlook ♦ our worldview

◆ have left the idea of government by express consent, whether through elections or on any other level, implausible.

We believe Dunn grossly misread the state of thinking about elections and legitimacy in contemporary society. To be fair, Dunn wrote this article in the 1980s and did not have the benefit of seeing how the idea of democracy has transformed formerly captive nations worldwide. However, we cannot let Dunn entirely off the hook. He has proven himself an unusually brave and incisive thinker, but one of his characteristic weaknesses is his tendency to assume too easily that the rest of the contemporary world thinks the way he does. In his career-spanning struggle to deny (almost) all applications of Locke's thought to today's circumstances, he has too often simply discounted the existence of hundreds of millions of people whose worldviews are ◆ improbable as it may sound ◆ much closer to Locke's than to his own.

Nowhere is this more clear than on the subject of electoral legitimacy. To Dunn, elections are mere "ceremonies" that are irrelevant to the direction of political power. Whether one agrees with this or not, it is simply not the predominant view in the contemporary world. That it is not so in the United States must surely be proven by the crisis over the 2000 election. Each side in that dispute accused the other of machinations to undermine authentic election results. If the contemporary world took Dunn's view that elections are mere ceremonies, these accusations would have been similar to an accusation that a president-elect planned to use a long string of foul language in his inaugural address ◆ an accusation of colossal bad taste, of hideous indifference to the sacredness of our civil rituals, but not a constitutional crisis or a threat to the fundamental legitimacy of the incoming presidential administration. In the rest of the world, the newly democratized societies of Eastern Europe , Central America , and Southeast Asia also

seem to think that elections confer legitimacy on their current governments that their former governments did not possess. Admittedly, the more cynical societies of Western Europe do take a dimmer view of the importance of elections, but we find it improbable that even these societies are as totally dismissive as Dunn of their legitimizing significance. Why else would the supporters of the European Constitution have felt it necessary to take the risk of submitting that document to national referenda?

People do still believe that authentic election results convey legitimacy on a government. The contemporary world's view of things may differ from Locke in many ways, but on the subject of electoral legitimacy it is still close enough to Locke for him to speak to us. While we must be careful to take account of historic differences, we should not abandon the valuable alternative perspective Locke provides on questions that truly did recur in his time and in ours.

Electoral Manipulation in 1680s England

Locke lived in a society shot through with extreme internal conflicts; over the course of the 17th century, the English political community fell apart again and again. The most important source of these conflicts was the ongoing enmity between religious factions. In 1642, when Locke was ten, the hostility between Anglicans and Puritans escalated into full-scale civil war. Even afterwards, the two groups maintained their underlying distrust and dislike of each other, and their rivalry boiled over into violence once again in the 1680s. Charles II, whose father Charles I had been executed by the Puritans in the Civil War, had consistently sought to draw more authority to the crown during his constant power struggles with the Puritan-controlled Parliament. Locke's patron, the Earl of Shaftsbury, was a leading opponent of Charles's efforts to expand the crown's power.

Charles had no legitimate son, and in 1679-81 a protracted struggle ensued over who would succeed him. The next in line to the throne was his brother James, who was openly Catholic. Parliamentary forces were already afraid that the liberties of Protestants in England, and perhaps even the existence of Protestantism itself, were in danger from Charles; they were even more afraid of what might happen if James took the throne.^{xxxvii} [37] They sought to exclude James from succession to the throne on grounds of his religion. Matters came to a head in 1681 when Parliament tried to meet to vote for the exclusion of James from the throne. Charles prevented it from meeting by exercising his constitutional authority to dissolve Parliament for new elections, and then refraining from actually holding new elections. This had the effect of abolishing Parliament entirely, essentially ending any hope of lawful political resistance to the crown. The king became, in fact if not in law, the whole of the English political system. For Shaftsbury and his circle this was the final proof that Charles was a threat to England's freedom, independence, and Protestantism. They quickly resolved upon a course of action they had previously refused to even contemplate: violent resistance. The next seven years would see a succession of assassination attempts and violent uprisings, particularly upon James's ascension to the throne in 1685. These convulsions culminated in James's overthrow in the Glorious Revolution of 1688. Perhaps even more important from a historical point of view, it was during this political crisis that Locke wrote the *Two Treatises* to justify his and Shaftsbury's violent opposition to the king.

What concerns us here is not Charles's ultimate abolition of Parliament but one of his earlier stratagems. In his struggle to secure Parliament's blessing for James's succession, Charles did not resort to the extreme and unprecedented expedient of abolishing Parliament until after he had exhausted all the available options involving good, old-fashioned corrupt manipulation of

Parliament. It was one of these tactics that moved Locke to include in the *Two Treatises* a discussion of who, if anyone, has legitimate authority to reform electoral procedures.

Charles attempted to increase the number of his cronies in the House of Commons, and thus jerry-rig for himself a House that would be more compliant to his wishes. One method for doing so was the manipulation of what are now called "rotten boroughs." While this term did not appear until the 19th century, the phenomenon had existed for centuries before. Rotten boroughs were parliamentary districts where the voting population had shrunk to a tiny number of voters, but that continued to enjoy their own seats in the House because the districts had never been redrawn. In these districts, a handful of voters ♦ who often didn't even live in the districts where they voted ♦ determined who would sit in the House. These voters were ripe targets for bribery, coercion, and other forms of corrupt influence. And since the king was in a position to offer bigger bribes and issue severer threats than anyone else, he had the advantage in using rotten boroughs to make his cronies into MPs (or to make existing MPs into his cronies).

Probably the most egregious example of a rotten borough was the district of Old Sarum. Settled at least three centuries before the time of Christ, it first served as a fortress for the Roman Empire and then grew into a thriving city, one of the most important in western England . Naturally, a city of such prominence had two representatives in the House of Commons. There was only one problem ♦ the city, initially placed on high and relatively barren ground by the Romans for the sake of defense, had outgrown the local geography's ability to support it in the early 13th century. The original site was completely abandoned in favor of a location more convenient to the Avon river, dubbed "New Sarum." But the parliamentary district did not move with it ♦ Old Sarum continued to enjoy parliamentary representation in Locke's day, over four

and a half centuries later, even though it had no resident voters and probably had not had any for some time. The handful of voters the district did have all lived elsewhere. Later, in the 18th century, the district would be represented by Pitt the Elder, who called borough representation "the rotten part of the constitution," thus anticipating the label that subsequent generations would apply to districts like his own.xxxviii [38]

Rotten boroughs were finally abolished by an act of Parliament in 1832. Obviously one reason it took so long to address this problem was that it was in the interest of the king (and the aristocracy generally) to block reform. But there was also another reason: there was serious doubt as to whether anyone, even Parliament, had authority under the English constitution to redraw Parliament's electoral districts.

While it is not strictly relevant to the topic at hand, it is interesting to note that the rotten borough problem was listed by the American founders as one of the deficiencies of the British constitution that they hoped to avoid in framing their own. In *The Federalist* #56, published in 1788, Madison records that England and Scotland contained about eight million people, represented by 558 members of the House of Commons (one MP per 14,337 voters), but 62 of those MPs represented only 364 voters (one MP per six voters!), and fully half the House represented only 5,723 voters (one MP per 21 voters), leaving the other half to represent everyone else (one MP per 28,670 voters). With characteristic dry understatement, Madison comments:

It cannot be supposed that the half thus elected, and who do not even reside among the people at large, can add anything either to the security of the people against the government, or to the knowledge of their circumstances and interests in the legislative councils. On the contrary, it is notorious that they are more frequently the representatives and instruments of the executive magistrate than the guardians

and advocates of popular rights. They might therefore, with great propriety, be considered as something more than a mere deduction from the representatives of the nation.xxxix [39]

It was widely understood that rotten boroughs posed a threat to the democratic character of Parliament. But the defenders of the status quo argued that redrawing parliamentary districts would be an even bigger threat to Parliament's democratic legitimacy, an argument to which we now turn.

The Democratic Argument for Rotten Boroughs

Locke's description of the rotten borough problem is followed by a concise statement of the argument against allowing Parliament, the king, or anyone else to redraw the nation's parliamentary districts:

This strangers stand amazed at, and every one must confess needs a remedy; though most think it hard to find one, because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it. And, therefore, the people when the legislative is once constituted, having in such a government as we have been speaking of no power to act as long as the government stands, this inconvenience is thought incapable of a remedy. (T II.157)*

Locke goes on to frame the matter even more succinctly: can a person who redraws the nation's parliamentary districts "be judged to have set up a new legislative"? (T II.158) If so, the redrawing cannot legitimately occur, because as long as the old legislature still exists no one can legitimately set up a new one.

* Citations from the *Two Treatises* will be made in parentheses with a T followed by treatise and section numbers ♦ for example, (T II.6) indicates the Section 6 of the *Second Treatise*. Citations are to the Everyman edition; chapter and section numbers vary somewhat from edition to edition.

The line of reasoning Locke wishes to critique seems to consist of the following premises:

1. *Political legitimacy initially lies with the people.* The foundation of government is described as "depending wholly" on the people's consent.

2. *Legitimacy passes from the people to the government through the creation of the legislature.*

Writing the rules by which the legislature will be chosen is the "original and supreme" act from which the legitimacy of the government flows.

3. *Any change in electoral procedures, such as redrawing the boundary lines of parliamentary districts, will "alter" the legislature.* Here "alter" is not used in a merely superficial sense (i.e. change some of its characteristics) but in a radical sense (i.e. "set up a new legislative"). On this view, a legislature's particular electoral procedures are the essence of that legislature; they are the thing that makes it what it is and not something else.

4. *While a legitimate legislature exists, no one may substitute a new legislature for the present one.* This follows necessarily from premise #2. Suppose legitimacy has passed from the people to a legislature ♦ call that Legislature A. So long as Legislature A exists and retains its legitimacy, no attempt to create a new legislature (call that Legislature B) can be legitimate. This is because Legislature B would have to derive legitimacy from the consent of the people in order to be legitimate, but that consent is already possessed by Legislature A.

5. *Conclusion: no one can legitimately redraw Parliament's electoral districts so long as Parliament exists and retains its legitimacy.* To do so would be an attempt to replace the current Parliament, to which the people have consented, with a new Parliament to which the people have not consented.

This line of argument, bizarre as it may seem to us today, is more reasonable than it may at first appear to be. If parliamentary districts are to be redrawn, who will redraw them? If the king were allowed to do it, he could simply redraw them in a way that suits his purposes rather than those of the people, by creating more districts in areas that support him and fewer districts in areas that don't. Parliament would cease to be democratic. Perhaps Parliament itself could redraw the districts? This may appear to offer a way out, since Parliament possesses democratic legitimacy. But even Parliament has interests other than those of the people it is supposed to serve. It could easily redraw its own districts in a way that insulates it from the people, setting itself up as a dictatorial committee. If Parliament rewrote the electoral procedures that define its character, it would lose its democratic legitimacy ♦ in the eyes of the people, it would have effectively abolished itself.

Boiled down to its essentials, the argument is simply this: every particular person or institution within society, including the legislature itself, has its own interests that do not coincide with those of the people. Thus, if we are to avoid the subversion of democracy by private interests, only the people themselves, acting directly, can be allowed to write electoral procedures. And the only time the people themselves act directly is in the formulation of the constitution; once the constitution is formulated, they cannot act again as long as that government lasts. That's the whole point of having a government ♦ if we wanted the people to act directly on a regular basis, we would govern ourselves directly and we wouldn't need a Parliament or a king in the first place.

At this point some readers may be thinking that this problem is particular to 17th-century England, whose unwritten constitution included no provision for redrawing electoral districts.

Surely the contemporary United States , with a constitution that explicitly gives Congress the right to redraw electoral districts and set other electoral procedures, has solved this problem? In the original act of formulating the constitution, the people have consented to a system for redistricting and similar adjustments to electoral procedures.

Unfortunately, having a constitutional process for setting and changing electoral procedures will solve this problem only so long as the constitutional process itself remains uncontroversial. There are any number of easily envisionable situations where the constitutional process itself may be the subject of a political crisis. Providing a constitutional process for resolving disputes over elections only moves the possibility for a crisis back a step, because you can always have a dispute about that constitutional process. At some point you must either agree with or disagree with the challenge being pressed by the supporters of rotten boroughs: once the people consent to a constitution, they claim, democratic legitimacy forbids deviating from that constitution for any reason.

The line of argument to which Locke is responding therefore has relevance to democracy in any time and place. If democracy is the foundation of legitimacy, there can never be any legitimate deviation from a democratically legitimate constitution. If a constitution malfunctions ♦ even in a way that reduces its democratic representation of the people ♦ we must simply live with that malfunction, because no one has democratic authority to change the constitution.

This may not seem like a pressing concern to us, especially when compared to the opposite danger, which is that government will deviate from the constitution when it shouldn't. Once you have a democratically legitimate constitution, why would you want to give people an excuse to deviate from it? But this problem only seems unimportant to us because of the times we happen

to live in ❖ we now confront this type of constitutional crisis less often than we used to. We have gotten better at preventing constitutional malfunctions like rotten boroughs. Most importantly, we have adopted constitutions that incorporate processes for changing the constitution. The constitutional crises we tend to face are caused by disagreements over what the constitution says, not disagreements over whether the constitution should be strictly adhered to in a given situation.

However, the infrequency with which we confront this kind of crisis in practice does not remove the theoretical problem. An account of democratic legitimacy cannot be satisfactory if it does not address this issue one way or the other. It would be implausible to suggest that a serious controversy over whether to strictly follow the constitution in some given situation would never occur again under any circumstances. We must either agree with the defenders of rotten boroughs, saying that strict adherence to the constitution is always mandatory no matter what else must be sacrificed, unless we are willing to abolish the constitution and suffer a total social breakdown; or else we must find a way to refute the defenders of rotten boroughs and show that in some circumstances it might be justifiable to depart from established constitutional procedures without abolishing them and rewriting the constitution.

Locke's Response to the Democratic Argument

Locke's response to this line of argument begins with a bold declaration: "*Salus populi suprema lex* [the people's safety is the supreme law] is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err" (T II.158). This is key to all that follows. But it hits the modern reader in the face ❖ we are accustomed to thinking of this kind of statement as an invitation to tyranny. To lay aside established democratic procedures in the name

of a higher purpose like "the people's safety" is for us almost the paradigmatic case of political corruption. Locke is by no means insensitive to this danger, but he unabashedly defends the practice in spite of it. To understand why, we need to step back and evaluate why Locke takes the view he does.

Locke's argument effectively denies that democracy as such is the ultimate ground of political legitimacy. Actions within the democratic polity are legitimate only if they follow the established democratic procedures, but those procedures themselves rest on a deeper philosophical foundation ♦ what we are calling a metanorm ♦ that is not itself identical with "democracy." It follows that where the established electoral procedures cease to serve the metanorm, changing them is not only permissible but obligatory. While democracy is an indispensable good for the English polity, it is an instrumental good rather than an absolute good ♦ democracy is good because it serves an end higher than itself.

Locke's position is that the ultimate ground of legitimacy is not the will of the people as such, but the good of the people:

It is not a change from the present state which, perhaps, corruption or decay has introduced, that makes an inroad upon the government, but the tendency of it to injure or oppress the people, and to set up one part or party with a distinction from and an unequal subjection of the rest. Whatsoever cannot but be acknowledged to be of advantage to the society and people in general, upon just and lasting measures, will always, when done, justify itself; and whenever the people shall choose their representatives upon just and undeniably equal measures, suitable to the original frame of the government, it cannot be doubted to be the will and act of the society, whoever permitted or proposed to them so to do. (T II.158; emphasis added)

The contrast between the will of the people and the good of the people is somewhat obscured in these statements, because Locke seems to be firmly confident that the people generally do will their own good. Hence Locke's direct appeals to the good of the people ("the tendency of it to

injure or oppress the people," "an unequal subjection of the rest," "of advantage to the society and people in general") are identified with the will of the people ("it cannot be doubted to be the will and act of the society"). But the contrast is nonetheless there, and it is a matter of crucial importance because the topic under consideration is election procedures. Once the constitution is formulated, the only way we can find out the will of the people directly is to hold an election. When that very process is in doubt, who is authorized to resolve the issue, and by what standard should that person resolve it? Locke confidently asserts that "whoever" can impose a solution that is "of advantage to the society and people in general" may do so. When you can't get at the will of the people directly, impose whatever solution is for the good of the people. In such a situation you are entitled to the assumption that what you have done is "the will and act of the society."

It may seem from the foregoing that Locke simply treats the will of the people and the good of the people as equal, making neither one superior to the other. However, Locke effectively treats the good of the people as normatively prior to the will of the people, a fact we can see more clearly in his claim that the executive power of "prerogative" could legitimately be used to redraw electoral districts. Prerogative power, discussed at some length elsewhere in the *Second Treatise*, is the king's right to suspend the law in particular cases where a strict application of the laws would be counterproductive to the original purpose for which the law was passed. Locke argues that the king could unilaterally redraw parliamentary districts, so long as he did it in a way that was clearly in the public interest and not self-serving:

Prerogative being nothing but a power in the hands of the prince to provide for the public good in such cases which, depending upon unforeseen and uncertain occurrences, certain and unalterable laws could not safely direct. Whatsoever shall be done manifestly for the good of the people, and establishing the government

upon its true foundations is, and always will be, just prerogative. (T II.158; emphasis added)

A hereditary monarch can have no direct claim to democratic or electoral legitimacy, but according to Locke he can exercise power independent of the legislature ♦ and in the case of redrawing parliamentary districts, he can even implicitly exercise power *over* the legislature ♦ so long as he does so for the good of the people.

Returning to the five-step argument for rotten boroughs presented above, Locke agrees with steps #1, #2, and #4; his disagreement is with step #3, the argument that changing election procedures entails an essential change in the legislature. Locke argues not only that it would not "alter" the legislature for the king to redraw parliamentary districts, but even that it *would* alter the legislature if he did not do so:

If, therefore, the executive who has the power of convoking the legislative, observing rather the true proportion than fashion of representation, regulates not by old custom, but true reason, the number of members in all places, that have a right to be distinctly represented, which no part of the people, however incorporated, can pretend to, but in proportion to the assistance which it affords to the public, it cannot be judged to have set up a new legislative, but to have restored the old and true one, and to have rectified the disorders which succession of time had insensibly as well as inevitably introduced; for it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community. (T II.158; emphasis added)




So not only does the reformer not abolish Parliament, he actually establishes Parliament ♦ that is, he reestablishes the Parliament that time and decay had threatened to remove.

We must not trivialize Locke's argument by thinking that he is simply restating a platitude. The temptation is to say, "of *course* reforming rotten boroughs obviously doesn't abolish Parliament, and can even be said to restore or reestablish it when it was in danger of being




abolished by decay." This may feel obvious to us, but whether it is obvious or not, it is not simply a platitude with little philosophical importance. Locke is taking a stand on an important theoretical question.

The only way to refute step #3 of the democratic argument for rotten boroughs is the only reason Locke himself believes that reforming them restores rather than abolishes Parliament is if we believe in a higher standard by which electoral procedures (and constitutions generally) can be judged. This standard must derive its existence from some foundation that is independent of the constitution itself, or of course there would be no way to use it to judge whether the constitution is good or bad. When Locke says that reform would restore or reestablish Parliament, he doesn't mean literally that reform would take us back to a policy that existed previously; reform introduces a new policy that did not exist before. The historical "Parliament" that was defined by the old policy will in fact cease to exist. What will be restored is not "Parliament" in that sense, but "Parliament" meaning the legitimate legislature of England. So "Parliament" (the idea of England's legitimate legislature) must exist separately from "Parliament" (the actual historical entity) for the argument against rotten boroughs to work. This ideal Parliament is a sort of transcendent entity, not in the sense of being ahistorical (after all, "the legitimate legislature of England" would not exist if the historical England did not exist) but in the sense that its characteristics are not constrained by the characteristics of the historical Parliament.

But and here comes the important catch if we are to judge a constitution by a higher standard that exists independent of it, that standard cannot be "democracy" as such. The ideal Parliament cannot simply be "a Parliament whose constitution is democratic." To make such a

claim, we would have to say something like the following: while the people did consent to the existing constitution when they first formulated it, due to changed events they would not consent to it if it were up for a vote today. The defender of rotten boroughs can knock that down by asking where we get the authority to say what the people would or would not accept if it were up for a vote today. Their case is that "the constitution of the legislative  depending wholly on the people, no inferior power can alter it." And if democracy is the ultimate standard, if there is nothing higher upon which democracy rests, then they're right; only the people themselves acting directly can have legitimate authority to alter or abolish a constitution. No one  no private person, no king, and not even the legislature itself  can do it for them, not even on grounds that due to time and decay the constitution is no longer democratic. Who are they to make that decision and impose reforms unilaterally? And yet how can "the people themselves" act directly, other than by a total abolition of the government and the subsequent construction of a new constitution from scratch? So long as the legislature continues to exist and does not decisively forfeit its legitimacy (for example, by making war on the people), no one can alter the constitution.

It may appear that this problem only applies if our concept of "democracy" is so narrow that it is identical with "the will of the people," and in fact no one seriously holds so narrow a concept of democracy. Some readers may think we are being unfair to democratic theory when we say that if democracy is the highest standard, there can be no appeal beyond the existing constitution. Sometimes the people do in fact consent to things that are not very democratic, and democratic theory certainly is not so crude as to say that whatever the people consent to is thereby shown to be democratic and legitimate. Typically it will set up certain rules to distinguish a truly democratic process of popular consent from mere mob rule.

While we readily agree that democratic theory holds out a standard of what is "democratic" that is not reducible to "whatever the people do," we think that this does not remove the deeper problem that is illustrated by Locke's collision with the defenders of rotten boroughs. A given standard of legitimacy either does or does not make the people's actual historical consent  however constrained by norms of deliberative democracy or any other rules governing what counts as truly democratic consent  the final court of appeal for legitimacy. If it does, it falls afoul of the rotten borough problem; once the people adopt a constitution through a democratically legitimate deliberative process, no one can claim authority to reform that constitution short of total social upheaval and construction of a new constitution through a new process of democratic deliberation. On the other hand, if a theory does not make some historical process of consent the final appeal, then its ultimate standard of legitimacy is not what people *do* consent to (under whatever conditions) but rather what people *should* consent to. This, it seems to us, makes democracy a purely instrumental good  something that is only desirable insofar as it serves a higher standard that is not itself "democracy." In the final analysis, such a theory is really not a theory of democratic legitimacy as such.

The Danger of Placing a Metanorm Above Democracy

In observing that Locke places the good of the people ahead of the will of the people, we have not yet said anything about what Locke thinks the good of the people is. It is important to remember that Locke does not simply hand governments a blank check to do whatever they can plausibly claim is for "the good of the people" in any sense. He provides a narrow definition of the good of the people, and requires all government authority to be exercised only for this purpose. His narrow definition of that purpose is what he calls the natural law, which is "to

preserve mankind in general," that is, to preserve society and each of its members (T II.8). He writes that "by the fundamental law of nature, man [is] to be preserved as much as possible" (T II.16) and that "the end of government [is] the preservation of all as much as may be" (T II.159). Government power "in the utmost bounds of it is limited to the public good of the society. It is a power that hath no other end but preservation" (T II.135).

Locke is perfectly well aware that even with a clear and narrow definition of what counts as "the public good," it is dangerous to declare that the king (or anyone else) has a right to act unilaterally if it is for "the public good." This issue comes in for extended treatment in the *Second Treatise*, because Charles and James were using precisely that argument ♦ and appealing to the prerogative power ♦ to justify their war on Parliament. In his chapter on prerogative, Locke presents a clear-sighted account of how easily such abuses can arise:

He that will look into the history of England will find that prerogative was always largest in the hands of our wisest and best princes, because the people observing the whole tendency of their actions to be the public good ♦. The people, therefore, finding reason to be satisfied with these princes, whenever they acted without, or contrary to the letter of the law, acquiesced in what they did, and without the least complaint, let them enlarge their prerogative as they pleased, judging rightly that they did nothing herein to the prejudice of their laws, since they acted conformably to the foundation and end of all laws ♦ the public good ♦. Upon this is founded that saying, "That the reigns of good princes have been always most dangerous to the liberties of their people." For when their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent and make them the standard of their prerogative ♦ as if what had been done only for the good of the people was a right in them to do for the harm of the people, if they so pleased ♦ it has often occasioned contest, and sometimes public disorders, before the people could recover their original right. (T II.165-166; emphasis added)

Given that the whole occasion of the *Two Treatises* was the struggle against Charles and James, we should not be surprised that Locke isn't naïve ♦ about the danger of the prerogative power.

Nonetheless, Locke points out that serious abuses of prerogative are easily recognized as such and can therefore be resisted: "If there comes to be a question between the executive power and the people about a thing claimed as a prerogative, the tendency of the exercise of such prerogative, to the good or hurt of the people, will easily decide that question" (T II.161). This same premise ♦ that the people can tell when someone is using prerogative as cover for a power grab ♦ can also be seen in Locke's discussion of the rotten borough problem. He writes that abolishing rotten boroughs would be justified because it would be "manifestly for the good of the people," and that "it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community" (T II.158; emphasis added).

This is not a perfect solution to the problem. Probably no one who believes in freedom and democracy should ever be totally comfortable with the idea that the government can act unilaterally in the name of an abstract standard of what is good for the people. And yet while it is imperfect, it is the best available solution. The alternative is not to acknowledge any legitimate right to deviate from established laws and systems under any circumstances. Critiques of this approach are usually expressed in terms of security: government couldn't handle emergencies or adequately defend society against foreign threats. However, the rotten borough problem suggests that the difficulty with this approach is broader than that. Government may need to act unilaterally for the public good in more than just emergency situations. There are all kinds of ways in which constitutions can malfunction. While we have gotten better than we used to be at preventing such malfunctions, we cannot rest easy that they will never occur. And if we want to

be able to handle them when they occur without succumbing to total social breakdown, we must affirm the existence of a prerogative power to act unilaterally for the public good.

Conclusion

If political authority ultimately comes from democratic processes, then no one can have political authority *over* democratic processes. And if no one has authority over democratic processes, no one can legitimately institute them, or legitimately sit in judgment when someone claims they are being subverted. Saward is wrong to dismiss democracy's historically non-democratic origins as "self-evident and uncontroversial." Self-evident or not, they cannot be uncontroversial, because a complete theory of democratic legitimacy must justify these origins. Current events provide several cases in point: is it "self-evident and uncontroversial" that the elections imposed by force upon Iraq and Afghanistan by the United States were democratically legitimate? If democracy is the ultimate ground of legitimacy, we do not see how that question can be answered either way. But if democracy is an instrumental good in the service of a metanorm, we can judge the legitimacy of the elections in Iraq and Afghanistan by whether or not they succeeded in serving that metanorm. We can ask, with Locke, whether those elections were "manifestly for the good of the people." If so, they were legitimate; if not, not.

As we have said, we do not claim that this problem is necessarily an insurmountable problem, only that it is a problem, and an important one, and democratic theorists do not seem to be treating it as such. Perhaps contemporary democratic theory can develop an adequate solution to this problem. Or perhaps it already provides a solution, but one that is not being articulated in such a way that it is visible to those who do not professionally specialize in democratic theory. In

any case, contemporary democratic theory cannot provide a complete theory of legitimacy until it openly acknowledges the scope of this problem and explicitly presents a satisfactory answer.

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Endnotes

i [1] Cohen (1998), cited in Saward (2000c) p. 67.

ii [2] Saward (2000c) 72, responding to Michelman (1997).

iii [3] Cohen (1989) 23 in Saward (2000c) p. 67.

iv [4] See Riker (1982) or Arrow (1963) as discussed in Miller (2003).

v [5] Miller (2003) 186.

vi [6] We are not arguing against democracy itself but instead critiquing the contemporary theorizing of it. As Budge (1996) notes, arguments for less democracy can become an argument against democracy altogether. That, as Saward points out, is a problem with Schumpeter's prescription and we hope not to fall into that trap. Saward (2000c) pp. 75-77 and Schumpeter (1976).

vii [7] See <http://www.whitehouse.gov/nsc/nss.html>; retrieved August 10, 2005 .

viii [8] Calabresi in Ackerman (2002) p. 129.

ix [9] Calabresi p. 142.

x [10] Dahl (1956) p. 3.

xi [11] Dahl (1998) p. 86.

xii [12] Dahl (1989) pp. 193-209. As Dahl writes, political autonomy is not an absolute right. Not all "persons" are automatically citizens either.

xiii [13] Dahl (1956) p. 36.

xiv [14] Dahl (1956) p. 47.

xv [15] See Putnam (1993) or Inglehart (1990) and (1997) for other instances providing some recognition of this problem. But questions of socialization or citizenship only approach the problem of how political values are communicated and transmitted. It does not tackle the question of how election rules are democratically chosen.

xvi [16] Dahl (1998) pp. 27-28.

xvii [17] Dahl (1956) pp. 50-51, 63-64, 131.

xviii [18] Dahl (1989) p. 179.

xix [19] Dahl (1989) p. 179-180.

xx [20] Saward (2000c) p. 67.

xxi [21] Przeworski (1998), cited in Saward (2000c) p. 67.

xxii [22] Saward (2000c) p. 77.

xxiii [23] Saward (2000b) p. 5 and Budge (2000).

xxiv [24] Miller (2003).

xxv [25] "The move from imaginary thought experiments to real (or at least possible) institutions, or the move from deliberations behind a 'veil of ignorance' to those in a 'face to face society' confronts us with precisely such questions. Instead of deliberations behind a veil, we are to envisage real people under realistic conditions making actual policy choices." Fishkin and Laslett (2003b) p. 2.

xxvi [26] Saward (2000c) and Dryzek (2000).

xxvii [27] Saward (2000b) p. 4.

xxviii [28] The role of elites becomes critical here. See Bang and Dyrberg (2000).

xxix [29] "Deliberative democracy, broadly defined, is any one of a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government." Bohman (1998) p. 401 in Saward (2000b) p. 6.

xxx [30] Rattila (2000) pp. 43-52.

xxxi [31] Saward (2000c) p. 75.

xxxii [32] Fishkin and Luskin (2000), Smith (2000), and Eriksen (2000).

xxxiii [33] Saward (2000c) pp. 70-75.

xxxiv [34] "I simply cannot conceive of constructing an analysis of any issue in contemporary political theory around the affirmation or negation of anything which Locke says about political matters." Dunn (1969) x.

xxxv [35] In fact, in the article he denounces his earlier across-the-board denial of any contemporary relevance for Locke, calling it an "expression of stupidity" reflecting "intellectual myopia." Dunn (1990) 9.

xxxvi [36] Dunn (1990) p. 21.

xxxvii [37] Shaftsbury had learned from his network of contacts and spies that in 1670, Charles had secretly signed a treaty with France promising that he would eventually, when the time was right, openly convert to Catholicism and return England to the ecclesiastical control of the Catholic Church. The supposed right time for this conversion never came; Charles was only seeking to gain French assistance against the Dutch in a war over trade, and does not appear ever to have made any move toward fulfilling his promise. But Shaftsbury and his allies did not have the benefit of hindsight and had

no way to know what Charles's real intentions were. See Ashcraft (1986) 17-20 and 115-116; and Marshall (1994) 357.

xxxviii [38] See http://en.wikipedia.org/wiki/Rotten_borough and http://en.wikipedia.org/wiki/Old_Sarum; retrieved August 22, 2005 .

xxxix [39] Madison (1961) p. 349.