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SYMPOSIUM: REGULATING THE ELECTORAL PROCESS: Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence.

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SUMMARY:

... Deliberative democracy is an emerging ideal. ... The ambiguous political valence of deliberative democracy is matched by the strategic conception's presence on both the left and the right. ... This argument would, indeed, count in favor of deliberative democracy if the contrast were fair, but pluralism and the other main strategic conceptions of democracy are not so morally nihilistic. ... If the category of deliberative democracy is to exclude such accomplished exponents of instrumental and strategic reason as Gauthier, then these stronger philosophical implications -- cognition, epistemology, and truth -- cannot be avoided. ... Gauthier argues that "the outcome of deliberative politics is *constitutive* of justice among individuals" and "the common good." There is no independent standard of justice or common good to which constitutional deliberation aspires; the justice of the outcome is a fact solely about the procedure that produced it. ... The mantle of deliberative democracy fits Rawls better than Gauthier for this reason. ... An Epistemic Proceduralism of the kind I have sketched suggests that not only is this philosophically bolder deliberative theory of democracy truer to the most useful deliberative/strategic dichotomy, but eventually it may even be a viable theory of democratic legitimacy. ...

TEXT:

[*1437] I. Introduction

Deliberative democracy is an emerging ideal. The phrase was apparently coined only recently, and it encompasses a cluster of views about politics that previously had long been unfashionable. The fashionable views, increasingly called "strategic" views of politics, characteristically applied doctrines or concepts developed primarily in welfare economics to the

actions of voters, political candidates, interest groups, and others in order to explain, predict, or morally evaluate behavior. n2 While much of that work has been done by economists and political scientists, the deliberative conception of politics has taken root especially in the fields of law and philosophy.

In law, the deliberativists tend to have distinctive theoretical conflicts with practitioners (especially the early ones) of the thriving movement in law and economics. n3 In political philosophy, the deliberative theorists are [*1438] characteristically at odds not only with the orthodoxy in the social sciences, but also with those who conduct moral and political philosophy as an extension of the ideas of economic rationality and efficiency. n4 The deliberativists in political philosophy are also characteristically opposed to moral utilitarianism, n5 the influential view that morally ranks actions or policies according to their tendency to produce the greatest sum of individual well-being. n6 However, this may not go as deep as the other tendencies in the end: John Stuart Mill, a founder -- along with Jeremy Bentham -- of modern utilitarianism, n7 had a conception of democratic politics that would be categorized as deliberative by any sensible construal of the dichotomy. n8 In both legal and political theory, then, deliberative democracy is associated with a degree of opposition to the extension of classical economic methods and concepts to the study of politics.

[*1439] There is no easy way to lump the deliberativists and the strategists into comfortable positions on the traditional left/right political continuum. Deliberative democracy's typical antipathy to laissez faire, or "invisible hand," n9 economic ideology in the study of politics tends to place it toward the left. n10 Its frequent embrace of some version of "civic virtue" n11 and community values, however, tends to place it toward the right. n12 The lesson is not that deliberative democracy is a centrist political philosophy. In certain versions -- especially certain leftist versions -- it has a clear noncentrist political valence. n13 However, nothing prevents more rightist versions from emerging in the mold of George Will's recent book. n14

The ambiguous political valence of deliberative democracy is matched by the strategic conception's presence on both the left and the right. Economics-oriented libertarians are not the only ones who conceive politics as a regulated rivalry among interest groups. Left-leaning work on racial polarization and voting rights reform often adopts the rhetoric, and perhaps also the normative framework, of strategic theories of democratic legitimacy. n15

It is in this context that the deliberative/strategic dichotomy has come to seem vulnerable. The dichotomy is most often drawn by theorists wishing to be placed on the deliberative side of the line. As a result, the deliberative side tends to get the better press, and even the better definition. In turn, theorists who fail to recognize their own views in the [*1440] unflattering accounts of strategic politics should be expected to don the mantle of deliberative politics, much as everyone has eventually adopted the well-regarded wardrobe of democracy itself over the last two centuries. A guiding question in this essay is whether the dichotomy between deliberative and strategic politics can be drawn so as to allow some self-respecting theorists to embrace each label. Why is this desirable? My own theoretical preferences would be well satisfied if everyone genuinely came to accept the ideal of deliberative democracy; there is no intrinsic value in having real partisans on each side. If this consensus is not forthcoming, though, different views of politics ought to be clearly distinguished, and I believe important differences can be captured

by a well-drawn dichotomy between deliberative and strategic politics.

The dichotomy between strategic and deliberative politics ought to begin by defining strategic politics as a spare thing, driven solely or primarily by the employment of instrumental rationality. Individuals are supposed to begin with their diverse ends, desires, goals, or projects, and then to promote them as effectively as possible. n16 Strategy is a special case of instrumental rationality, namely the most effective promotion of one's ends in light of the fact that the results of one's choices will be partly determined by the choices made by other agents. Strategy does not imply competition; whether instrumentally rational agents will compete depends on whether one person's getting what she wants precludes other individuals from getting what they want. Where several people all prefer the same scarce goods, there will be competition. It is immediately clear, then, that strategic behavior will require individual deliberation in the employment of instrumental reason. Each individual will deliberate about which means to choose, and sometimes such deliberation will lead to coordinating actions with others to achieve greater benefit, and even to discussing with others how best to coordinate, or to persuading others that they have mistaken their interests by neglecting important information. Indeed, many actions may be aimed solely at the good of others, or even at the common good, depending on how highly these things rank in individuals' preferences. Individuals may behave in selfish, insensitive ways, or they may not. They might behave, instead, in cooperative, even apparently altruistic ways. It depends, for one thing, on how much they value such things as the well-being or autonomy of others for their own sake. An individual's behavior [*1441] will also depend on how beneficial it is to act selfishly or insensitively, as opposed to cooperatively or altruistically. If one's preferences are best served either directly or indirectly by it, a purely strategic agent might earnestly endeavor to support and comply with utterly egalitarian institutions and practices. This is all possible through the spare employment of instrumental reason in the face of other rational agents, that is, in the spare *strategic* conception of politics.

How then to characterize *deliberative* politics? It certainly will not sufficiently define the concept to say that, unlike strategic politics, in deliberative politics there is *deliberation* or *cooperation* or the employment of *reason*, or all three. n17 Now it might be replied that while these things may be allowed as well by the *idea* of strategic politics, *in practice* the facts about scarcity and actual preferences show that purely strategic politics would indeed consist of unbridled selfishness, competition, and conflict. n18 But this claim is, of course, one of the more controversial propositions in the history of social thought. It is very much a live issue today. It should not be assumed without elaborate supporting argument that the distinction between strategic and deliberative politics is the distinction between conflict and cooperation, or between power and reason. These assertions are too close to saying it is the very distinction between evil and good. Maybe one of them leads, in actual fact, to more evil and less good than the other (a matter of legitimate controversy), but this should be an issue about theories that are first defined in other terms.

It is better, then, to identify the strategic conception of politics with the insistence that the sole or predominant individual motives are those of instrumental rationality. This strategic conception can be contrasted, then, with all the other conceptions, those that give instrumental rationality something less than a predominant role. Among the many nonstrategic conceptions, how is the conception labelled deliberative democracy distinct?

Frank Michelman draws a distinction between two kinds of politics: deliberative and strategic. n19 David Gauthier puts Michelman's distinction [*1442] to heavy use in his recent theory of the authority of the Constitution. n20 It is important, then, to examine the strengths and weaknesses of Michelman's distinction and Gauthier's particular use of it. According to Michelman, deliberative politics is characterized by "argumentative interchange among persons who recognize each other as equal in authority" and as equally entitled to respect. n21 Each person may be persuaded by reasons relating to the claims of others as well as her own. A vote represents a "pooling of judgments" on some question of public ordering. n22 In contrast, strategic politics asks each participant to consider only her own interests. The outcomes of strategic politics, Michelman says, represent "not a collective judgment of reason but a vector sum in a field of forces." n23 Apparently, votes, like other political acts, are used simply to promote self-interest. n24

It is immediately clear which conception we should all favor. If these are the choices, what decent person could oppose the deliberative conception in favor of the strategic? The distinction is approximately between power and reason, between the view that might makes right and the view that politics is a sincere cooperative effort to promote the common good. Deliberative politics involves "argumentative interchange" aimed "in good faith" at "reasonable answers" while strategic politics yields not "reason" but "forces." n25 If I have accurately drawn the implications of a politics based on instrumental rationality, then we should expect any theorist to eschew strategic politics in Michelman's sense, since it leaves no room for reason, deliberation, or cooperation. Paradoxically, even a sophisticated instrumental-rationality theorist may feel more at home, with everyone else, in the deliberative camp, given Michelman's characterization of the choices.

Cass Sunstein, another leading legal academic advocate of deliberative democracy, takes the main theoretical opponent to advocate "power" rather [*1443] than "reasons" in politics. n26 The "pluralist" view of politics n27 implies that might makes right. n28 This argument would, indeed, count in favor of deliberative democracy if the contrast were fair, but pluralism and the other main strategic conceptions of democracy are not so morally nihilistic. If nondeliberative politics is defined according to Sunstein as "[m]ight makes right" n29 or Michelman as the party of power (as opposed to the party of reason), n30 then all major political views will count as deliberative and their important differences will be missed. Sunstein uses one less tendentious formulation. In deliberative democracy, laws and policies must be justified by "public regarding reasons" and arguments. n31 Is it a public-regarding reason for a law to say that a majority of adequately informed citizens favor it? If so, it is difficult to think of a strategic theorist who would deny the importance of public-regarding reasons. If not, on what grounds?

In other places, Sunstein associates deliberative democracy with a tendency to arrive at normative truths. "[A] large point of the [constitutional] system is to ensure discussion and debate . . . in a process through which reflection will encourage the emergence of general truths." n32 He approvingly cites James Madison's discussion of the system of national representation as a mechanism with which to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country." n33

In what follows, I hope to turn back David Gauthier's recent attempts to represent his own approach as deliberative, and to shore up the boundaries of this category in the process. To do so, it will be useful to adopt Michelman's placement of *judgment* at the core of deliberative politics n34 in a way that (so I will argue) puts the focus on cognitive, as distinct from [*1444] narrowly practical, reason. Deliberative politics has no monopoly on reason, but it does distinctively emphasize applying cognitive judgment, and therefore cognitive reason, to moral and political questions. Cognition, epistemology, and truth are all kindred concepts, and the fear they provoke in legal and political theory swells the ranks of the strategic theorists. n35 If the category of deliberative democracy is to exclude such accomplished exponents of instrumental and strategic reason as Gauthier, then these stronger philosophical implications -- cognition, epistemology, and truth -- cannot be avoided. I hope to show that much of the fear is misplaced, both philosophically and politically. There is a promising, though so far undeveloped, conception of democracy as epistemic.

II. Gauthier

David Gauthier theorizes about how a constitution comes to be the privileged embodiment of the popular will, and a law "higher" than ordinary legislation. n36 He argues that a constitution is a unanimous agreement about how to structure interaction so that strategic behavior will not lead to outcomes that are worse for all than other possible outcomes. n37 The problem is that of Hobbes: n38 pure strategic interaction where goods are limited will often lead to an outcome that is inferior in a compelling sense, namely that there is another possible condition that would be better for all (or at least better for some and worse for none). n39 The task is to devise a way for the participants to restructure their own interaction to remove this feature. Hobbes thought they could yield all their powers to a sovereign leader or state whose function it would be to make certain individual actions costly enough that each will be steered, by self-interest alone, to a collectively optimal outcome. n40 Locke famously pointed out one among many problems with this suggestion: A sovereign leader with unlimited powers is at least as great a threat to individual security as the original state of nature is, though neither is very secure. n41 If Hobbes's solution fails, [*1445] consider Gauthier's theory as a proposal to substitute a constitution for Hobbes's sovereign.

How is it supposed to be an improvement? We know the ways in which the actual Constitution is superior to a Hobbesian sovereign, such as the separation of powers, the system of checks and balances, and the Bill of Rights, n42 but that should be put aside for now. We first need to know whether any constitution, and if so what kind, could be approved by Hobbesian individuals seeking to escape the state of nature. The theory is supposed to explain the authority of a constitution by reference to the way in which it was or would be chosen.

Gauthier suggests that he is broadening the horizons of traditional Hobbesian subjects by making them "civic friends." n43 Hobbesian individuals regard each other as a threat, and for good reason. n44 Gauthier suggests that politics is impossible in such a case. n45 Suppose each person recognizes the potential for cooperation (as well as the potential threat) that other individuals represent. In this case there is the possibility of a genuinely political good. n46 It is unclear what is more "political" about this case, or why this is a good thing, as he clearly suggests. That aside,

the suggestion is that this interest in achieving cooperation is a key to the Hobbesian problem, a way out of mutually disadvantageous interaction.

It is notoriously difficult for Hobbesian individuals to achieve cooperation because it is not clearly in anyone's interest to keep agreements to cooperate. Each person has an interest in getting others to "cooperate" but then taking the money and running. Each finds the other a convenient potential dupe. n47 It is hard to see how real cooperation would be possible among such agents. Gauthier has an elaborate theory, developed elsewhere, that it would be rational for such agents to, in effect, change their character to that of a noncheater. n48 Not only that, but Gauthier believes this is the correct account of the nature of morality: The dictates of morality are indirectly the dictates of rational self-interest. One would do well to do good, and to stop caring so much about doing well. The reason [*1446] is that cheaters are more or less detectable and cannot be trusted. They are left out of interactions from which they could have benefited even without cheating, and so they do worse than if they had not been (and been seen to be) cheaters. n49 Under these conditions, morality, being an implication of instrumental reason, is reconciled with reason. The theory is ingenious and, like any reasonably rigorous philosophical theory of morality, highly controversial. n50

In his discussion of the contractarian roots of the authority of a constitution, n51 Gauthier does not give any explanation of how cooperation is achieved. Instead, he skips over, without comment, the problem of how agreements to cooperate could be kept by self-interested agents. He simply assumes that they could, and suggests that in time such "bonds of convenience become ties of mutual civic concern." n52 Each "respect[s] the identity and aims of her fellows [and] willingly accord[s] them equal place in their common affairs with her own." n53

It is likely that the preceding account of how cooperation by self-interested agents is achieved borrows from the theory in *Morals By Agreement*. n54 There, Gauthier argues that a dimension of sociability can be "rationally reconstruct[ed]" from his account of the rational basis of morality. n55 A noninstrumental form of sociability exists in moral feelings themselves. Just because the account of morality is limited to considerations of instrumental rationality does not mean that moral feelings themselves must be narrowly instrumental: "In relating morality to the provision of benefits that themselves involve no affective concern with others, we do not thereby impoverish the moral feelings of persons who have such concern. It is because we can give morality a rational basis that we can secure its affective hold." n56 The constitutional deliberators apparently are individuals who are moral in the ways implied by Gauthier's moral theory. Accordingly, they subscribe to ideals of fairness and respect, and to this extent have a noninstrumental social regard for their fellows. n57

[*1447] On this reading, the constitutional theory utterly depends on the success of the moral theory. The traditional political problem about the cooperation of self-interested agents is presumed to be solved at a prior moral level of inquiry. That solution, ingenious and controversial, cannot be evaluated here. n58 But suppose it succeeds. We are still left with no clear description or derivation of the motivation of post-constitutional citizens, and no explanation of why a constitution would be a necessary constraint. Let us imagine, with Gauthier, that purely selfish individuals have transformed themselves into people who value every other comrade's interest as highly as their own. It is not clear what this means. It is clear

that for Gauthier such impartial motives are supposed to be present in the joint effort to devise a constitution. n59 By a "constitution" Gauthier means a way "to regulate their interaction to secure mutual benefit and express mutual respect." n60 But it is not clear what the problem is to which a constitution is a solution. If individuals have been transformed into utterly impartial agents, the Hobbesian problem of mutually disadvantageous interaction has been solved. Or, at least, there is no argument that it or anything like it would still obtain. n61 Unless Gauthier is assuming that the interactions of such individuals would still produce mutually worse outcomes, there is no problem for a constitution to solve. Gauthier is unclear about this issue: "I have supposed that those who first see others as useful will, as they share a wider range of activities, come to see those others as companionable, and will seek ways to regulate their interaction to secure mutual benefit and express mutual respect. These ways are embodied in their constitution." n62

The answer seems to be that impartiality does not come to characterize interaction in general, but primarily characterizes the choice of a constitution. However, the rest of interaction does not revert entirely to strategic, purely self-interested behavior, since it now willingly conforms itself to the dictates of the constitution. But within those constraints, interaction remains strategic or self-interested: "[I]n . . . constitutional politics, human [*1448] beings seek, through an appropriately conditioned strategic interaction, to direct and constrain their future interaction, which they anticipate to be largely strategic. They seek to remedy the failure of strategic interaction to yield outcomes affording fair mutual advantage." n63

It was obscure from the beginning how the transformation from selfishness to impartiality would come about. We simply imagined that cooperation was possible and then swallowed the psychological speculation that relations of convenience would, in time, produce a profound mutual respect leading to impartial concern of each for each. It now emerges that this (unspecified) psychological process leads individuals from relations of convenience to a willingness to regard all with utter impartiality in the choice of a constitution, but then largely to ignore any interests but one's own in all other interaction, except to confine one's actions to the dictates of constitutionally valid law. If morality is already being assumed, and it affords us the further assumption that each person regards everyone's interests impartially, then what warrants the conclusion that post-constitutional politics is largely strategic? Of course, post-constitutional politics is assumed to confine itself to the law as authorized by the constitution. Perhaps it is also assumed to confine itself to the dictates of morality, and then, within these combined constraints, to be strategically aimed at maximizing self-interest. It is unlikely that post-constitutional behavior is thought of as *amoral* apart from its fidelity to constitutionally authorized law; there would be nothing to warrant this assumption, and it would apparently be incompatible with the recommendations of the moral theory. n64 But with such robust constraints on maximizing behavior, it is not clear why further constitutional regulation would be required to avoid the inefficiencies of naked strategy. n65

Although Gauthier gives no reason to accept this complicated set of psychological premises, he hopes to ground the authority of the constitution on the fact that it would be agreed to by individuals who, out of enlightened self-interest, come to value everyone's interests equally. According to Gauthier, this is more than can be said for ordinary legislation, and that is what is "higher" about constitutional law.

III. Judgments and Independent Standards

Gauthier, the leading philosophical exponent of the sufficiency of instrumental reason in moral and political theory, opts for deliberative [*1449] politics in Michelman's sense. Gauthier's conception of politics is not deliberative outside of the choice of a constitution. It is strategic, within the law as authorized by the constitution, in the rest of politics. Voting will conform to Michelman's description of voting in purely strategic politics. n66 Public political discussion, except when it concerns constitutional questions, will conform to the strategic model with the qualification that it will be conducted within the law. Ordinary politics is explicitly assumed not to be reliably deliberative: "If we were confident that these day-to-day decisions were themselves deliberatively reached, we should have no need of *higher law*." n67 Nevertheless, Gauthier claims that his account of *constitutional* politics is deliberative by Michelman's standards. He quotes and claims to comply with "Michelman's characterization: 'a reasoned interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed towards answering some question of public ordering.'" n68

It is true that the characters that populate Gauthier's constitutional convention conduct themselves in distinctively unstrategic ways, if only because each gives equal weight to everyone's interests. Gauthier's constitutional designers are not constrained by justice or the common good. Rather, they give content to these ideas in their choice of a constitution. Gauthier argues that "the outcome of deliberative politics is *constitutive* of justice among individuals" and "the common good." n69 There is no independent standard of justice or common good to which constitutional deliberation aspires; the justice of the outcome is a fact solely about the procedure that produced it. n70 Is this sort of constitutive account compatible with the idea of deliberative politics? By insisting that justice and the common good are constituted by the constitutional deliberations, Gauthier makes it clear that there is no room for judgments about justice or the common good within the deliberations. This point does not depend on the claim, defended below, n71 that the idea of cognitive judgment involves objective standards. There is a logical breakdown of a sort if justice or the common good is held to be constituted by judgments about them. In general, the correct answer to a question cannot coherently be constituted by judgments as to the answer. n72

[*1450] Michelman says that in deliberative politics a vote represents a "pooling of judgments." n73 This assertion might be read as ruling out a politics that answers to no independent standard, a constitutivist view like Gauthier's. The use of the idea of judgments clears up an ambiguity involved in placing reason at the center of deliberative politics. Reasons can be reasons for choices, and some reasons for choices, those within "instrumental reason," are simple facts about the agent's ends and the means to achieving them. n74 Reason, in that sense, is not foreign to strategic politics. Many philosophers also believe there are other reasons for choices, and many locate moral reasons here. n75 Besides reasons for choices, there is another sense of reason, namely reasons to judge or believe that something is so. Philosophers sometimes call this the distinction between practical and theoretical reason, n76 although "theoretical" is not well chosen to reflect the contrast. We might speak of reason in the practical versus the cognitive sense. n77 It is not that there cannot be practical reasons to believe something; it is that practical reasons are not in general also cognitive reasons to believe. The same fact could be both a cognitive and a

practical reason. For example, if God tells me I will be damned if I lose faith, I have both a practical and a cognitive reason to believe. Practical for obvious reasons; cognitive, because if He tells me this, He must exist. n78 Michelman apparently means to characterize deliberative politics partly by the central importance it affords to cognitive reason, an importance not afforded in strategic politics.

Unfortunately, the matter is complicated by a similar ambiguity in "judgment." We can form the judgment that capitalism is declining, and judgment in that sense will be true or false. But sometimes a judge makes [*1451] a judgment that someone shall be fined, or that someone shall have the legal status of guilty or not guilty. This type of judgment is not judgment in the cognitive sense, but in what I shall call the "performative" sense. Performative judgment does not admit of truth or falsity. Rather, to judge in the performative sense is to act so as to fix or determine the situation in certain respects. One might act this way based on beliefs or cognitive judgments that could be true or false. The act of performative judging, though, is not itself true or false.

When Michelman speaks of pooling judgments he means judgment in the cognitive sense, not the performative sense. He means judgments that something is the case. Cognitive judgment on any topic involves the assumption that there is an objective standard. In judging that things are a certain way and not some other way, one presupposes that there is a way things are. Cognitive judgments may be inappropriate in certain contexts precisely because there are not facts of the matter (for example, whether Armstrong is better than Ellington), but that would not affect the point. If one holds that cognitive judgment is appropriate to deliberative politics, as Michelman appears to, then one thereby presupposes that there are objective standards of truth or correctness that apply to them. Objectivity is sometimes used in an imposing way, as entailing some or all of universality, necessity, timelessness, or independence. n79 By "objective" all we mean here is a standard by which individual judgments and the associated political outcomes could be mistaken. Michelman apparently holds that deliberative politics is distinctive in involving cognitive reason in a way strategic politics does not. If this reading of Michelman is correct, deliberative politics must involve the use of cognitive reason -- judgments that can be true or false. n80

The philosophical school known as pragmatism rejects many of the stronger metaphysical associations of the idea of truth. It has had some influence in legal thought, n81 and perhaps Michelman is thinking of it. Still, William James, a founding pragmatist, n82 even allows that "truth supposes a standard outside of the thinker." n83

Gauthier reads Michelman entirely differently. Michelman says that "[t]he deliberative attitude [does not] presuppose[] the existence of an [*1452] objectively best answer." n84 Gauthier apparently misinterprets this point. He notes that in Michelman's account, "[a] deliberative politics is characterized procedurally," as a certain kind of "reasoned interchange." n85 He concludes, fallaciously, that in general a deliberative politics in Michelman's sense is incompatible with the assumption of independent standards: "The appropriateness of the answers it yields . . . is established, not by any appeal to assumed expertise, but by the assurance that the manner in which it is conducted is informed by the standards that the answer must satisfy." n86 Michelman says nothing in the article cited by Gauthier to suggest this view. In a separate article, Michelman is clearer. He says, "It is true that notions of deliberative politics *may* be framed as

presupposing the existence of objectively discoverable, transcendentally right or best answers," but they "need not" do so. n87

Michelman is in danger of making the inconsistent assertions that there need not be procedure-independent standards and that voting in deliberative politics is a "pooling of judgments." If judgments answer to no independent standard, then they are not judgments in the cognitive sense. Since performative judgments do not fit here, what kind of judgments are they? n88 Many people think democratic inputs are mere expressions of preference, not judgments at all. n89 They, of course, can consistently say that such inputs answer to no independent standard. Indeed the fact that the preference model enables one to avoid the need for independent standards is one of its main attractions for many theorists. n90 But Michelman's [*1453] conception of deliberative politics is designed to contrast with that view by concentrating on judgments instead of preferences, thus making it hard to see how independent standards can be avoided.

I shall call a theory that allows justice or the common good to be constituted by political inputs *constitutivist*, and call all nonconstitutivist theories that nonetheless admit such things as justice or common good *objectivist*. n91 Among objectivist theories, some will see certain political inputs as cognitively addressing questions of justice or common good (for example, judging of them); I shall refer to these theories as *cognitivist* (and the remainder as *noncognitivist*). One could deny constitutivism without being a cognitivist. Cognitivism as employed here implies objectivism, but objectivism does not imply cognitivism. n92 Despite his remark that no objectively best answer is presupposed, Michelman's category of deliberative politics should not be read as simultaneously, and untenably, allowing constitutivist theories but allowing only cognitivist theories. Constitutivist theories cannot coherently be cognitivist.

While Gauthier's theory cannot recognize independent standards of justice or common good prior to the choice of a constitution, nevertheless such a choice does answer to independent standards in a way. This lets his foot back in the deliberative door, but it also finally keeps him from getting through.

IV. Is Gauthier's Theory Genuinely Deliberative?

Under Gauthier's theory, parties to a constitutional convention deliberate and then unanimously agree to a set of institutions. In deliberating, they do not ask themselves what is just or what is to the common good, but what they choose will *count* as justice and the common good. They ask themselves what institutions will avoid the characteristic inefficiencies of unfettered strategic interaction. The deliberators are allowed to assume that ordinary (nonconstitutional) interactions will be largely strategic, but limited by whatever constitutional constraints are chosen. n93

It is fruitful to ask whether cognitive deliberation turns out to be entirely beside the point on this view. It is already clear that outside the choice (and amendment and interpretation) of a constitution, Gauthier's politics are largely strategic, though constrained by the law. The question [*1454] here is whether there is anything essentially deliberative about this theory of a constitution's authority.

Suppose, to oversimplify for a moment, Gauthier's theory placed the authority of the constitution

in the hypothetical fact that if agents of a certain kind were situated in a certain way they would unanimously agree on a constitution of a certain kind. It is possible to show, first, that if his theory took this form, deliberation would be utterly irrelevant to the account in light of certain of its other features. The point will not just be that hypothetical deliberation does not count as deliberation; rather, such an account would not essentially involve even hypothetical deliberation. Second, while Gauthier's theory is explicitly not hypothetical in quite this way, its difference is not sufficient to incorporate deliberation in an essential way. I begin with the simplified, hypothetical interpretation of the authoritative constitutional choice.

If the hypothetical fact about a certain kind of deliberation is what authorizes the actual constitution on Gauthier's view, then we should ask whether an equivalent justification could be given without any mention of deliberation or discussion. What I mean by an equivalent justification is sufficiently clear in the following, simpler example. The following two statements are equivalent in the pertinent respects even though one mentions agreement and deliberation and the other does not:

Statement 1. -- The *best* building is whichever building would be unanimously agreed, after deliberation, to be *tallest* by deliberators situated so as to have only accurate views about tallness, and having full information about all buildings.

Statement 2. -- The *best* building is whichever building is *tallest*.

The mention of agreement and deliberation in a hypothetical agreement situation is not always removable in this way. Consider:

Statement 3. -- What is just is whatever would be agreed to after deliberation by individuals with different motives and preferences.

Besides being "agreed to after deliberation," there is apparently no other salient property of the outcomes of such an agreement -- like tallness in the first two statements -- that would allow an equivalent statement of the principle. The kind of "removability" of agreement and deliberation in question, then, does not derive simply from the hypothetical form of an account.

Reading Gauthier's condition as hypothetical for now, we can see that the constitutional "deliberators" would be addressing a question whose correct answer is independent of their deliberations, and they are assumed to have "full information."⁹⁴ The question they address is this: Which [*1455] institutional arrangement (if normatively accepted and coercively enforced) will avoid the inefficiencies that would be produced by unfettered strategic individual behavior? The answer is independent of their deliberations. They would consider the effects of each alternative set of institutions, and reject all those for which there is another institution that is better for all (or better for some and worse for none). They ask, that is, which arrangements are in the Pareto optimal set, and choose one of them (if there is more than one). Since the deliberators are assumed to have full information of the kind necessary to correctly answer the question about Pareto efficiency, the hypothetical deliberative formulation and a formulation that removes any mention of agreement or deliberation are equivalent:

Statement 4. -- Justice is whatever set of institutions *would be unanimously agreed, after deliberation* by fully informed deliberators, to lead to more efficient outcomes than the results of unfettered strategic activity, or other available institutional arrangements.

Statement 5. -- Justice is whatever set of institutions *would lead* to more efficient outcomes than the results of unfettered strategic activity, or other available institutional arrangements.

If the theory were entirely hypothetical in this way, then agreement and deliberation would be entirely removable from the account. Some readers will notice the similarity to a familiar point about the removability of agreement and deliberation in Rawls's "original position." n95 We will look at Rawls in this connection below. n96

A theory of democracy is not essentially deliberative unless it makes essential reference to processes of interpersonal deliberation. Gauthier's account of political justice violates this criterion since it would not be significantly changed if the hypothetical deliberative procedure were replaced by some nondeliberative procedure that was also a perfect efficiency detector. For example, consider a formulation that says justice is whatever would be printed out by a computer programmed to calculate the Pareto efficient options. Because the procedure infallibly returns the answer that is correct by a procedure-independent standard (a "perfect" procedure in Rawls's influential terminology), n97 any perfect procedure with regard to that standard will always return the same answer as Gauthier's hypothetical deliberative procedure. If the theory were [*1456] reformulated in any such way, it would be equivalent, in its results, to Gauthier's own formulation. Such theories would all call the same outcomes just or unjust; they would be coextensive in this respect.

Suppose Gauthier replied that two theories that are coextensive, giving the same verdict in all cases, may yet be importantly different. After all, an arrangement's being efficient and its being correctly chosen as efficient are two different things. If this reply refers to an arrangement's *actually* being correctly chosen as efficient, it is surely a different thing from that arrangement's being efficient. But this idea is easily seen by noting that those two ideas are *not* coextensive. Some efficient arrangements will not be correctly chosen as efficient. However, if we choose truly coextensive properties -- (a) an arrangement's being efficient, and (b) an arrangement's being such that a hypothetical procedure that is perfect with regard to efficiency would choose it -- it is not clear that these are two different things. The two characterizations are certainly different in meaning in obvious respects -- as only one of them mentions agreement, for example. Still, it is not clear that they characterize different properties of arrangements because not only do they always agree in fact, but it is impossible for them to diverge under *any possible* circumstances. This is what I mean by saying they are not essentially different.

Suppose Gauthier were to exploit the acknowledged difference in meaning between the two characterizations -- the one that mentions deliberation and the one that does not. The characterization that mentions a deliberative agreement among hypothetical individuals may not pick out a different property from characterizations that do not, but it brings out the moral significance of the single property captured by both characterizations. We can see how this property might plausibly be identified with the undoubtedly moral concept of justice by seeing how it can be characterized in terms of a certain kind of hypothetical rational agreement. Think

of it this way: It is very natural to see a close connection between justice and what would be voluntarily chosen by all the fully informed individuals who would be affected. Because we are dealing with a hypothetical case, there are no genuinely voluntary choices, and the closest we can come is to substitute rational and fully informed choices. n98

The claim that this hypothetical rational agreement is the closest we can come to voluntary choices requires some thought. Rawls proposes a hypothetical choice situation in which the parties are rational but, crucially, not fully informed because they are kept from knowing, and thus exploiting, [*1457] particular information about themselves or others. n99 Rawls argues that certain considerations are "arbitrary from a moral point of view," n100 and ought not to influence the outcome of a hypothetical choice designed to capture and clarify our convictions about justice. Gauthier never argues that this is not "getting closer" to the idea of justice as voluntary acceptance than his fully informed choice situation. Indeed, his primary methodological difference with Rawls is not that Rawls's choice situation is less morally plausible, but that it is less morally innocent -- it already needs to assume crucial moral convictions n101 in order to weave the "veil of ignorance," n102 whereas Gauthier hopes to derive moral convictions from the purely nonmoral apparatus of instrumentally rational choice. n103 It is almost certain that a theory without Gauthier's harsh constraints could get closer to the voluntariness conception of justice. For example, consider the view that what is just is what would be agreed to by fully informed and rational persons in light of all their knowledge, *including* their moral convictions (other than those specifically about justice). This is closer to the idea of a voluntary choice than either Gauthier's or Rawls's scheme, whatever its defects may be. By including a person's considered moral convictions, surely we would get closer to the idea of that person's voluntary choice, but Gauthier does not allow it. One needs antecedently to accept his more radical reductionist program before there is reason to accept the idea that rational fully informed agreement is as close as we can get to the idea of justice as voluntary agreement.

To sharpen this point, we should ask in what respects the Gauthier agreement situation really brings out moral aspects of Pareto efficiency by seeing how it could be the object of a rational fully informed agreement in certain circumstances. Is this method in general a way of exposing an idea's moral aspects? If we can do this for Pareto efficiency, can we do it for other principles as well? We bring out the moral aspects of some principle *p* by showing how it could be deliberately agreed to in a perfect *p*-detecting procedure. Does this work for the principle of, say, maximal entertainment value? Assume justice is whatever maximizes entertainment value. We imagine hypothetical individuals who are fully informed and motivated in the ways required to infallibly determine which social policies will maximize entertainment value. Next we note that certain policies would be deliberately agreed to by individuals in this hypothetical choice situation. To do this analysis, of course, we would have to give the parties [*1458] different motives from those assumed by Gauthier. Then, compare the conclusions in the following statements, where the latter utilizes a formulation that leaves out deliberation and agreement:

Statement 6. -- Justice is whatever hypothetical individuals would deliberately agree maximizes entertainment value.

Statement 7. -- Justice is whatever would produce the greatest sum of entertainment.

It is clear that in this example the deliberative formulation utterly fails to bring out any moral aspect of the principle that might have been suppressed in the nondeliberative formulation.

This fanciful analogy may seem to ignore the possibility that the moral significance of Gauthier's formulation does not lie solely in the ideas of deliberation and agreement, but also in the assumptions about the parties' motives. In particular, at Gauthier's constitutional choice stage we are to assume (as we have seen) n104 that the participants are impartial as among their own utility and that of anyone else, as they are already moral individuals. Still, the fact that something would be agreed to even by moral individuals does not in general establish any moral significance of the thing chosen. Moral individuals can agree on morally indifferent as well as morally significant things.

The question here is not whether Pareto efficiency is in fact a morally significant standard, n105 but whether, among a number of necessarily co-extensive characterizations of the standard, one that links it to the ideas of deliberation and agreement thereby captures any moral significance in the standard. If so, my charge that the theory is not essentially deliberative could be rebutted. As things stand, however, this reply appears not to succeed. Gauthier's theory is not essentially deliberative because its import is just as well captured by the nondeliberative standard of Pareto efficiency as it is by the idea of a Pareto efficiency-detecting deliberative agreement.

This argument for excluding Gauthier's theory from the deliberative category depends on the assumption that the kind of deliberation that is central to that category is cognitive deliberation, as I have recommended. n106 If merely instrumental, noncognitive reason or deliberation were enough, then Gauthier's theory arguably would count as essentially [*1459] deliberative. The reason is that Gauthier's idea of an appropriate constitution is one that allows for ordinary interaction to be largely strategic without falling into characteristic Pareto inefficiencies. The account essentially involves strategic behavior, which intrinsically involves instrumental reasoning -- a noncognitive kind of deliberation. This type of deliberation is noncognitive in that its conclusions are not beliefs or propositions -- the kinds of things that can be true or false. Instrumental reasoning concludes in intentions or actions. If a theory like Gauthier's is not usefully categorized as deliberative, our emphasis on cognitive deliberation can help to explain why.

So far, we have oversimplified by supposing Gauthier's standard for an appropriate constitution to be entirely hypothetical, that it *would* be chosen under certain circumstances. Gauthier's theory is, in fact, explicitly not hypothetical: "My account of the adoption of a constitution . . . does not treat it as merely hypothetical. The constitutional fact plays a key role in the argument." n107 However, the actual constitutional choice situation has its authority only "as a reasonable approximation" of the ideal constitutional choice situation. n108 Indeed, he says it is enough if some actual agreement may "be seen as making possible an interchange . . . the *outcome* of which might approximate to the outcome of a fair universal interchange." n109 It is not enough that an actual constitution accords with what (hypothetically) would have been agreed to in the ideal constitutional choice situation; it must also have been the actual product of some agreement that "represents itself as the expression of the people's will." n110

The requirement of an actual agreement is not sufficient, however, to bring deliberation back into

the account. The required actual event need not have the sort of deliberative nature that would give it any moral authority. It must merely intend -- or pretend -- to be deliberative in that way. The main justification of a constitution stems from the hypothetical question of whether it *would* have been agreed to in Gauthier's *ideal* constitutional choice situation. As we have seen, however, deliberation plays [*1460] no essential role in that question. n111 Deliberation plays no essential role -- really or ideally -- in this account of the authority of the constitution. The central justifying device is the economic idea of efficiency. A constitution is justified, for the most part, according to whether under it largely strategic interaction will be more efficient than if it were unregulated. To the same extent, then, because Gauthier identifies such a constitution with justice and the common good, n112 these, too, are largely matters of efficiency in the economic sense. n113

It would be a mistake to think that Gauthier's theory is, after all, objectivist rather than constitutivist as these terms have been defined here, n114 though the preceding analysis may seem to suggest such a characterization. Gauthier's ideal or actual constitutional choosers do indeed face the objective, procedure-independent question: "What arrangements are Pareto efficient?" They do not, however, face an objective, procedure-independent question about justice; their decision constitutes the justice of the chosen arrangement on Gauthier's view. n115 His theory is constitutivist about justice despite its virtual identification of justice with the procedure-independent standard of Pareto efficiency.

V. Why Do Deliberative Theorists Like Rawlsian Justice?

If deliberation and agreement are removable from Gauthier's theory without essential change, then they are similarly removable from Rawls's theory in *A Theory of Justice*. This similarity is notable because exponents of deliberative democracy are typically sympathetic to, even motivated by, Rawlsian theory. n116 Such a sympathy cannot be owing to any deliberative theory of politics in that book, because there is none. Before considering the significance of Rawls for deliberative theories of democracy, it is important to see how deliberation is removable from his theory of both justice and of a justified constitution.

First, it has long been noticed, most notably by Rawls himself, n117 [*1461] that his explication of justice by reference to deliberation and agreement in an imaginary "original position" is equivalent in its consequences to a formulation that makes no reference to agreement or deliberation. The following two statements are equivalent in this way:

Statement 8. -- A just basic structure is whichever would be unanimously *agreed to, after deliberation*, n118 *by individuals who are motivated by self-interest* n119 but who know no more about themselves (or each other) than that they would prefer more rather than less of certain "primary goods" n120 such as wealth and power.

Statement 9. -- A just basic structure is whichever would be *chosen by a single self-interested individual* who knows no more about herself than that she would prefer more rather than less of certain "primary goods" such as wealth and power.

Deliberation and agreement are removable from the account without essential change. This point

is of some interest in a theory that attempts to explain social justice in terms of a contract, as do the theories of both Rawls and Gauthier. n121

Rawls's theory of a justified constitution goes slightly beyond the general theory of a just basic structure, but it still does not involve deliberation in any essential way. He says, "A just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the two principles of justice [agreed to in the original position]. When we justify a constitution, we present considerations to show that it would be adopted under these conditions." n122 The delegates to such an imaginary convention are still behind a "veil of ignorance," n123 but a thinner one because they now know the principles of justice they are to follow, as well as certain general information about their society. As in the original position, however, there [*1462] is no reason to think the conclusions of one delegate would differ from those of any other. "[T]hey are to choose the most effective just constitution, the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation." n124 As in Gauthier's ideal constitutional choice situation, the delegates are to address a specific question whose answer is independent of their decision, and they are assumed to be sufficiently informed to answer the question correctly. Roughly, Gauthier's delegates answer the question, "What arrangements are efficient?" and Rawls's answer the question, "What arrangements are most just?" In both cases, the issue of deliberators correctly answering the question is removable. A legitimate constitution is, roughly, the most efficient or the most just, respectively. Deliberation and agreement play no essential role in Rawls's theory of a justified constitution any more than in Gauthier's theory.

When we move from the constitutional to the legislative arena, we find an irremovable deliberative component in Rawls's theory. n125 The mantle of deliberative democracy fits Rawls better than Gauthier for this reason. A close look, however, suggests that Rawls has no deliberative normative theory of *actual* politics; deliberation only figures essentially in his account of the *ideal* legislature. Even in ideal circumstances, because "rational legislators would often reach different conclusions, there is a necessity for a vote. . . . The restrictions on information will not guarantee agreement, since the tendencies of the general social facts will often be ambiguous and difficult to assess." n126 For these same reasons, even at the ideal level "the effects of common deliberation seem bound to improve matters." n127 To justify legislation is partly to show that a majority of such ideal legislators would approve it after deliberation, n128 and partly to show that it was actually chosen by procedures that would have been unanimously approved in an ideal constitutional convention. n129 Even if the first part cannot be shown, the second part is often sufficient for the legitimacy of even unjust legislation. n130

What we do not find in Rawls is any account of the legitimacy of actual legislative practices in terms of their deliberative nature. Nor is [*1463] citizen voting justified as a part of a deliberative process for ascertaining just policies, as we might have expected. Instead, voting by actual legislators is defended as a concession required by each delegate to the constitutional convention in order to achieve agreement. n131 Voting by actual citizens is defended, and circumscribed, primarily by an appeal to individual liberty. n132

Why, then, do deliberative democrats consistently take inspiration from Rawlsian theory? A good reason, and a possible explanation, is that Rawls's theory of justice, unlike Gauthier's, n133

supplies a standard for the evaluation of political practice that is independent of actual political choice procedures. n134 With such a standard in hand, it would be possible to conceive of a politics that is not limited to individual instrumental reason and strategy. There would be cognitive reasons with which to evaluate political proposals. There would be such things as getting it right and getting it wrong. If, as I have suggested, what is distinctive about a deliberative conception of politics is that it gives a central place to cognitive reason and judgment, n135 then Rawls's theory is an example of how there might be independent standards of the correctness of democratic political decisions. The theory's appeal is not only that it would provide an independent standard, but also that the standard would not be too independent. It does not purport to be prior to or independent of our faculties of reason, n136 or even to have timeless or universal application. n137 In these ways, it would differ from Platonic forms, God's Law, and Natural Law. Despite being less exalted in these ways, the idea of an independent standard of correctness or truth of political judgments and decisions may provoke a number of concerns.

VI. Afraid of Truth?

Wariness about the existence of procedure-independent standards of justice or common good may be traced partly to the fact that if such standards exist then the business of politics must be to ascertain and then to [*1464] meet them. This epistemic dimension of justice raises the specter of expertise n138 and of rule by the wise, and it is not comforting to advocates of democracy. n139 This line of worry, however, must be scrutinized. The concern that rule by the wise is necessary to uncover procedure independent standards of justice depends on premises that we need not accept. In particular, it supposes that if there is a procedure-independent (objective) standard of justice or common good and some are relatively expert at knowing and meeting that standard, then these relative experts are legitimate political leaders. If this inference is faulty, as it apparently is, it is no longer clear how independent standards would be a threat to democracy. Different people will criticize the inference at different points. n140 My own view is that its central flaw is its failure to recognize one liberal criterion of political legitimacy: A political regime is not legitimate unless it can be defended in a way that is beyond reasonable objection. n141 If we adopt this liberal standard, then the inferential link between independent standards and authoritarianism only holds if we suppose that the experts' status as knowers is not only actual but also beyond reasonable doubt. Since the expertise in question specifically concerns justice and the common good, there is not likely to be any method for identifying such experts that is itself beyond reasonable doubt. We can grant the existence of independent standards, and even sharply different abilities to know them, and still deny the authoritarian conclusion. Therefore, it is not clear why independent standards should threaten our liberal or democratic sensibilities. n142 Of course, this analysis does not yet specify what role these standards would play in a theory that admitted them. I will discuss that in greater detail below. n143

Authoritarianism is not the only thing one might fear in the idea of procedure-independent standards of justice or common good. Another line of worry is not political but philosophical: The idea of procedure-independent [*1465] truths smacks of a mysterious Platonic realm of universal, necessary, timeless, and independent moral and political facts to which moral and political judgments correspond when true. And isn't this a repudiated philosophical extravagance? n144

I do not know whether such a view should be regarded as repudiated. In any case, it is not implied here. The objection assumes more than it needs to about what the idea of independent standards, or even truths about justice and common good, involves. Consider the following general claim:

Any account (or theory, or world view) that allows that some things are just and others are unjust must also allow that it is *true* to call those things just or unjust respectively.

This claim does not imply that this is all there is to truth (though some philosophers take that view), n145 but whatever there is to truth, there is this. Therefore, the idea of truth is not more (nor less) Platonistic, universalistic, or metaphysical than the idea of, for example, justice.

Why say, as the philosophical objection to the idea of procedure-independent standards of justice or common good seems to, that this connection between a thing's being just and its being true to say so only holds for accounts that assert that some things are universally, independently, timelessly, necessarily just? Why think these extra things must be included or presupposed if we are to admit that it is true to call something just? The above general claim seems undeniable even where no such qualification (universality, independence, timelessness, necessity) are attached. These qualifications would be more understandable if there were a similar qualification in nonmoral contexts. But there is not. Nonmoral truths generally do not need to be universal, necessary, timeless, or independent. One example of a sentence that is surely capable of truth and falsity when it is used to describe some particular person, but is none of these grander things, would be: "John is afraid of breaking the law." Four observations should be made regarding this sentence.

[*1466] *Observation 1.* -- It can be true without being *timelessly* true; John may overcome this fear, or he may not have always had it. If timeless only means that it is true for all time when temporal indexes are added, as in "John is afraid of breaking the law throughout September 1992," then maybe this statement is timelessly true. If so, I have no objection to requiring a similar weak brand of timelessness in the case of justness statements. The point would remain that what is just need not remain timelessly the same for such statements to have truth value.

Observation 2. -- It can be true without being so, *independently* of all mental states; certainly, the truth of the sentence is not independent of John's mental states. If you want to say that the relevant sense of independence concerns beliefs, not fears, then consider the sentence, "John believes he has broken the law." This sentence can be true, but need not be true independently of John's beliefs. There is a good counterexample for any condition which asserts that for something to be true it must be true independently of *S's* having mental states *m*. Consider the statement, "*S* has *m*." The statement's truth could not be independent of *S's* having *m*, and yet it seems bound to be true or false.

Observation 3. -- It can be true without being *necessarily* so; John is afraid but he need not have been. Things could have been different.

Observation 4. -- It can be true without being true *universally* (or from every point of view);

what counts as the "law" in such a sentence is context-relative. When one person says it, it may refer to Israeli law, but when I say it, it may refer to United States law. When said in certain contexts, it may refer to only whichever laws John regards as covering him. (Again, if one builds all these indexical elements into the proposition in question, one may get something like universality. If so, I accept this weak kind of universality on the truth value of moral statements as well.)

There may be some nonmoral truths that have some or all of these properties (timelessness, necessity, universality, and independence). In any event, there are clear examples of truths that lack some or all of them. Therefore, moral truths need not have these properties to count as truths (or at least special reason must be given for burdening moral truth in this way).

It may be asked what moral reality could be like so as to make any moral statements true. The answer is simple (up to a point). For it to be true that x is wrong, x must *be* wrong. The question of how anything could be wrong is a fine -- but different -- question. A similar question how anything could be just, or in the general interest, may be raised. But if one thinks anything is just or in the general interest, then one must admit [*1467] that in those cases it would be *true* to say so. n146 If we switch from the question of how it could be true that x is just to the question of how something could be just, there should be little temptation to think that the only possible answers allude to a Platonic realm of moral facts (even if that is one possible kind of answer). Rawls's theory of a just basic structure of society n147 is, for example, one philosophical option that makes no use of moral facts that are prior to and independent of practical reason (as he would put it). n148

If this is how we treat truth, then who cares whether normative political principles can be true? Why raise a big stink about whether the statement " x is just" is true, and not just simply ask whether x is just? The answer is that something cannot be known unless it can be true; there is no question about the epistemology of political principles if there is no question about their truth. One deliberative conception of proper democratic institutions is importantly *epistemological*; it asserts, for example, that people try to figure things out and correct their beliefs in light of arguments and reasons that support a contradicting belief, and that some are wiser than others. Epistemic democracy is not just epistemic in the sense that it *produces* outcomes that meet an independent standard. That would not be epistemological at all. It is epistemic in the sense that people come to *know*, more or less well, the independent standard and what meets it. This conception of epistemic democracy does not require that the facts in question be universal, necessary, timeless, or independent. It does require *some* account, of course, but I am concerned here mainly with the gun-shy reaction to truth that is so frequently encountered. This fear, like many, feeds on an exaggeration of the dimensions of its object. When truth is brought down to size, perhaps it is philosophically less frightening.

VII. Epistemic Proceduralism

Even if all the concerns about the idea of political truth were calmed, the following objection to an epistemic conception of democratic deliberation and voting might still be raised. An epistemic conception would seem to be incompatible with two basic convictions: (1) democracy often gets it wrong, and (2) certain political decisions are legitimate even if they [*1468] are wrong.

Regarding the first point, an epistemic conception of deliberative democracy is free to acknowledge that democratic decisions are robustly fallible (to put it politely). The epistemic conception might be thought to imply that the general run of law and policy is legitimate (as I assume it is) only because democracy almost always gets it right. If much democratic fallibility is acknowledged, n149 it may seem impossible to explain the general legitimacy of democratic outcomes.

An epistemic theory of democracy can be put in a form that avoids this problem. I shall provide only a sketch of such a theory here. Assume that any adequate theory of democratic legitimacy must admit that the legitimacy of democratic choices does not depend on their independent moral correctness (though there are limits). It must derive, then, from something about the procedure itself. Dissenting citizens are not free to reject the legitimacy of Bill Clinton's political authority just because they think his election is a moral mistake or his policies are unjust. An adequate theory must be "proceduralist" in this sense. This notion may seem to count against an epistemic approach's appeal to procedure-independent standards. There is a natural proceduralist theory of democratic legitimacy that does not appeal to any independent standards, but instead relies on the *fairness* of democratic procedures to legitimate their outcomes, even when they are mistaken under (correct, but not liberally admissible) independent standards. I shall call this view "Fair Proceduralism." But if a liberally acceptable independent standard exists, we can reasonably object that Fair Proceduralism ignores the question of how often or how well the independent standard is met -- how often the procedures produce *substantively* just decisions. Is our only choice between a nonproceduralist epistemic theory, which can only explain run-of-the-mill legitimacy in terms of run-of-the-mill moral correctness, and a Fair Proceduralism, which utterly neglects such appropriate independent standards as there might be? Neither of these choices is acceptable, but we do not need to choose between them.

One may argue that there is a liberally acceptable independent standard of the correctness of political decisions, and that democratic choices are legitimate because of democracy's (imperfect) tendency to produce choices that are correct under such a standard. I shall call this view "Epistemic Proceduralism." The theory remains properly proceduralist because [*1469] legitimacy does not require correctness, and yet the (supposedly) independent standard plays a central role in the account of legitimacy. Of course, the viability of such a theory depends on the development of a liberally admissible standard (independent of actual procedures) for democratic choices and on the standard's being adequately met by certain democratic procedures. The tendency of democracy to produce correct decisions by this standard is best defended, I believe, through the idea of epistemically valuable public discussion and voting.

This brief sketch of an epistemic theory of democracy raises many questions that cannot be addressed here. One question, however, is so central to our topic as to be worth considering: Is Epistemic Proceduralism essentially deliberative? Gauthier's and Rawls's theories are not, as I have argued. n150 There are significant differences between Epistemic Proceduralism and those theories, however.

In Epistemic Proceduralism, there is a procedure-independent standard of justice; under our terminology it is "objectivist," not "constitutivist." n151 Nevertheless, legitimacy is a purely procedural standard on this view. Legitimacy derives from actual deliberations, and while those

deliberations are about an independent standard of justice, the outcome's legitimacy is not equivalent to its meeting that independent standard. There may or may not be an essentially deliberative aspect of the account of justice, but such an aspect is not necessary. The account of legitimacy, however, is essentially deliberative. A decision is made legitimate by being chosen in an actual deliberative democratic procedure that tends -- though imperfectly -- to produce substantially just decisions. There is no salient nondeliberative alternative formulation that would necessarily declare all the same decisions legitimate or illegitimate as does the deliberative formulation.

If some nondeliberative procedure were able to meet the criteria -- moral and epistemic -- of a legitimating procedure, then a theory in terms of that procedure would not be deliberative. However, if deliberative democratic procedures are uniquely able to meet such criteria, as I believe they are, the only question is whether those procedures would necessarily be effectively equivalent to any alternative procedures formulated without reference to such deliberative notions as discussion, argument, and agreement. Epistemic Proceduralism denies two things here: (1) that any nondeliberative, nondemocratic procedure will do *as well* under the appropriate moral and epistemological criteria; and (2) that the deliberative democratic procedures alleged to fit the bill are equivalent to, in the sense of necessarily always giving *the same answer* as, some nondeliberative procedure. [*1470] The first denial actually implies the second, but the second specifically addresses the issue in the terms in which we have considered it in evaluating Gauthier's deliberative credentials. n152

VIII. Michelman Revisited

It is instructive to compare Epistemic Proceduralism with Michelman's deliberative conception of democracy. n153 The two views share much ground, some of which is generally controversial and some of which is not. I believe both views accept all of the following assertions: (1) in a deliberative conception of democracy, voting procedures constitute a pooling of cognitive judgments; (2) such cognitive judgments presuppose that they are either true or false, correct or incorrect; (3) the presupposed truth or falsity of these judgments does not consist in their being endorsed by democratic procedures but depends on some standard that is independent of the outcomes of democratic choice procedures; (4) there are purely procedural kinds of fairness that provide some degree of political legitimacy for their outcomes; (5) no consensus is likely on what in a given case is the correct choice (for example, the truly just choice); and (6) a decision is produced, despite a lack of consensus, by taking a vote. n154

Nevertheless, there are differences between Epistemic Proceduralism and Michelman's deliberative democracy. To see these differences, consider a certain tension that arises from the application of Michelman's view:

Proposition 1. -- Deliberative politics is made up of judgments that imply an objectively correct or truly just answer, in a procedure-independent sense.

Proposition 2. -- Democratic legitimacy has nothing to do with any tendency to produce or promote such objectively correct decisions.

Both Michelman's view and Epistemic Proceduralism accept the first proposition, but they may diverge on the second. Michelman seems to consider the question raised by the second, but only indirectly and indeterminately. He suggests that a deliberative conception could go either way on this question. n155 That suggestion implies that some nonepistemic standard of legitimacy would be required of a deliberative conception that rejects the [*1471] second proposition; at least, the standard would not involve democracy's ability to discover the truths *mentioned* in the first.

It is true that notions of deliberative politics *may* be framed as presupposing the existence of objectively discoverable, transcendentally right or best answers, or as demanding of participants the submergence of their individualities and conflicts in a collective being or common good. But aspirations to deliberative politics *need* not carry such strongly solidaristic baggage. n156

It is clear that Michelman lacks sympathy for this "solidaristic" view, but it is unclear whether he objects to its pursuit of objectively correct choices or to its totalitarian submergence of individuality or to both.

On the question of objectively correct choices, we have seen that Michelman is willing to count truth-seeking as a constitutional value. n157 However, is the truth he is comfortable with here the same truth that is presupposed by deliberative political participation? Does he admit as a constitutional value the ability of democratic procedures to determine which positions in the deliberative political forum are correct? Michelman's view on this question is difficult to discern, but textual evidence suggests that he believes that the truths presupposed and debated in political discourse are *not* to be chosen among by the democratic procedure. n158 Instead, the role of democratic procedure is to arrive at political truth of another kind: a reasonable resolution in light of the persisting first-order disagreements. The outcome of democratic procedure is counted as reasonable so long as the procedure allows for each citizen's full and free exercise of argument and reason in the discussion preceding a vote. Apparently, then, this reasonable resolution is not a procedure-independent standard of correctness. Actual discursive procedures constitute this kind of "correctness" of political choices on Michelman's view, even though cognitive reason in the deliberative process presupposes a more "transcendent" sense of correctness. "Transcendent" here seems to mean procedure independent. The political truth that Michelman is willing to credit as a constitutional goal is not transcendent, but purely procedural:

Hence, the state is justified by its purpose of establishing and ordering the public sphere within which persons can achieve freedom in the sense of self-government by the exercise of reason in public dialogue. . . . It is in this qualified sense of . . . a commitment to the possibility of reaching a common understanding through the [*1472] communicative action of reason-giving in public debate -- that I speak of political truth, or truth-seeking. . . . n159

Michelman's view creates a tension, then, between the two propositions --between the admission that each participant presupposes a procedure-independent truth about what ought to be done, and the proposition that political legitimacy has nothing to do with the production or promotion of decisions that are correct by that independent standard. This tension does not involve a contradiction, however, and there may be good reasons to live with it. For example, it may be impossible to postulate that legitimacy depends on democracy's tendency to get it right without

also officially adopting a view of the common good that some reasonable citizens might well reject. An epistemic theory of democratic legitimacy may thus offend a liberal respect for reasonable and deeply held moral and philosophical differences between citizens. If so, then it should indeed be rejected.

On the other hand, the tension is acute. How can the same citizen hold both that there is a procedure-independent standard regarding what ought to be done, and that political legitimacy has nothing to do with whether political decisions are correct by the appropriate independent standard? With (liberal) due respect for conscientious disagreement, it is important to consider whether this tension can be removed by an epistemic account. As I understand Michelman, he is inclined to doubt it. Hence, political legitimacy is derived from purely procedural values, albeit those concerning procedures in which citizens address themselves to substantive, procedure-independent matters.

Epistemic Proceduralism, on the other hand, holds that democratic legitimacy derives partly from democracy's ability to separate the correct from the incorrect positions advocated within democratic deliberation. It avoids illiberal sectarianism by supposing that the positions it must choose between -- those offered in the public deliberations -- are already passed through a liberal filter. Some claims or arguments are not acceptable as reasons in political deliberation because they offend the commitments of some reasonable moral or philosophical world views in the society. Epistemic Proceduralism requires a skeletal account of justice or common good that is beyond reasonable objection in the requisite respects, but the fleshing out of this account is the business of democratic procedures. Correctly fleshing out the notion of justice or common good is independent of actual political procedures and is the topic to which democratic deliberation ought to be devoted. Democratic outcomes are legitimate because of the imperfect but real tendency of democratic procedures to approximate [*1473] the correct answer -- the correct fleshing out of the skeletal conception of justice or common good. Such a view would be at once deliberative, democratic, liberal, and epistemic. Of course, whether such a view is possible is too big a question for us to tackle here. It would, in any case, involve procedure-independent political truth in the theory of political legitimacy in a way that Michelman's view, for better or worse, apparently does not.

IX. Voting Rights and Deliberative Democracy

Where some group is in a minority in every voting district, and all of a district's representatives go to the winning party under majority rule, polarized voting can render the minority group powerless at the legislative level. Advocates of minority power often respond to such polarization with calls for voting schemes that would translate the minority's polarized, block-like voting behavior into more electoral victories, or more policy influence, or both. n160 The goal of greater minority representation at the legislative and policy levels can be endorsed from either a deliberative or a strategic point of view. As noted earlier, n161 even left-leaning work in voting rights often waxes strategic. It often accepts a competitive and factional conception of voting while seeking to increase the power of the smaller factions. This section will briefly argue that this emphasis may be misguided. Voting rights jurisprudence ought at least to join deliberative theory's critique of strategic or pluralist models of legitimacy.

Samuel Issacharoff explicitly acknowledges the conflict between deliberative and group-interest models and endorses the latter. n162 He also notes the existence of racial polarization, which he says is to be expected given the "fundamentally different societal interests resulting from the basic differences in the socioeconomic means of blacks and whites." n163 Issacharoff regards polarized voting patterns as "unfortunate," however, and suggests that there is more to interest-group concerns about ideal politics than in other forms of interest-group competition. n164 Therefore, in criticizing "republicanism" and opting for pluralism in the area of voting [*1474] rights, he may be advocating strategic political practice on the part of racial minorities more than endorsing any theory of the moral legitimacy of democratic decisions.

It is important not to confuse the advocacy of strategic action with the endorsement of a strategic model of legitimacy. Even for a theorist who advocates a deliberative model of legitimacy, it may be entirely consistent to recommend strategic, nondeliberative political activity for certain individuals or groups as a response to largely strategic action in the rest of the population. Issacharoff emphasizes that voting rights jurisprudence is founded on the long-standing reality of racially polarized voting and the well-documented supposition that white racial bigotry is an important cause. n165 In such a case, self-protection may be a sufficient warrant for African-American strategic behavior. Indeed, tit-for-tat resorts to strategic behavior may even produce a more legitimate political process than if some voters acted strategically while others were naively public spirited. n166 Certainly, legitimacy is not enhanced by the existence of suckers. To the extent that a process affords everyone equal power over the outcomes, and the power is effectively used, this kind of procedural fairness admittedly lends some moral legitimacy to the outcomes. This leaves open the possibility that deliberative politics offers more legitimacy yet. Deliberative theories of legitimacy are compatible with this claim since they may assert that mere procedural fairness yields only a weak and limited form of legitimacy, inferior to that available in a deliberative theory. Thus, the strategic cast of Issacharoff's discussion of racial politics does not imply any commitment to the superiority of a strategic versus a deliberative theory of democratic legitimacy.

Lani Guinier avows ambivalence between deliberative and strategic (or "pluralist") models of legitimacy, n167 but the tendency of her thought is, so far, strategic. She often speaks the language of pluralism, as when she says that "[a] fair system of political representation" would ensure that minority groups "have a fair chance to have their policy preferences satisfied" n168 and advocates "an equal opportunity to influence public policy." n169 In eliding the possibility that some citizens' interests are less meritorious than others, Guinier's view is distinctively pluralist. n170 [*1475] Guinier's adoption of the pluralist model is apparently founded in part on its being the only thoroughly articulated model of democratic process. n171

Recognizing some normative limitations in a pluralist approach to democratic legitimacy, Guinier asserts that "in a racially polarized environment, some systems may be procedurally fair but fundamentally unresponsive." n172 The critique does not go very far, however, since it fails to challenge the moral legitimacy of majority rule under a white majority where racial bias is not a factor. Where African-Americans' interests are trampled as a result of their smaller numbers and not because of bigotry, Guinier has no resources from which to challenge the majoritarian decision. Guinier is not sufficiently clear about whether the illegitimacy of the decisions produced by existing white majorities is rooted in the *permanence* of this particular majority,

n173 the *bigoted* nature of white voting patterns, n174 or the very idea of rule in the *interests* of a majority. n175 Only the last would recognize the dangers posed for minority groups by a pluralist theory of legitimacy.

Voting rights theory should be expected to recognize that even without the presence of bigotry, or ill-will on any side, the outcome of a contest in which each individual is given equal power over the outcome and exercises that power in her own interest could yet be unjust. Equal power over policy outcomes is a formula for the hegemony of the most numerous interest group or coalition. Racial minorities, it is safe to say, lack the power of numbers, and so have a front-line position to feel the impact of the potentially unjust decisions of an interest-based majoritarianism. Pluralist or strategic models tend to link legitimacy to the power of numbers in this way, and deliberative theorists typically reject the link. n176 Deliberative theory, then, may have something to offer to the voting rights movement, as a more congenial model of political legitimacy. Racial (and other) minority groups would do well both to increase their political power, and at the same time criticize the idea that the balance of political power determines what is just or legitimate.

[*1476] X. Conclusion

My aim has not been to defend a particular deliberative conception of politics, such as Epistemic Proceduralism. Instead, the question I have primarily addressed has been whether and how the distinction between deliberative and strategic politics can fruitfully be drawn. I have suggested that it is distinctive of deliberative conceptions of politics that the content of justice or the common good is independent of actual political decisions and is what political participants ought to address and aim to achieve. This notion of democratic politics gives a common topic to political deliberation that is absent from conceptions in which citizens pursue their own preferences or interests. Under those views, citizens address common topics only when their separate projects happen to call for it. Where justice is an independent standard, political choices that attempt to meet the standard can be incorrect; deliberation about what the standard is and prescribes will involve judgments that can be true or false.

The idea of true or false judgments about political justice is perhaps the key to a useful deliberative/strategic dichotomy. Without it, theories such as Gauthier's, which can correctly claim to involve reason, deliberation, judgment, mutual respect, fairness, and many other good qualities, can thereby apply for membership in the deliberative category. Gauthier's theory does not essentially involve cognitive deliberation at any level -- actual or ideal, constitutional, legislative, or electoral. At each of these levels the goal is to remove obstacles to efficient pursuit by individuals of their own preferences. In the choice of a constitution, efficiency is the extent of a common topic of deliberation, but I have argued that even there the deliberation is removable from the account without essential change. Gauthier's theory shares many good things with deliberative theories, but at least at the constitutional level, it categorically denies that there are procedure-independent standards of justice or common good. Political and moral standards are constituted by actual choices among Pareto optimal arrangements. There are no truths concerning justice about which to deliberate, nothing to ascertain or approximate. This evasion of political truth and knowledge has long won admirers among those fearful that truths about justice and common good are incompatible with democracy and those with liberal respect for

divergent views. I have tried to show that truth in political philosophy can play a constructive role while avoiding much of its traditional metaphysical clothing. If there is such a thing as an arrangement's being just, then it is *true* to call that arrangement just. That idea is enough to let truth, epistemology, and cognitive deliberation in the door (though making them check their coats).

This analysis does not suffice to establish the merits of an epistemic theory of democracy, but it forestalls some of the most influential objections. Michelman's idea of a politics in which voting is a pooling of [*1477] judgments has been central to the deliberative strand in democratic theory at least since Rousseau asserted that voters should address the General Will (and could -- and usually did -- get it wrong).ⁿ¹⁷⁷ Nevertheless, the epistemic side of Rousseauian theory is still usually avoided -- even feared -- for the reasons discussed above.ⁿ¹⁷⁸ I do not believe the fears are well founded. Whether or not any more robust kind of legitimacy can be achieved, the non-epistemic proceduralism's brand of legitimacy is quite limited. For the engaged citizen with his or her own views about substantive justice, non-epistemic proceduralism has bad news and good news. The bad news is: "Thank you for your opinion, but the procedure has no particular sensitivity to good reasons -- no positive tendency to approximate the true or more reasonable outcomes." The good news is: "It may be some consolation to know that no one else's considered judgments or preferences are any more likely to make a difference than yours." This is indeed something, but not much. At the same time, the idea that reasoned appeals to one's fellow citizens will have *no tendency* to improve the quality of outcomes may be an extreme and implausible pessimism. Perhaps Michelman himself is not that pessimistic. However, all it takes to sign on to the epistemic approach is to reject such severe and unfounded doubts. Epistemic Proceduralism makes a very limited epistemic claim: Democratic decisions will tend to be of higher quality after full reasoned discussion culminating in voting. It does not say the decisions will always be correct, or that their legitimacy depends on their being correct. Theories like Michelman's, which advocate full and equal public deliberation culminating in a vote, have little reason to stop short of these modest epistemic claims; indeed, their emphasis on public deliberation is difficult to understand without the further step.ⁿ¹⁷⁹ An Epistemic Proceduralism of the kind I have sketched suggests that not only is this philosophically bolder deliberative theory of democracy truer to the most useful deliberative/strategic dichotomy, but eventually it may even be a viable theory of democratic legitimacy. Deliberative democracy countenances political truth, an idea whose use in political philosophy requires caution, but not fear.

FOOTNOTES:

n1 The phrase appears to have been coined by Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 102, 104 (Robert A. Goldwin & William A. Schambra eds., 1980). *See also* JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (forthcoming 1994).

n2 *See generally* DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

n3 For examples of the deliberative versus the strategic conception of politics, compare Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *The Supreme Court, 1985 Term -- Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); and Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) with RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149 (1987); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); and Richard A. Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 19-32.

n4 Illustrative of deliberative views are Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 18-32 (Alan Hamlin & Philip Pettit eds., 1989) (developing and defending from strategic counterarguments an ideal deliberative procedure for a deliberative democracy); Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 103, 111-12 (Jon Elster & Aanund Hylland eds., 1986) (attacking the injection of marketplace preferential behavior into analyses of the political forum); and Jurgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38, 41 (1989) (urging a moral philosophy based on a "cooperative search for truth" rather than encouraging individuals to act in their self-interest). In contrast, for examples of strategist views, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 307-08 (1989) (arguing that the common good is merely what the fully informed members of a group would choose in their own interests); DOWNS, *supra* note 2, at 20 (proposing a model of democratic government rooted in rationality understood in its utility-maximizing economic sense); David Gauthier, *Constituting Democracy*, in THE IDEA OF DEMOCRACY 314, 315 (David Copp et al. eds., 1993) (asserting that "ordinary law-making . . . typically rests on a strategic power play"); and John C. Harsanyi, *Morality and the Theory of Rational Behavior*, in UTILITARIANISM AND BEYOND 39, 61 (Amartya Sen & Bernard Williams eds., 1982) (concluding that morality is the product of rational, utility-maximizing behavior).

n5 See Sunstein, *Beyond the Republican Revival*, *supra* note 3, at 1546 (remarking that utilitarianism cannot be harmonized with the deliberative legislative process as it actually occurs).

n6 See Robert Sugden, *Maximizing Social Welfare: Is It the Government's Business?*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE, *supra* note 4, at 69, 69-70.

n7 See HORATIO W. DRESSER, A HISTORY OF MODERN PHILOSOPHY 297, 301 (1928) (describing Jeremy Bentham as the formulator of utilitarianism and John Stuart Mill as its defender); BRYAN MAGEE, MEN OF IDEAS 152 (1978) (characterizing Bentham and Mill as

the popularizers of utilitarianism).

n8 For his interpretation of voting as expressing a cognitive judgment on the common good, see JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 155 (Currin V. Shields ed., Bobbs-Merrill Co. 1958) (3d ed. 1865) ("His vote . . . has no more to do with his personal wishes than the verdict of a jurymen. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good.").

n9 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 423 (Edwin Cannan ed., Modern Library 1937) (5th ed. 1789) ("[Every individual] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain, and he is in this . . . led by an *invisible hand* to promote an end which was no part of his intention." (emphasis added)).

n10 See Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 802-03 (1993) (noting that civic republicans and leftists both "view government as the necessary agent for cultivating positive social values and developing a 'good' society"); cf. Cohen, *supra* note 4, at 18 (observing that one goal of deliberative democracy is to ensure that the political agenda is not controlled by economically powerful groups).

n11 See, e.g., Gey, *supra* note 10, at 808-09 (defining civic virtue as an essentialist, non-neutral concept that is diametrically opposed to pluralism).

n12 See *id.* at 891 (describing elitist and paternalistic aspects of civic republicanism that align it with the right). For example, in a surprising case of a nascent academic category jumping from the Ivory Tower to the best-seller shelf, conservative media commentator George Will has endorsed congressional term limits in the name of deliberative democracy. GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992).

n13 See, e.g., JURGEN HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION* 345-47 (Thomas McCarthy trans., 3d ed. 1985) (arguing that capitalism and democracy are separated by an indissoluble tension); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, in *SOCIAL PHILOSOPHY AND POLICY* 25, 49 (1989) (discussing "the ways that the deliberative conception of democracy provides the core of a philosophical conception of socialism"); Cohen, *supra* note 4, at 30-32 (advocating the institutionalization of deliberative procedures through the use of public funds).

n14 See *supra* note 12.

n15 See *infra* Part IX.

n16 Effectiveness can be precisely cashed out for formal purposes by supposing each person has a ranking of states of the world such that he or she is disposed to choose some over others. Taking the most effective means to your ends is nothing but bringing about as highly ranked a state of the world as you can. See Brian Barry & Russell Hardin, *Introduction to Part II*:

Individual Preferences and Collective Decisions, in RATIONAL MAN, IRRATIONAL SOCIETY? 213, 224-26 (Brian Barry & Russell Hardin eds., 1982) (arguing that the social choice literature usually interprets preferences as rankings of complete, and thus mutually exclusive, social states).

n17 Admittedly, many descriptions of deliberative democracy emphasize these characteristics. See, e.g., Cohen, *supra* note 4, at 19 (characterizing democratic politics as a "fair system of social cooperation"); Sunstein, *Beyond the Republican Revival, supra* note 3, at 1541 (listing deliberation in politics and universalism made possible by practical reason as central principles).

n18 For a discussion of the nature of strategic politics, also labelled the politics of "public choice" or "pluralism," see DENNIS C. MUELLER, *PUBLIC CHOICE 1* (1979) (noting that "[t]he basic behavioral postulate of public choice . . . is that man is an egoistic, rational, utility maximizer"); Michelman, *Law's Republic, supra* note 3, at 1507 (stating that "pluralism . . . doubts or denies our ability to communicate . . . without deception, coercion, or other manipulation"); Sunstein, *Beyond the Republican Revival, supra* note 3, at 1542 (asserting that "politics [under the pluralist conception] consists of a struggle among interest groups for scarce social resources").

n19 Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293-94 (1989) [hereinafter Michelman, *The Case of Pornography Regulation*]; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 447-50 (1989) [hereinafter Michelman, *Voting Rights*].

n20 Gauthier, *supra* note 4, at 314.

n21 Michelman, *The Case of Pornography Regulation, supra* note 19, at 293.

n22 *Id.*

n23 *Id.*

n24 This claim does not imply that each person is expected to vote for the social choice that she thinks best serves her own interests. This use of a vote is often not the most self-interested. For example, it may better serve my interests to vote for a less preferred outcome if that vote will produce the best chance of avoiding an even worse outcome. A model on which each person votes for the outcome that would best promote her interests cannot be combined with the assumption of purely self-interested voting. Therefore, it cannot be combined with a purely strategic model of politics as Michelman understands it.

n25 Michelman, *The Case of Pornography Regulation, supra* note 19, at 293.

n26 CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 24 (1993).

n27 See, e.g., DAHL, *supra* note 2, at 4, 134-35 (formulating a theory that balances the power of

majorities and the power of minorities based upon the relative intensity of preferences among the members of each group); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372 (1983) (adopting an economic perspective of pluralism in which political equilibrium is reached when competing groups maximize their incomes by spending the optimal amount on the exertion of political pressure).

n28 SUNSTEIN, *supra* note 26, at 24-28.

n29 *Id.*

n30 Michelman, *The Case of Pornography Regulation*, *supra* note 19, at 293.

n31 Sunstein, *Beyond the Republican Revival*, *supra* note 3, at 1545.

n32 SUNSTEIN, *supra* note 26, at 253.

n33 *Id.* at 20. I cite this for its epistemic conception, not for its view of representatives as especially wise. I doubt that their, or anyone's, having special moral wisdom could be defended in a liberally acceptable way. See **David Estlund**, *Making Truth Safe for Democracy*, in THE IDEA OF DEMOCRACY, *supra* note 20, at 71, 94 (concluding that society would not be capable of identifying, in a way acceptable to all reasonable citizens, those individuals qualified to rule based upon their special moral wisdom).

n34 See *supra* notes 21-24 and accompanying text.

n35 See Estlund, *supra* note 33, at 74-76 (characterizing the opposition to normative political truth as an anti-authoritarian reaction to the natural-law tradition and identifying strategic theorists such as Duncan Black as leaders of the anti-authoritarian movement).

n36 Gauthier, *supra* note 4, at 315.

n37 *Id.* at 326.

n38 See THOMAS HOBBS, LEVIATHAN 87 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) ("[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation . . .) endeavour to destroy, or subdue one an other.").

n39 This condition is the economist's notion of Pareto efficiency. JOHN RAWLS, A THEORY OF JUSTICE 66 (1971). For a fuller explanation of the problem, see *id.* at 67-69.

n40 See HOBBS, *supra* note 38, at 120-21.

n41 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 326 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

n42 See Sunstein, *Beyond the Republican Revival*, *supra* note 3, at 1561-62 (arguing that bicameralism, federalism, and legal rights constitute a system of checks and balances that counteracts excessive ambition and allows the different governments to control each other).

n43 Gauthier, *supra* note 4, at 318.

n44 See HOBBS, *supra* note 38, at 89 ("Nature . . . render[s] men apt to invade, and destroy one another.").

n45 Gauthier, *supra* note 4, at 317.

n46 *Id.*

n47 See HOBBS, *supra* note 38, at 96 (arguing that in a state of nature there is no assurance that one party to an agreement will be able to secure performance from the other party, once the first party has performed). For a sympathetic exposition of Hobbes's argument, see generally GREGORY KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986).

n48 See GAUTHIER, *MORALS BY AGREEMENT* 113-14 (1986) (arguing that "[r]eason . . . offers . . . the prospect of new benefits achieved mutually, through cooperation").

n49 *Id.* at 227.

n50 See, e.g., *CONTRACTARIANISM & RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT* (Peter Vallentyne ed., 1991) (collecting fourteen essays debating the merits of Gauthier's reconciliation of morality and reason); *THE NEW SOCIAL CONTRACT: ESSAYS ON GAUTHIER* (Ellen F. Paul ed., 1988) (collecting nine essays discussing Gauthier's theories, including Gauthier's response to his critics); Alan Nelson, *Economic Rationality and Morality*, 17 *PHIL. & PUB. AFF.* 149, 156-57 (1988) (arguing that the problems with Gauthier's theory include the fact that it requires individuals to be able to recognize others as either cooperators or noncooperators and the difficulty for even cooperators to always cooperate rather than act to benefit themselves at the expense of others).

n51 Gauthier, *supra* note 4, at 327.

n52 *Id.* at 318.

n53 *Id.*

n54 GAUTHIER, *supra* note 48.

n55 *Id.* at 338-39.

n56 *Id.* at 339.

n57 Gauthier, *supra* note 4, at 319.

n58 For a critical evaluation of Gauthier's theory, see CONTRACTARIANISM & RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT, *supra* note 50; THE NEW SOCIAL CONTRACT: ESSAYS ON GAUTHIER, *supra* note 50.

n59 *See supra* notes 52-53 and accompanying text.

n60 Gauthier, *supra* note 4, at 319.

n61 I make this qualification because there may still be certain problems. It is not clear what impartiality means. There are numerous ways of treating everyone alike, such as giving each person's interests equal weight in a sum that is to be maximized, or giving each a veto over certain or any arrangements. Also, there are difficulties with having each person's interests figure in every other person's interests, difficulties that can lead to serious logical difficulties. *See* David M. Estlund, *Mutual Benevolence and the Theory of Happiness*, 87 J. PHIL. 187, 187 (1990) (analyzing the "loop" problem where each person's happiness depends on the happiness of others).

n62 Gauthier, *supra* note 4, at 319.

n63 *Id.* at 324.

n64 *See id.* at 329.

n65 *See* Christopher W. Morris, *On Contractarian Constitutional Democracy*, in THE IDEA OF DEMOCRACY, *supra* note 20, at 335, 341 (raising a similar worry regarding Gauthier's constitutional theory). I follow Morris in supposing "civic friendship" is intended to pick up the thread from Chapter XI of *Morals By Agreement*. *See id.* at 339; *supra* text accompanying notes 54-57.

n66 *See supra* text accompanying note 63.

n67 Gauthier, *supra* note 4, at 315-16 (emphasis in original). Gauthier does not defend this sweeping claim, and it is implausible. Presumably, democratic procedures for ordinary legislation need to be constituted in logically prior law, which is higher in that sense.

n68 *Id.* at 319 (quoting Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation* (1989) (original manuscript), *published with revisions in* Michelman, *The Case of Pornography Regulation*, *supra* note 19, at 293).

n69 Gauthier, *supra* note 4, at 322 (emphasis in original).

n70 *Id.* at 321-22.

n71 *See infra* text accompanying notes 79-83.

n72 For a more detailed analysis of this problem, see David M. Estlund, *The Persistent Puzzle of the Minority Democrat*, 26 AM. PHIL. Q. 143, 146 (1989).

n73 Michelman, *The Case of Pornography Regulation*, *supra* note 19, at 293.

n74 *Id.* at 302.

n75 *See, e.g.*, THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 27-32 (refuting the position that moral beliefs alone cannot produce action and arguing that some facts can provide motivating reasons even without any pertinent prior desire); WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, in THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY (1897), *reprinted in* WILLIAM JAMES WRITINGS 1878-1899, at 445, 595-96 (Gerald E. Myers ed., 1992) (noting that in both ethics and physics, individuals strive to find an account of the world that can be woven into a single stable system and thus decide what is true).

n76 *See, e.g.*, Hans Oberdiek, *The Will*, in AN ENCYCLOPEDIA OF PHILOSOPHY 463, 468 (G.H.R. Parkinson ed., 1988) (contrasting theoretical reasoning, which is employed to establish the truth or falsity of facts, laws, and theorems, with practical reasoning, which guides an individual's actions).

n77 By "cognitive reason" I just mean reason in the usual sense of a reason to judge or believe that something is so.

n78 The example is related to "Pascal's Wager." Discussions of the Wager are a fruitful source of reflections on the theoretical/practical reason distinction. *See, e.g.*, JON ELSTER, SOUR GPAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 36, 53, 57, 74 (1983) (mentioning Pascal's Wager as illustrating the premise that by pretending to hold certain beliefs and preferences over a period of time, you will eventually accept the pretend beliefs and preferences as your own).

n79 *See infra* notes 144-46 and accompanying text for a discussion of these in the context of moral and political truth.

n80 For strong evidence that Michelman intends the cognitive sense of judgment, see Frank Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV U. STUD. IN L. 281, 291, 290-91 (1988). There, he associates civic republican thought with a sympathy for the idea of political truth and avows a personal "disposition to credit political truth-seeking as a constitutional value." *Id.* at 290-91.

n81 For recent essays on pragmatism in legal thought, see Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

n82 *See* GERALD E. MYERS, WILLIAM JAMES: HIS LIFE AND THOUGHT 292 (1986).

n83 JAMES, *supra* note 75, at 600.

n84 Michelman, *The Case of Pornography Regulation*, *supra* note 19, at 293.

n85 Gauthier, *supra* note 4, at 320.

n86 *Id.*

n87 Michelman, *Voting Rights*, *supra* note 19, at 448 (emphasis in original).

n88 There are philosophical theories that try to retain the idea of moral judgment and belief without accepting that they admit of truth or falsity. See JOHN RAWLS, *POLITICAL LIBERALISM* at xx (1993) ("Which moral judgments are true, all things considered, is not a matter for political liberalism, as it approaches all questions from within its own limited point of view."). I criticize Rawls's reticence about political truth in Estlund, *supra* note 33, at 74-80. Allan Gibbard defends a very different view of moral judgment and belief. ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 6, 7 (1990) (asserting that "moral judgments are not feelings but judgments of what moral feelings it is rational to have," and "to call something rational is to express one's acceptance of norms that permit it"). Unlike Rawls, Gibbard is willing to characterize his view as "noncognitivist." *Id.* at 8 (noting that "[t]he analysis is non-cognitivist in the narrow sense that . . . to call a thing rational is not to state a matter of fact, either truly or falsely"). It is not clear, however, whether or why Gibbard is entitled to the idea of "judgments" except insofar as the attitudes in question involve certain elements that *do* admit of truth or falsity, such as an act's conforming to certain norms. In any case, Michelman's use of judgment is explicitly linked to political truth. See Michelman, *supra* note 80, at 284.

n89 See, e.g., BUCHANAN & TULLOCK, *supra* note 2, at 19-20 (comparing an individual's political acts to economic choices, whereby the actor expresses an individual preference between alternatives, not a judgment of which alternative furthers the public interest).

n90 See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (3d ed. 1950) (proposing a model in which the role of people is "to produce a government" rather than "hold a definite and rational opinion about every individual question").

n91 Recall the unimposing sense of "objective" used here. See *supra* text accompanying note 79.

n92 An example of an objectivist theory that is not cognitivist would be a theory according to which the aggregation of (noncognitive) preferences imperfectly approximates some procedure-independent standard of justice or common good.

n93 See *supra* notes 37, 62-70 and accompanying text. It is not only that the constitution might set up coercive institutions to which individuals will necessarily conform. Gauthier assumes they will voluntarily adhere to these legal constraints, for the most part, apparently out of moral motivation.

n94 Gauthier, *supra* note 4, at 324 ("Deliberative agreement may thus be treated as strategic

bargaining under full information, in circumstances designed to remove the effects of all differential pressures and capacities on reaching agreement.").

n95 RAWLS, *supra* note 39, at 138 ("To say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion.").

n96 *See infra* Part V.

n97 *See* RAWLS, *supra* note 39, at 85.

n98 Gauthier gives this argument in a related context in David Gauthier, *Bargaining Our Way Into Morality: A Do-It-Yourself Primer*, in CONTEMPORARY POLITICAL THEORY, *supra* note 4, at 153, 162 ("We might say that . . . an agreement is just in manner if and only if it is genuinely voluntary. But the nearest approximation to what is voluntary in the case of hypothetical agreement, must be what is rationally acceptable.").

n99 RAWLS, *supra* note 39, at 139.

n100 *Id.* at 15.

n101 *See id.* at 138.

n102 *Id.* at 12.

n103 *See supra* notes 49-50 and accompanying text.

n104 *See supra* notes 52-53 and accompanying text.

n105 Rawls assumes that a principle of justice must choose among the Pareto efficient alternative distributions (within certain other constraints such as "the principle of equal liberty or the requirement of open positions"). RAWLS, *supra* note 39, at 70. Pareto efficiency alone is not only indeterminate but indeterminate among cases that it would be absurd to treat as morally indifferent. Pareto efficiency is necessary but not sufficient for justice. *Id.* at 67-72. "There are, I shall assume, many efficient arrangements of the basic structure. . . . The problem is to choose between them, to find a conception of justice that singles out one of these efficient distributions as also just." *Id.* at 70-71.

n106 *See supra* text accompanying notes 34-35; *supra* Part III.

n107 Gauthier, *supra* note 4, at 334 n.17.

n108. *Id.* at 328.

n109 *Id.* (emphasis in original). It is striking that Jurgen Habermas, whose work has inspired some of the recent deliberation theories (*e.g.*, Cohen, *supra* note 4, at 33 n.12; Elster, *supra* note

4, at 112; and Sunstein, *Beyond the Republican Revival*, *supra* note 3, at 1551 n.58 & 1570 n.176), makes a similar split between the structures of ideal and actual legitimate outcomes, denying any direct implications of his theory for a deliberative public sphere. *See* HABERMAS, *supra* note 13, at 186. Still, Habermas's normative political theory apparently is essentially deliberative in ways that neither Gauthier's nor Rawls's is. *See* KENNETH BAYNES, *THE NORMATIVE GROUNDS OF SOCIAL CRITICISM: KANT, RAWLS AND HABERMAS* 84 (1992) (characterizing Habermas's view of democratic deliberation as one where "all other goals and purposes are subordinated to that of reaching agreement"); *see also* David M. Estlund, *Book Review*, 20 *POL. THEORY* 694 (1992) (discussing Baynes's treatment of Rawls's and Habermas's theories of democratic deliberation).

n110 Gauthier, *supra* note 4, at 328.

n111 *See supra* notes 94-95 and accompanying text.

n112 Gauthier, *supra* note 4, at 322.

n113 I say "largely" because it is possible on Gauthier's view to have an arrangement that is efficient, but not just, because that arrangement was not actually chosen (at all, or through a suitable procedure). Justice, however, would be all it lacks.

n114 *See supra* note 91 and accompanying text.

n115 More precisely, the actual decision so constitutes justice where its procedure, or at least its outcome, can be thought of as likely to approximate the outcome of a suitably ideal constitutional choice. Gauthier, *supra* note 4, at 328.

n116 *See, e.g.*, SUNSTEIN, *supra* note 26, at 175 (identifying Rawls as one of the "great theorists of constitutional democracy"); Cohen, *supra* note 4, at 17-20 (accepting Rawls's characterization of the ideal conditions for political institutions).

n117 *See* RAWLS, *supra* note 39, at 139-40 (arguing that those behind the veil of ignorance would reach the same result whether they used deliberation or simply formed a coalition because the coalition "would not know how to favor themselves").

n118 Rawls uses the term "deliberation" to apply within the original position. *See, e.g., id.* at 138.

n119 Rawls's assumption, "mutually disinterested rationality," is only an approximation of the ordinary concept of self-interest. For a full account of this assumption, *see id.* at 142-50.

n120 *Id.* at 62.

n121 *See id.* at 16 ("Justice as fairness is an example of what I have called a contract theory. . . . [I]t conveys the idea that principles of justice may be conceived as principles that would be chosen by rational persons, and that in this way conceptions of justice may be explained and

justified."); Gauthier, *supra* note 4, at 328 (characterizing the constitution as "the agreement as concluded by persons who take themselves to be representing . . . the members of their society, and to be seeking the terms that those members would find reasonable to accept").

n122 RAWLS, *supra* note 39, at 357. The two principles of justice are identified by Rawls as (1) equal rights to as much liberty as possible without infringing on others' rights, and (2) social/economic equality arranged so any inequalities have the highest possible minimum standard, and are attached to offices/positions that are meaningfully open to all members of society. *Id.* at 302.

n123 *Id.* at 12.

n124 *Id.* at 197.

n125 *See id.* at 357-62 (describing legislative discussion as part of the ideal process for producing just legislation).

n126 *Id.* at 357.

n127 *Id.* at 359.

n128 Joseph Bessette offers this "hypothetical test" as a sufficient condition for a political decision to count as democratic. *See Bessette, supra* note 1, at 105-06. Notice that, in principle, a dictatorship could meet the condition.

n129 *See RAWLS, supra* note 39, at 357.

n130 *See id.* at 354 (asserting that citizens have a duty to obey even unjust laws if they are produced by legislators bound by a just constitution).

n131 *See id.* at 355, 353-62 ("[I]n adopting some form of majority rule, the parties accept the risks of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative procedure.").

n132 *See id.* at 221-22 (arguing that all individuals should be equally represented in making laws with which they must comply). *But see Cohen, supra* note 4, at 18-20 (emphasizing certain proto-deliberative aspects of Rawls's view that support the argument for broader public debate).

n133 *See supra* notes 69-70 and accompanying text.

n134 *See supra* notes 122-24 and accompanying text.

n135 *See supra* text accompanying notes 34-35; *supra* Part III.

n136 *See RAWLS, supra* note 88, at 95 (explaining that the constructivist concept of political liberalism neither denies nor asserts that the order of moral values is independent).

n137 *See id.* (declaring that political liberalism maintains that "this represented order is the most appropriate one for a democratic society marked by the fact of reasonable pluralism").

n138 Gauthier denies the relevance of expertise. *Cf.* Gauthier, *supra* note 4, at 328 ("[W]e may consider it unreasonable to suppose that any procedure of representation can guarantee an outcome approximating . . . that of a fair universal reasoned interchange.").

n139 *See* Estlund, *supra* note 33, at 71 (proclaiming that democrats must rebut the inference of the superiority of rule by the wise stemming from the unequal distribution of political wisdom).

n140 *See id.* (noting that some deny the existence of a normative truth, others deny that anyone knows the normative truth, and others emphasize the beneficial effects of democratic institutions on citizens).

n141 This criterion owes a fuller explication of "reasonable," but that explication is not necessary here. It is enough to note that reasonable people can disagree, and, therefore, some can be mistaken even though reasonable. For Rawls's account of reasonableness, see RAWLS, *supra* note 88, at 48-54. See also his explanation of the "liberal principle of legitimacy." *Id.* at 137 (asserting that political power is proper only if it would reasonably be expected to win the endorsement of free and equal citizens "in the light of principles and ideals acceptable to their common human reason").

n142 *See* Estlund, *supra* note 33, at 94.

n143 *See infra* Part VII.

n144 *See* KARL L. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 210 (1950) (arguing that knowledge in the Platonic sense is scientifically impossible). *But see* T.K. SEUNG, *INTUITION AND CONSTRUCTION* at xii-xiii (1993) (claiming that the "bedrock version" of transcendental normative standards, that consisting of only basic normative ideals, is indispensable for imparting positive norms and for critically evaluating them); JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* 1-5 (1953) (defending Plato's belief in natural law as a morally realistic approach).

n145 For several minimal conceptions of "is true" as redundant or little more, see PAUL HORWICH, *TRUTH* 6 (1990) ("My plan is to provide a highly deflationary account of our concept of truth. . . ."); F.P. Ramsey, *Facts and Propositions*, in *TRUTH* 16, 16 (George Pitcher ed., 1964) (finding the problem of truth to be a "linguistic muddle" where statements such as "It is true that Caesar was murdered" cannot mean any more than that Caesar was murdered); P.F. Strawson, *Truth*, in *TRUTH*, *supra*, at 32, 52-53 (concluding that "is true" statements are redundant except for their performative functions, such as expressing agreement with other speakers).

n146 Perhaps justice and common good are concepts we can do without. Maybe what matters to some is whether a society is free, or equal, or efficient, or engaged, or whatever. The point in the

text applies equally well for any of these notions.

n147 *See supra* notes 122-24 and accompanying text.

n148 It is a complication here to note that Rawls avoids, even rejects, the terminology of truth as applied to political principles. *See* RAWLS, *supra* note 88, at xx, 94, 116, 127 ("Political liberalism, rather than referring to its political conception of justice as true, refers to it as reasonable instead."). So he does not agree with me that his theory represents a possible approach to political truth. I criticize the reasons for his reticence about truth in Estlund, *supra* note 33, at 74-80.

n149 *See, e.g.*, EDMOND CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 11-15 (1961) (describing the consequences of injustices inflicted by democratically elected officials); ANDREW LEVINE, *LIBERAL DEMOCRACY: A CRITIQUE OF ITS THEORY* 170 (1981) (arguing that democracy permits economic injustice); J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 158 (1979) (conceding that democracies may fail to live up to democratic ideals); Michael Oreskes, *American Politics Lose Way as Polls Displace Leadership*, N.Y. TIMES, Mar. 18, 1990, at A1 ("[D]omestic politics has become so shallow, mean and even meaningless that it is failing to produce the ideas and leadership needed to guide the United States in a rapidly changing world.").

n150 *See supra* Parts II and V.

n151 *See supra* note 91 and accompanying text.

n152 *See supra* Part IV.

n153 *See supra* notes 21-22, 73-92 and accompanying text.

n154 I leave aside here the complications about whether the choice in question is to be put to citizens, as in the case of the election of representatives or executives, or to representatives themselves, as in the case of legislation.

n155 *See* Michelman, *supra* note 80, at 284-86 (discussing the extent to which deliberative democracy incorporates both the "civic vision," which works toward political truth, and the "pluralist vision," which is highly skeptical of the search for truth).

n156 Michelman, *Voting Rights*, *supra* note 19, at 448 (emphasis in original).

n157 *See* Michelman, *supra* note 80, at 291.

n158 *See, e.g.*, Michelman, *supra* note 80, at 285 (asserting that in pluralist constitutional vision the "accidental set of outcomes . . . are not, themselves in any sense truth directed").

n159 *Id.* at 284.

n160 See, e.g., Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (proposing a system of semi-proportional voting comparable to cumulative voting in corporate law).

n161 See *supra* text accompanying note 15.

n162 See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1874 (1992) ("The republicanist image of politics stands quite apart from the group-based interests which underlie contemporary voting rights jurisprudence.").

n163 *Id.* at 1879. This assertion is echoed by Lani Guinier. See Guinier, *supra* note 160, at 1624 ("The group differentiation of racial minorities is a function of historical oppression, shared experience, and present inequality.").

n164 See Issacharoff, *supra* note 162, at 1879.

n165 See *id.* at 1855 ("[R]acial bloc voting is the single most salient feature of contemporary political life in this country.").

n166 See ELSTER, *supra* note 78, at 115-16.

n167 See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1145 (1991) (claiming that her proposed proportionate interest representation theory is "based on a view of politics that is both interest-based and deliberative").

n168 *Id.* at 1136 (emphasis omitted).

n169 Guinier, *supra* note 160, at 1614.

n170 See Guinier, *supra* note 167, at 1148 n.332 (asserting that "proportionate interest representation defines procedural equality . . . [as] an equal voice in government or an equal opportunity to influence decisions"). Guinier cites Diane Pinderhughes for the view that "pluralist theory presumes equivalence between all political and economic demands." *Id.* at 1123 n.225 (citing DIANE M. PINDERHUGHES, RACE AND ETHNICITY IN CHICAGO POLITICS 253-55 (1987)).

n171 *Id.* at 1123 n.225 ("The model described here is essentially a pluralist one, because it remains the dominant political science explanation of contemporary political participation.").

n172 *Id.* at 1136.

n173 See *id.* at 1080, 1114, 1135, 1147.

n174 See *id.* at 1114, 1147.

n175 See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1478 (1991) ("Disproportionate majority power is, in itself, so wrong that it delegitimizes majority rule.").

n176 See Sunstein, *Beyond the Republican Revival*, *supra* note 3, at 1587 (rejecting the conception of the electoral process "as a self-interested struggle").

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7 See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 72 (Maurice Cranston trans., Penguin Books 1968) (1762) ("[T]he general will is always rightful and always tends to the public good; but it does not follow that the decisions of the people are always equally right.").

n178 See *supra* Part VI.

n179 Michelman is not alone among theorists of deliberative democracy in stopping short of the epistemic claims. Joshua Cohen explicitly avoids epistemic claims. See Cohen, *supra* note 5, at 29 ("[W]hat is good is fixed by public deliberation, and not prior to it."). Bernard Manin also stops short in *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 367 n.35 (Elly Stein & Jane Mansbridge trans., 1987) ("Given the appropriate procedural rules for deliberation, the better argument is simply the one that generates more support and not the one that is able to convince all participants."). Sunstein seems to get his feet wet. See *supra* text accompanying note 32.