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Deliberative Constitutionalism

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Deliberative constitutionalists propose an account of democracy combining the principles of constitutionalism with those of deliberative democracy, but they have not adequately considered whether deliberative and constitutional ideals are logically compatible. This Article explains how these rival conceptions of democracy can be reconciled. It first describes the basic principles of constitutionalism and of deliberative democracy. It then discusses two putative contradictions between constitutional and deliberative principles suggested by the rhetoric of deliberative democracy. Neither presents any genuine contradiction, however, because one depends on a mischaracterization of constitutionalism, the other on an expendable tenet of deliberative democracy. The Article also addresses the contradiction between constitutionalism's commitment to entrenched individual rights and deliberative democracy's insistence on the provisionality of political decisions. After considering several unacceptable strategies for dissolving this conflict, the Article concludes that deliberative constitutionalism can be coherent, provided it permits the alteration of entrenched constitutional rights only by means of the more exacting methods ordinarily required for constitutional amendment.

I. INTRODUCTION

Democratic principles enjoy greater prestige today than perhaps at any time in the history of political ideas, yet democratic theorists still disagree about the meaning and justification of democratic ideals and about what legal, political, and social institutions those ideals require.[1] Three rival conceptions of democracy have been especially influential among modern theorists. Procedural democrats emphasize popular sovereignty and majority rule as the best

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1. *See generally* FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION (2002); DAVID HELD, MODELS OF DEMOCRACY (3d ed. 2006).

technique for achieving it, allowing only for those individual rights necessary for guaranteeing the fairness and integrity of democratic processes.[2] Constitutional democrats accord priority to those institutions, practices, and rights that protect individuals against majoritarian excesses by imposing constraints on popular decision making.[3] Deliberative democrats underscore the ideal of achieving the reasoned agreement of free and equal citizens and so advocate political decisions issuing from the public deliberation of citizens.[4]

2. Some procedural democrats adopt an entirely methodological view of democracy, eschewing any concern about substantive outcomes. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (5th ed. 1976) (characterizing democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for people's vote"). But others who emphasize that democracy should be understood in procedural terms are also willing to recognize constraints on democratic processes necessary to achieve popular will. *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 175 (1989) (stating that the right to the democratic process is "a claim to all the general and specific rights. . . . that are necessary to it, from freedom of speech, press, and assembly to the right to form opposition political parties"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 874 (1980) (advocating a "participation-oriented, representation-reinforcing approach" to constitutional adjudication); Brian Barry, *Is Democracy Special?*, *in* PHILOSOPHY, POLITICS AND SOCIETY: FIFTH SERIES 155, 156–57 (Peter Laslett & James Fishkin eds., 1979) (explaining that democracy should be understood in procedural terms, without "any constraints on the content of the outcomes produced," except for those required by democracy itself as a procedure).

3. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 23–24 (1996) (stating that the constitutional conception of democracy presupposes "the conditions of moral membership in a political community"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977) ("The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1367 (3d ed. 2000) (" [T]here is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions."); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 4 (1985) ("[C]onstitutional interpretation is a practice . . . laden with content."); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977) ("[C]onstitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental . . . .").

4. *See, e.g.*, JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 3 (1994) ("[T]he key to the reconciliation of these apparently contradictory intentions—to restrain popular majorities but also to effectuate majority rule—lies in the framers' broad purpose to empower deliberative majorities at the expense of uninformed, immoderate, or passionate majorities."); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 36 (1991) ("Political equality without deliberation is not of much use, for it amounts to nothing more than power without the opportunity to think about how that power ought to be exercised."); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 50 (1996) [hereinafter DEMOCRACY AND DISAGREEMENT]

Recently, some theorists—I will call them "deliberative constitutionalists"[5]—have sought to combine constitutional and deliberative principles by developing an account of deliberative democracy within the context of a liberal constitutional framework.[6]

On first consideration the deliberative constitutionalist project would not appear to be a promising one, for the theoretical commitments of constitutionalism and of deliberative democracy seem to be in tension, if not utterly incompatible, with one another. Surprisingly, legal and political theorists have paid scant attention to whether the ideals of constitutionalism and deliberative democracy can be combined without contradiction. As Samuel Freeman has observed:

("Deliberative democracy aspires to a politics in which citizens and their accountable representatives, along with other public officials, are committed to making decisions that they can justify to everyone bound by them."); Bruce Ackerman & James S. Fishkin, *Deliberation Day*, 10 J. POL. PHIL. 129 (2002) (proposing a "deliberation day" in connection with presidential elections in which samples of 500 citizens would assemble in local schools and halls to deliberate over the choice of candidates); Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 69 (Seyla Benhabib ed., 1996) ("According to the deliberative model of democracy, it is a necessary condition for attaining legitimacy and rationality with regard to collective decision-making processes in a polity that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals."); James Bohman, *The Coming of Age of Deliberative Democracy*, 6 J. POL. PHIL. 400, 401 (1998) (Deliberative democracy is "any one of a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision-making and self-government."); Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY 185, 186 (Jon Elster ed., 1998) [hereinafter Cohen, *Democracy and Liberty*] ("According to a *deliberative* conception, a decision is collective just in case it emerges from arrangements of binding collective choice that establish conditions of *free public reasoning among equals who are governed by the decisions*.").

5. The label "deliberative constitutionalist" appears to originate from Bohman, *supra* note 4, at 414.

6. Some prominent works blending constitutional and deliberative ideals include BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, FOUNDATIONS]; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1998); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001) [hereinafter SUNSTEIN, DESIGNING DEMOCRACY]; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) [hereinafter SUNSTEIN, THE PARTIAL CONSTITUTION]; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989).

> [One] issue that needs further clarification is whether and if so how the deliberative ideal is consistent with constitutional limits on democratic decisions, such as separation of powers, a bill of rights, and judicial review. This is one way into further discussion of the larger question of the relationship between deliberative and constitutional democracy. Are the two compatible (as Rawls and Michelman contend), or do they stand in opposition with one another (as others seem to maintain)?[7]

The question of the compatibility of constitutionalism and deliberative democracy holds more than merely theoretical interest; if they are contradictory, it is no more possible to establish legal, political, and social institutions on the model of deliberative constitutionalism than it is to build a fenced enclosure on the model of a square circle.

This Article aims to show that, contrary appearances notwithstanding, deliberative and constitutional principles are logically coherent. Part II briefly describes the core tenets of constitutionalism and of deliberative democracy. Part III then identifies and evaluates two apparent contradictions between the principles that emerge from the rhetoric that theorists sometimes employ to distinguish liberal constitutionalism from deliberative democracy. It argues that neither putative inconsistency poses any genuine contradiction, in one case because it depends on a misconception of constitutionalism, in the other because it depends on a prominent but expendable feature of deliberative democracy. Part IV addresses a more serious concern—the apparent conflict between the priority deliberative democracy accords to popular decision-making processes and the priority constitutional democracy accords to antecedently established substantive rights. After considering and rejecting several possible strategies for resolving this inconsistency, Part IV argues that a modest amendment to the ideals of deliberative democracy will render them compatible with constitutional principles; with that amendment, the deliberative constitutionalist project can go forward without risk of incoherence.

7. Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFFAIRS 371, 417 (2000) [hereinafter Freeman, *Sympathetic Comment*].

II. THE PRINCIPLES OF CONSTITUTIONALISM AND OF DELIBERATIVE DEMOCRACY

Both constitutionalism and deliberative democracy are complex ideals taking a variety of forms, and there are no canonical statements of either. Since our concern is to discover whether the deliberative constitutionalist project is coherent, not whether some particular version of constitutionalism is compatible with some particular version of deliberative democracy, we need accounts of both constitutionalism and deliberative democracy that are broad enough to be informative about whether their principles are logically consistent but specific enough to preserve their distinctive claims. To avoid being tendentious or question-begging, in what follows I provide minimalist accounts of constitutionalism and deliberative democracy that seek only to identify the essential features of these two rival conceptions of democracy.

A. Constitutionalism

Presently almost every nation-state has a constitution; with rare exceptions that constitution is embodied in a formal, written document.[8] In general, constitutions establish the forms and institutions of government, so it is possible to think of a constitution as nothing more than that set of rules defining a community's political institutions. As many writers on constitutionalism have recognized, such a broad understanding would entail that almost every state, even a dictatorship, has a constitution and that virtually all states are constitutional states.[9]

8. Nations having constitutions today even include those with military governments (like Libya, Myanmar, and Sudan), theocratic governments (like Iran), and communist governments (like China, North Korea, and Vietnam).

9. *See, e.g.*, Atilio A. Boron, *Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 339, 339 (Douglas Greenberg et al. eds., 1993) [hereinafter CONSTITUTIONALISM AND DEMOCRACY] (noting "the wide gap dividing Latin America's history of constitutions and the weakness of its constitutionalist tradition"); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY, supra, at 65, 65–66 (observing "the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally emphatic rejection of the . . . liberal democratic notion of constitutionalism").

Most constitutionalists, however, do not have in mind any such capacious conception. Instead, the idea of constitutionalism is more properly regarded as the view that government can and should be limited in its powers and that its authority depends on its observing those limitations. As the historian Charles H. McIlwain puts it, "All constitutional government is by definition limited government. . . . [C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."[10] This understanding of constitutionalism highlights three essential features: (1) the supremacy principle, (2) the limited government principle, and (3) the entrenchment principle.

The *supremacy principle* holds that the government itself should be subjected to the governance of law.[11] It recognizes that the values secured by subjecting individual citizens to rules that both constrain and guide their conduct can also be achieved by applying the rule of law to the state.[12] For example, Article VI of the United States Constitution explicitly proclaims it to be "the supreme Law of the

10. CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21–22 (rev. ed. 1947). This understanding of constitutionalism as limited government is widely held. *See, e.g.*, CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA 35 (1950); Stephen L. Elkin, *Constitutionalism: Old and New*, *in* A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY 20 (Stephen L. Elkin & Karol Edward Soltan eds., 1993); Harvey Wheeler, *Constitutionalism*, *in* HANDBOOK OF POLITICAL SCIENCE 36 (Fred I. Greenstein & Nelson W. Polsby eds., 1975). For a view accepting that constitutionalism refers to constraint of the coercive power of the government but denying McIlwain's view that it consists of legal constraints, see SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY (1999). Gordon argues that the historical key to constitutionalism is the recognition that "*power can only be controlled by power*." *Id.* at 15.

11. MCILWAIN, *supra* note 10, at 21 ("[C]onstitutionalism has one essential quality: it is a legal limitation on government . . . ."); THE FEDERALIST NO. 51 (James Madison) ("[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself."); C.L. Ten, *Constitutionalism and the Rule of Law*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 394, 394 (Robert E. Goodin & Philip Pettit eds., 1995) ("Constitutionalism and the Rule of Law are related ideas about how the powers of government and of state officials are to be limited."); Harvey Wheeler, *The Foundations of Constitutionalism*, 8 LOY. L.A. L. REV. 507, 508 (1975) ("[C]onstitutionalism . . . purports to guarantee that [the] attributes of law and government will be achieved in accordance with the 'rule of law.'").

12. Substantive constitutional provisions function as constraints both by limiting and by empowering. *See* Randall G. Holcombe, *Constitutions As Constraints: A Case Study of Three American Constitutions*, 2 CONST. POL. ECON. 303, 303 (1991).

Land," thereby identifying itself as the single law having special status as the paramount or fundamental law.[13] The most general purpose served by constitutions is reducing the dangers posed by the state.[14] Constitutions can restrict the state's reach by specifying just what it may and may not do, so they may circumscribe the state's power either by defining an exclusive grant of public power or by removing from its control certain privileged private activities.[15] Also, a constitution may further cabin state power by providing a guide for legislation and for the interpretation of legislation, so that an ordinary law that conflicts with the constitution is invalid or inapplicable. But constitutions also reduce the power of the state simply by virtue of its announcing in advance the rules by which the government will operate.[16] Constitutions protect the arena for individual planning and action by imposing publicly accessible rules governing the sources, the procedures, and the extent of public power, thereby providing a measure of regularity and predictability that enables people to arrange their affairs with confidence about the potential for state intervention. In short, a constitution that both restricts the powers of the state and antecedently announces the scope of state authority in effect extends the principle of the "rule of law" to the power of lawmaking itself.[17]

The *limited government principle* requires institutional mechanisms both limiting the arbitrary exercise of state power and recognizing individual rights and freedoms.[18] A constitution thus will

13. U.S. CONST. art. VI, § 3.

14. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 177–79 (1960); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 9, at 3, 5–6.

15. Louis Henkin, *Elements of Constitutionalism*, 60 REV. INT'L COMMISSION JURISTS 11, 12–13 (1998) [hereinafter Henkin, *Elements*].

16. Daniel S. Lev, *Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 9, at 139, 139–140.

17. JAMES A. CURRY, RICHARD B. RILEY & RICHARD M. BATTISTONI, CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE 5–6 (5th ed. 2003); Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 40–42 (Michel Rosenfeld ed., 1994) [hereinafter Henkin, *A New Birth*]; Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

18. *See, e.g.*, J. Roland Pennock, *Epilogue*, *in* CONSTITUTIONALISM 377, 379 (J. Roland Pennock & John W. Chapman eds., 1979) ("Certain things, [constitutionalism] holds, no government should be permitted to do . . . .").

specify some set of procedural and substantive rules or norms that clearly limit the government's arbitrary exercise of power by establishing institutional mechanisms concerning the allocation and the exercise of governmental power and by protecting individual rights and freedoms.[19] Constitutionalists may disagree about just which institutions are essential to limited government and the prevention of tyranny. Institutions frequently mentioned as necessary include the separation of governmental powers, checks and balances among the different branches of government, federalism, bicameralism, and an independent judiciary with judicial review. But few governments would qualify as constitutional if we were to insist that a constitutional government must have all of these institutions, and selecting any particular subset of them is likely either to be arbitrary or to implicate some tacit normative judgment. It is preferable, therefore, to say only that constitutionalism requires *some* institutional constraints on the procedures regulating public life—which may include the separation of powers, checks and balances, federalism, and the like—and to recognize that a government may be strongly or weakly constitutional to the extent that its constitution contains more or fewer of these constraints.

Constitutionalism similarly implies an obligation of the government to respect and to protect individual rights, and constitutions frequently include a bill of rights. There is a substantial measure of consensus that some individual rights deserve constitutional protection, but widespread disagreement remains over just which rights must be recognized. Freedom of expression, freedom of the press, freedom of religion, a right to due process, equality and equal protection of the law, the right to life, a right of liberty and security of person, rights to property and to economic enterprise, economic and social rights (like rights to work and to adequate food, housing, health care, and education), and workers' rights all find protection within some constitutional schemes. But, again, rather than trying to identify just which specific rights must be protected for a government to qualify as constitutional, it is better to require only that a constitution include some specific strictures on

19. HAYEK, *supra* note 14, at 182–86; Henkin, *Elements*, *supra* note 15, at 13–19; Henkin, *A New Birth*, *supra* note 17, at 40–42; Murphy, *supra* note 14, at 5–6; Okoth-Ogendo, *supra* note 9, at 65, 67; Rosenfeld, *supra* note 17, at 1307.

the content of laws designed to prevent the state from encroaching upon certain individual interests.

Another essential feature of constitutionalism is that the rules imposing limits on government power must be "entrenched." The *entrenchment principle* holds that the constitutional limitations on state power cannot be subject to change by recourse to routine political processes.[20] Constitutionalism does not deny the propriety of formal, and perhaps even informal, mechanisms for effecting constitutional change. Nevertheless, it does presuppose that the process by which the constitution can be amended must be more onerous and more demanding than that provided for modifying or repealing ordinary legislation. Thus, one basic function of a constitution in a democracy is to put certain decisions—especially those relating to constitutionally guaranteed individual rights and liberties—beyond ordinary democratic processes. As Justice Robert Jackson put it in a celebrated opinion:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[21]

So, while ordinary laws may be modified or repealed by the legislature or declared illegal or unconstitutional by the judiciary, the legislature has no power to modify or repeal the constitution unilaterally, and the judiciary has no power to declare the constitution itself illegal.[22]

Of course, constitutions typically do provide for some process of constitutional revision or amendment that is initiated by or requires

20. SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 6, at 97–105; Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 375 (2003); Wil Waluchow, *Constitutionalism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2004 ed.), *available at* http://plato.stanford.edu/archives/spr2004/entries/ constitutionalism/.

21. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

22. The United Kingdom presents a special problem, since Parliament is legally free to enact whatever legislation it sees fit. For the view that the principle of parliamentary sovereignty presents no greater threat to constitutionalism in the United Kingdom than does the flexible amendatory provisions in other constitutions, see Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 853–857 (1962).

participation by the organs of government whose powers they limit, but those processes invariably require something more than a routine governmental decision to effect a change. Sometimes they require constitutional assemblies;[23] supermajority votes;[24] referenda;[25] or, in a federal system, some agreement between the central government and some number or proportion of regional governments.[26] Whatever the mechanism, the controlling idea is that the constitutional amendment process should be insulated from the ordinary political process, so that the organs of government whose powers are limited by the constitution are not entitled to change or to repeal those limitations. In part, constitutional entrenchment facilitates a degree of stability over time. As James Madison argued in connection with the ratification of the United States Constitution, frequent recourse to amendment would undermine the stability of government, because it would imply that the constitution was seriously defective.[27] More importantly, however, the constitution's relative invulnerability to change is arguably a requirement for the very possibility of

23. For example, the Bulgarian Constitution calls for an amending convention called by the National Assembly upon a two-thirds vote of all members in order to amend certain of its provisions, including those establishing the state structure or form of government, preserving the inviolability of human rights, defining the territory of the republic, and providing for amendment of the constitution. KONSTITUTSIYA [Constitution] ch. 9, art. 158 (Bulg.).

24. Supermajoritarian requirements are very common, but they may vary in stringency. In Germany, constitutional amendments require a two-thirds vote by both houses, must be clearly stated, and cannot affect certain provisions of the Basic Law. GRUNDGESETZ [GG] [Constitution] art. 79 (F.R.G.). In Bulgaria, the National Assembly may amend the constitution only by a three-fourths vote of all members, with three different ballots taken on three different days and with at least one month passing between initiation and the first vote. KONSTITUTSIYA [Constitution] ch. 9, art. 155 (Bulg.).

25. *See, e.g.*, 1958 CONST. 89 (Fr.) (referendum following passage by both Houses of Parliament in identical terms); COSTITUZIONE [COST] [Constitution] art. 138 (Italy) (referendum after adoption by each of the two chambers of parliament twice within no less than three months and approval of a majority of each chamber in the second vote).

26. In Canada, the constitution generally can be amended by resolutions of the Senate and House of Commons together with the agreement by resolution of the legislatures of at least two-thirds of the provinces having in the aggregate at least fifty percent of the population of all the provinces. CAN. CONST. (Constitution Act, 1982) pt. V, § 38(1). Amendments that derogate from the legislative powers or rights of the provincial governments also require the consent of the provincial legislature to be effective in the province. *Id.* at §§ 38(2), 38(3). Certain amendments—including amendments to the Office of the Queen, the representation of the provinces in the House of Commons, the composition of the Supreme Court, and the amending procedure—require unanimous consent of the provinces. *Id.* at § 41. But only the Parliament can amend provisions relating to the executive government or the Senate and House of Commons. *Id.* at § 44.

27. THE FEDERALIST NO. 49 (James Madison).

constitutional government: the constitutional limitations on state power would be ineffective and meaningless if the government were free to unilaterally alter, amend, or eliminate those limitations. Understood in this way, the constitutionalist's commitment to limiting state power by legal means necessitates the entrenchment principle.

B. Deliberative Democracy

Broadly conceived, deliberative democracy holds that public deliberation of free and equal citizens is the basis for legitimate political decision making and self-government. As Jon Elster writes,

> There is a robust core of phenomena that count as deliberative democracy . . . . All agree, I think, that the notion includes collective decision making with the participation of all who will be affected by the decision . . . . Also, all agree that it includes decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality . . . .[28]

But what animates deliberative democracy is not merely promoting the public discussion of political affairs. Instead, deliberative democracy affirms the centrality of deliberative decision making, which appeals to "reasons that should be accepted by free and equal persons seeking fair terms of cooperation."[29] Four salient principles emerge from the various accounts of deliberative democracy: (1) the common good principle, (2) the public reason principle, (3) the preference transformation principle, and (4) the egalitarian principle.[30]

The *common good principle* provides that citizens and other political decision makers should deliberate about which among the competing proposals under consideration will best advance the common good. Deliberative democrats commonly distinguish the deliberative model of democracy from interests-oriented or

28. Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY, *supra* note 4, at 1, 8.

29. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004) [hereinafter WHY DELIBERATIVE DEMOCRACY?].

30. Philip Pettit provides a somewhat different account. *See* Philip Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, *in* DEBATING DELIBERATIVE DEMOCRACY 138, 139–140 (James Fishkin & Peter Laslett eds., 2003); Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 269–271 (2001) [hereinafter Pettit, *Deliberative Democracy and the Discursive Dilemma*].

aggregative models of democratic decision making. Under the so-called aggregative model, democratic processes operate like commercial market transactions.[31] Citizens reflect on their individual and group interests, evaluate how the competing policy options will likely affect those interests, and then select the measures they believe best advance those interests. The electoral system simply mechanically aggregates individuals' brute preferences in the hope of achieving a utilitarian optimal result.[32] The aggregative model expects each voter to register his own considered preferences where those preferences presumably reflect his mainly private and self-interested concerns, and the political aggregation of those preferences is calculated to maximize overall preference satisfaction.[33] Under the bargaining model of democratic decision making, citizens also act on the basis of their personal preferences, but they express those preferences in sequences of bargaining offers. The offers each person makes are designed to guarantee that he was obliged to make only the minimal concessions to others necessary for promoting his own purposes.[34]

Deliberative democracy rejects both the priority of individual self-interest and the mechanical process-orientation reflected in the aggregative and bargaining conceptions of democracy. Instead, the hallmark of deliberative democracy is that it requires voters to deliberate about how they should vote on the basis of their impartial judgments as to what best conduces to the common good rather than on the basis of what best advances their own individual or group interests.[35] In deliberating about matters of public concern, democratic citizens and their elected representatives must distance themselves from their own personal or group interests and impartially adopt laws, policies, and institutions that promote the

31. James Bohman & William Rehg, *Introduction*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, at ix, ix–xii (James Bohman & William Rehg eds., 1997).

32. Freeman, *Sympathetic Comment*, *supra* note 7, at 373–75.

33. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 19–21 (2000); Cohen, *Democracy and Liberty*, *supra* note 4, at 185–87; David Miller, *Deliberative Democracy and Social Choice*, 40 POL. STUD. 54, 55 (1992).

34. *See* Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 3, 4.

35. Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 67, 75–76 [hereinafter Cohen, *Democratic Legitimacy*]; Miller, *supra* note 33, at 56.

interests of all citizens.[36] Political actors should be concerned with what is best for society as a whole.[37] For the deliberative democrat, the goal of deliberation is not the narrow pursuit of one's self-interest, but rather the identification of measures that, as far as possible, answer to the needs and interests of all citizens.[38]

The *public reason principle* requires a public process in which the members of the political community participate in public discussion and critical examination of collectively binding public policies.[39] Of course, deliberative democrats reject the notion that citizens privately form their own judgments about perceived common interests and then vote on the basis of those judgments. But what distinguishes deliberative from other conceptions of democracy is not public discussion as such, since under any view of democracy voters can benefit from sharing information with one another. Instead, whether a democratic theory is *deliberative* depends not only on whether there is joint deliberation among citizens, but also on the kinds of considerations they recognize as good reasons in democratic discussion and decision making. Public deliberation provides deliberative democracy with its conception of political legitimacy.[40] The idea is that, in a democratic society characterized by a plurality of moral, religious, and philosophical views, merely giving everyone's interests equal consideration is not enough to justify political decisions. Political justification also calls for public deliberation in terms of reasons that free and equal citizens can reasonably accept.[41]

Since consent of the governed is at the heart of democratic decision making, the legitimacy of deliberative outcomes is derived not simply from the will of the majority, but instead from the results of collectively reasoned reflection by political equals engaged in a shared project of identifying laws and public policies that respect the

36. Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 407, 420–21 [hereinafter Cohen, *Procedure and Substance*].

37. Freeman, *Sympathetic Comment*, *supra* note 7, at 372–76.

38. *See, e.g.*, SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 6, at 24–39, 185–92; Elster, *supra* note 34, at 2; Pettit, *Deliberative Democracy and the Discursive Dilemma*, *supra* note 30, at 269–71.

39. *See generally* HELD, *supra* note 1, at 237–38.

40. *See* MICHAEL SAWARD, DEMOCRACY 120–24 (2003).

41. *See, e.g.*, DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 79–94; Cohen, *Procedure and Substance*, *supra* note 36, at 414–18; Cohen, *Democracy and Liberty*, *supra* note 4, at 203.

interests, preferences, and values of all citizens.[42] Reasonable persons holding different moral, religious, and philosophical views are entitled to be given reasons for the laws, institutions, and policies that affect them which they can regard as acceptable from the perspective of their own comprehensive views.[43] If they are not given such reasons, they are not treated as equals in the democratic decision-making process.[44] Laws, institutions, and policies adopted according to reasons peculiar to a particular comprehensive view—reasons that many democratic citizens cannot reasonably be expected to endorse—are thus unjustified. The coercive powers of the state would be exercised against citizens on grounds they do not find reasonable or that they cannot as free and equal citizens endorse. The political legitimacy of the outcomes of public deliberation is thus located in the fact that the deliberations are guided by the use of publicly scrutinized reasons.[45]

The *preference transformation principle* maintains that citizens and others engaged in deliberative democratic decision making must be willing to evaluate critically and to change their own preferences and values.[46] Again, deliberative democrats contrast this view with that represented by other aggregative or interest-based conceptions of democracy:

> Interest-based conceptions of democracy consider democracy primarily as a process of expressing one's preferences and demands, and registering them in a vote. . . . By contrast, the model of deliberative democracy conceives of democracy as a process that creates a public, citizens coming together to talk about collective problems, goals, ideals, and actions. . . . Instead of reasoning from the point of view of the private utility maximizer, through public

42. WHY DELIBERATIVE DEMOCRACY?, *supra* note 29, at 3–5.

43. *Id.* at 133–35, 144–47; YOUNG, *supra* note 33, at 25.

44. Cohen, *Democracy and Liberty*, *supra* note 4, at 205–06.

45. *See, e.g.*, DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 52–69; Benhabib, *supra* note 4, at 69–70; Cohen, *Procedure and Substance*, *supra* note 36, at 419–22.

46. *See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 6, at 8 ("A central point of deliberation . . . is to shape both preferences and beliefs, and frequently to alter them . . . ."); Thomas Christiano, *The Significance of Public Deliberation*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 243, 244–46 ("Public deliberation transforms, modifies, and clarifies the beliefs and preferences of the citizens of a political society."); Elster, *Introduction*, *supra* note 28, at 5–7 (Deliberation "aims at the transformation of preferences" rather than merely the aggregation of preferences.). *See generally* HELD, *supra* note 1, at 232–34.

> deliberation citizens transform their preferences according to public-minded ends . . . .[47]

According to deliberative democrats, interest-based models of democracy envision citizens entering into the political process with predetermined personal preferences they seek to advance by manipulating the instrumentalities of political decision making. Political actors do not expect that their preferences will undergo any change as a consequence of their political interactions, and the system of democratic decision making is not designed to facilitate such changes. Deliberative democracy, by contrast, contemplates that political decision makers enter the deliberative decision-making process open to preference transformation during the course of their political interactions.[48] This commitment might be viewed as an outgrowth of deliberative democracy's commitment to the ideal of public reason: as participants in the deliberative process, all citizens must be prepared to respond respectfully and with an open mind to the reasons offered by their fellow citizens.

The *egalitarian principle* requires that all members of the political community are equally entitled to vote on how to resolve issues of collective concern. Deliberative democrats thus hold that many substantive rights and liberties, together with opportunities and egalitarian social institutions, also must be in place to make genuine democratic deliberation possible.[49] To assure equal participation in the process of public deliberation, therefore, deliberative democrats typically endorse a broader view of the social and political conditions necessary for democratic decision making than do some proponents of purely procedural conceptions of democracy. For the latter, democracy is often no more than a political decision-making procedure that requires political rights like a universal franchise, the equal right to vote and hold office, and majority rule. They also may recognize some additional political rights—like freedom of political speech and freedom of the press—but only to the extent they are necessary to establish and maintain

47. Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 4, at 120, 120–21.

48. *See* SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 6, at 22–23; YOUNG, *supra* note 33, at 26.

49. *See* WHY DELIBERATIVE DEMOCRACY?, *supra* note 29, at 102–10; Jack Knight & James Johnson, *What Sort of Equality Does Deliberative Democracy Require?*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 279, 279–310.

the integrity of the democratic decision-making process. By contrast, deliberative theories generally recognize that deliberation not only must provide for procedural rights of political participation, but that it also must provide for additional substantive rights and liberties and certain social institutions to guarantee that citizens participate in democratic deliberation as equals.[50] They insist that these stringent social and political conditions must be satisfied if citizens are to achieve a status as political equals who are free, and that these conditions must be in place if democratic citizens are to be in a position to discover and to vote for the common good.[51]

Deliberative democrats do not agree on what social and political conditions are necessary for deliberation to take place. Although it would be inappropriate simply to stipulate what those conditions are for all versions of deliberative democracy, it is worth mentioning some of the kinds of rights deliberative democrats have claimed are necessary for deliberation just to get a sense of the breadth of those claims. Since deliberative democracy requires that the systematic considerations of the interests and needs of all citizens be ensured by providing an equal voice to all, some theorists emphasize removing institutional barriers to participation in public deliberation and developing accessible forums in which all citizens can freely participate in the deliberative process. Deliberative democrats therefore may recommend institutions like public financing of political campaigns and public provision of arenas of free political expression in order to guard against the political process being controlled by wealthy or powerful interests. Others claim that the requirement of political equality may entail the redistribution of power and of material resources in order to promote the equal opportunity of political influence and thereby economic rights like adequate work and educational opportunities and adequate health care.

50. *See* DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 52–69; James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 321, 321–23.

51. *See, e.g.*, Cohen, *Democracy and Liberty*, *supra* note 4, at 205–06; Cohen, *Democratic Legitimacy*, *supra* note 35, at 67–92.

III. FALSE CONFLICTS BETWEEN CONSTITUTIONALISM AND DELIBERATIVE DEMOCRACY

Democratic theorists often distinguish liberal constitutional accounts from deliberative accounts by focusing on the different roles individual preferences play in each of them. David Miller explains the contrast this way:

> In the liberal view, the aim of democracy is to aggregate individual preferences into a collective choice in as fair and efficient a way as possible. In a democracy there will be many different views as to what should be done politically, reflecting the many different interests and beliefs present in society. Each person's preferences should be accorded equal weight. Moreover, preferences are sacrosanct because they reflect the individuality of each member of the political community . . . . The problem then is to find the institutional structure that best meets the requirements of equality and efficiency. . . .
>
> The deliberative ideal also starts from the premise that political preferences will conflict and that the purpose of democratic institutions must be to resolve this conflict. But it envisages this occurring through an open and uncoerced discussion of the issue at stake with the aim of arriving at an agreed judgment. The process of reaching a decision will also be a process whereby initial preferences are transformed to take account of the views of others. That is, the need to reach an agreement forces each participant to put forward proposals under the rubric of general principles or policy considerations that others could accept.[52]

This standard distinction between constitutional and deliberative democracy suggests that they are more than just strange bedfellows, but rather that they are, in fact, inconsistent. In the first place, the common good principle of deliberative democracy appears to conflict with constitutional principles. Deliberative democracy requires that decision makers act in accordance with their impartial judgments of what conduces to the common good of all citizens. The deliberative process is designed to encourage citizens, legislators, and other democratic decision makers to bracket their individual and group interests and to seek consensus over the common good. By contrast, constitutional democracy contemplates that citizens will reflect on

52. Miller, *supra* note 33, at 55.

their individual or group interests, ascertain how competing policy proposals affect those interests, and then promote those policies they believe will best advance their interests. Since democratic decision makers act to promote their own individual or group interests, constitutional restraints on popular will are necessary to guard against the risk that self-interested persons might seek to turn public power to private advantage.

In the second place, the preference transformation principle of deliberative democracy seems incompatible with constitutional principles. On the standard account, deliberative democrats maintain that citizens' preferences must be open to transformation during the course of the political process. When citizens engage in the deliberative democratic process, they must be prepared to question and to change their own preferences, for the process of articulating reasons and offering them in public forums "forces the individual to think of what would count as a good reason for all others involved."[53] But constitutional democracy presupposes that citizens enter into the democratic decision-making process with predetermined preferences that remain fixed during the course of their political interactions. Citizens engage in democratic processes without any expectation that their preferences will change in the course of the process, and the processes themselves are designed merely to aggregate those individual preferences, not to encourage the transformation of those preferences.

In fact, neither of these supposed contrasts poses any necessary inconsistency between constitutionalism and deliberative democracy.

A. Constitutionalism and the Common Good

The first supposed conflict—between acting from self-interest and acting from the common good—is ambiguous. It could be a claim that constitutionalism and deliberative democracy presuppose competing descriptions of what actually motivates political actors, or it could be a claim that the rival theories espouse contradictory views about the moral obligations of political actors.

The descriptive version of this objection poses no obstacle for the deliberative constitutionalist project. A contradiction between the two views would arise only if deliberative democrats held that

53. Benhabib, *supra* note 4, at 71–72.

political actors always are motivated by their impartial judgments about the common good or if constitutionalists held that political actors always are motivated by self-interest, but neither theory presupposes such an implausibly unqualified view of human motivation. To be sure, deliberative democrats probably are more sanguine than are constitutional democrats about the prospect that political actors will be able to put aside self-interest and act to promote what they impartially judge to be in the common interest. After all, one reason constitutional democrats accentuate the importance of constitutional limitations on government power is to protect against the risk that the self-interested majority will run roughshod over minority rights. But constitutionalism does not entail that self-interest always motivates political actors.

Conversely, deliberative democrats certainly are committed to the view that citizens can and should be morally motivated by justice or the common good and be willing to abide by democratic decisions regarding these values. They assume, for example, that citizens can act from a commitment to deliberative institutions and the norms and principles generated by deliberation[54] or from a commitment to reciprocity and public reason-giving.[55] But these are not assumptions about the actual motivations that citizens have in real democratic societies so much as they are statements of the motivations political actors must have if the ideal of deliberative democracy is to be actualized. Indeed, any complete theory of deliberative democracy must provide some account of how to deal with those citizens who do not have the appropriate motivations or who altogether reject the ideal of democratic deliberation.[56] There is certainly nothing inconsistent, however, in the deliberative democrat's view of human motivation and his acceptance of the institutional constraints on popular will that constitutionalists recommend to counteract the pathologies that sometimes may adversely affect political decision-making processes.

54. Cohen, *Democratic Legitimacy*, *supra* note 35, at 72.

55. DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 53; Frank I. Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 31, at 145, 149.

56. In fact, Gutmann and Thompson stipulate that deliberative democratic processes are appropriate only among those persons who are prepared to reason together in the right spirit. DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 55. Thus, they would exclude the purely self-seeking amoralist and the intractable moral or religious fanatic. *Id*.

The prescriptive version of the contrast between acting from self-interest and acting from the common good is no more successful in showing any inconsistency between constitutional and deliberative democracy. Deliberative democracy is explicitly committed to the view that voters should cast their ballots in accordance with their estimates of what best conduces to justice or the common good, but there is no reason to suppose that constitutional democracy presupposes that voters should vote in accordance with their individual or group preferences. Perhaps some constitutional democrats do hold that the goal of democratic processes is merely to aggregate preferences and so would recommend that citizens should vote entirely in accordance with their individual or group preferences. But the preference-voting view is most congenial with a utilitarian defense of democracy that locates the value of democratic processes in their potential to maximize overall utility measured by reference to preference satisfaction. Conceived along the utility-maximizing model, democratic processes perform a function comparable to economic markets.[57] Citizens register their preferences by means of their votes, just as consumers register their preferences by means of their purchasing decisions. Democracy simply records and responds to individual preferences as expressed by the greater number of persons voting for a particular law or policy or candidate. Voting is not just a decision-making procedure. On this account, the aim of democracy is to maximize preference satisfaction, and voting provides the mechanism for revealing and expressing what preferences citizens have.

But this utilitarian justification for democracy does not seem especially compelling. Apart from its commitment to preference satisfaction as the exclusive goal of government, the argument seems to justify no more than public opinion polling to determine citizen preferences. But, whatever the merits of this utilitarian defense of democracy generally, constitutional democracy does not necessarily depend on it. In fact, *constitutional* democracy appears to rest somewhat uneasily on utility-maximizing foundations. If the aim of democracy were to maximize preference satisfaction and the purpose of voting were simply to register citizens' preferences, then there would be nothing undemocratic about collective decisions that operate for the benefit of the majority of citizens and to the

57. *See* Elster, *supra* note 34, at 3–33.

detriment of a minority. So, for example, racially discriminatory legislation adopted by a popular referendum might well maximize preference satisfaction, even though it does so at the expense of the minority race. But since constitutional democracy recognizes certain basic rights and liberties in order to protect minorities against the popular will, someone committed both to a preference-satisfaction defense of democracy and to constitutional limitations on democratic decision making will have to do some pretty fancy philosophical footwork. It would appear far more promising to justify constitutional democracy and its guarantees of individual rights and liberties on the grounds that it respects or promotes either the liberty or the equality of citizens better than any other kind of decision making than on the grounds that it maximizes preference satisfaction.

Despite the impression created by the rhetoric of deliberative democracy, therefore, constitutional democracy is not incompatible with deliberative democracy's common good principle. If that principle is a descriptive account of what actually motivates political actors, then deliberative democrats can accept that those actors sometimes will be driven by the kinds of self-interested considerations that justify the institutional restraints on governmental power that constitutional democrats recommend. If, instead, the common good principle is a moral requirement guiding the goals that political actors must pursue, then constitutional democracy does not run afoul of deliberative democracy's demand that political actors promote the common good, since constitutional democracy is not committed to an individual preference-aggregation model of democratic decision making. Indeed, the most compelling justifications for *constitutional* democracy do not support the preference-aggregation approach.

B. Constitutionalism and Preference Transformation

The second supposed conflict between constitutional and deliberative democracy—that constitutional democracy assumes citizens engage in political interactions with predetermined preferences that remain unchanged, while deliberative democracy presupposes citizens' preferences will be open to transformation as a result of their participation in the deliberative process—overstates the role of preference transformation in deliberative democracy. In deciding which competing law, policy, or candidate to support, a

citizen might attempt to determine which would best advance his own personal or group-oriented interests, or he might assess which of them would best advance the public interest. The standard account treats preferences as dispositions to choose those courses of action that promote one's self—or group—interest. It then claims that constitutional democracy holds that voters seek to advance their individual preferences, whereas deliberative democracy maintains that voters should seek to promote the common good. But the standard account overlooks an important distinction: whether one's judgment about what advances one's self-interest remains fixed or changes during the course of political interactions and whether one should vote to promote one's self-interest or to advance the common good are entirely separate questions. Whether the self-interested preferences of voters or other political actors remain fixed or undergo transformation during the political process is entirely irrelevant for any theory of political decision making that requires citizens to act in accordance with their best estimates of what will promote the common good.

Deliberative democratic accounts, therefore, need not insist on the preference transformation principle. This claim may seem surprising; as already noted, deliberative democrats explicitly endorse the idea that citizens and other political decision makers engaged in the deliberative process must be open to questioning and revising their individual preferences. But there is no reason for citizens to be amenable to preference transformation if, as deliberative democracy holds, their obligation is to abstract from their individual or group preferences and to vote impartially for those laws, institutions, and policies that they sincerely judge best contribute to the common good.

Consider a simple domestic example. Five people agree to share a house and meet to deliberate about and to adopt guidelines for their joint living arrangements. Three of the roommates are smokers and would personally prefer that smoking be permitted in the house, but the two non-smokers would prefer it to be a non-smoking residence. If everyone were to vote his individual preference, smoking would be permitted. But suppose that the residents do not vote their individual preferences but instead vote in accordance with their best estimates of what would be in the interests of all. Some or all of the smokers might well think that, despite their personal preferences for allowing smoking, a no-smoking rule would be in the best interests

of the small domestic community and thereby vote to prohibit smoking. By the same token, some or all of the non-smokers might judge that permitting smoking in the house would be in the common interest. In either case, those residents who do as deliberative democrats insist they must and put aside their own personal preferences and vote in favor of the house smoking policy they impartially judge will best promote the common interest need not undergo any change in their individual preferences. A smoker could consistently maintain his personal preference that smoking be permitted yet believe it would be better for all concerned that it not be, just as a non-smoker could without contradiction believe that allowing smoking would be best for the group but personally prefer that people not smoke inside.

Deliberative democracy's requirement that democratic decision makers promote the common good, therefore, is completely indifferent as to whether their individual preferences change or remain fixed during the deliberative process. In view of deliberative democracy's commitment to the principle that political decision makers should vote for those measures they believe promote the common good rather than for those they think best advance their individual preferences, it is difficult to understand why preference transformation is such a pervasive feature of deliberative democratic accounts. In any event, to the extent that constitutional democracy also appeals to the common good, it too is indifferent as to whether individual preferences remain fixed or are subject to change. No conflict exists between deliberative and constitutional accounts of democracy, therefore, because, so long as both maintain that citizens and other political decision makers should decide on the basis of their impartial judgments of what is in the common interest, both will be equally indifferent as to whether personal preferences are mutable or fixed.

Deliberative democrats may charge that I have mischaracterized what it is they claim must be subject to transformation during deliberative democratic processes, but no conflict between constitutionalism and deliberative democracy arises under either of the two most plausible alternative interpretations of deliberative democracy. First, the deliberative democratic claim that those engaged in deliberative processes must be prepared to change their own preferences might just mean that decision makers must be amenable to shifting from a preference for advancing their self-

interest to a preference for advancing the common interest. But if that is all the claim amounts to, it adds nothing to the deliberative democratic tenet that decision makers must put aside personal interests and act impartially for the good of all. As already shown, this claim poses no conflict between deliberative democracy and constitutionalism. Second, the preference transformation principle might mean that citizens and other political actors must be open and receptive to the reasons presented by others so that they are willing to change their minds about what is in the common interest and how best to achieve it. On this interpretation decision makers simply must be amenable to changing their judgments about the common good. But if this is what deliberative democrats mean by preference transformation, the claim is not especially distinctive. And, distinctive or not, it would give rise to a contradiction only if constitutionalism entailed the view that political actors should enter into the decision-making process with a predetermined view of what is in the common good that does not change during political interactions, and constitutionalism certainly does not require any such view.

In short, constitutionalism does not conflict with deliberative democracy's preference transformation principle for two reasons. First, since deliberative democracy requires political actors to promote the common good, whether their individual preferences remain fixed or are mutable during the deliberative process makes no difference. The preference transformation principle, therefore, is an unnecessary feature of deliberative democratic theory. Second, to the extent that constitutional democracy also endorses the common-good principle and rejects the preference-aggregation model of democratic decision making, it too is indifferent to whether the initial personal preferences of decision makers are transformed. Whether individual preferences are subject to revision during the course of political interactions is entirely irrelevant, so long as democratic decision makers are obliged to promote the public good rather than their individual self-interests.

IV. DELIBERATIVE DEMOCRACY AND CONSTITUTIONAL ENTRENCHMENT

The most serious source of tension between constitutionalism and deliberative democracy resides in their treatment of individual rights and liberties. Constitutionalism is committed to the idea that individuals have certain rights—freedom of speech and religion,

equality before the law, a right to own private property, and so on—that lie beyond the scope of legitimate government action. A democratic constitution recognizes a set of entrenched rights that effectively take off the political agenda certain possible majoritarian initiatives. Constitutionalism thereby accords priority to certain basic rights and liberties over democratic decision-making processes. By contrast, the central idea of deliberative democracy is that of the people deliberating—the sovereign people engaged in public reasoning and argument about what laws, institutions, and social policies are required to achieve justice and the common good. For deliberative democrats, citizens should deliberate about specific governmental policies, but they also should deliberate about both the procedural mechanisms of democratic decision making and which values deserve constitutional protection. Thus, what rights should be regarded as fundamental is itself a subject for democratic deliberation and decision making. Deliberative democracy therefore accords priority to democratic decision-making processes over any privileged set of rights and liberties.

Constitutionalism and deliberative democracy thus appear to have conflicting commitments. For constitutionalism, there are fundamental rights that ordinary political processes cannot abrogate; for deliberative democracy, what basic rights to recognize is itself a proper subject of democratic decision making, so that any particular right is vulnerable to abrogation following appropriate deliberative processes. The deliberative constitutionalist project thus appears to be a non-starter. On the one hand, if democratic deliberation must take place within the constraints of constitutionally guaranteed rights, then citizens cannot deliberate over what fundamental values will be recognized. Instead, those values are imposed from outside the deliberative process. On the other hand, if citizens may deliberate about all important values and may decide whether to recognize certain rights, then those rights do not enjoy the entrenched status of constitutional rights. Instead, they are rights whose recognition is vulnerable to "the vicissitudes of political controversy."[58]

58. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Referring to Seyla Benhabib's attempt to blend constitutional and deliberative principles, Carol Gould puts the problem this way:

> Benhabib wants to have it both ways, then; for if the rights are really contestable, then one possibility has to be that they can be abrogated. Otherwise, contestation

The deliberative constitutionalist project will fail if this tension between constitutional and deliberative principles cannot be resolved. Constitutional rights cannot be both subject to democratic processes and insulated from them, so it appears that any democratic theory that is committed to both claims must be incoherent. I believe, however, that this tension can be resolved. My proposed reconciliation claims that the principles of deliberative democracy can recognize that constitutional rights be vulnerable to change only by means of the more demanding processes required for constitutional amendments and not by means of the ordinary political process. Before describing my proposal, however, I will consider several alternative strategies for harmonizing constitutional and deliberative principles that the deliberative constitutionalist might pursue. For a variety of reasons, each of these alternatives is unsatisfactory.

A. Allocating Decision-Making Authority Versus Limiting Government

First, let me consider one response to a related but distinct problem that recognizing constitutional rights is supposed to pose for democracy generally; namely, the so-called countermajoritarian dilemma. In American constitutional law, the question is most often posed as whether judicial review is consistent with democratic government. The objection is that, in declaring a law unconstitutional, an unelected court frustrates enforcement of a law that presumably reflects the will of the majority.[59] But, if there is a

> reduces to differences of interpretation and that's not what essential contestability means. But if they are not contestable, this means that they have their authority in something other than the discursive procedure of the genesis and validation of norms. Either the rights are contestable, or they are not.

Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 4, at 171, 178.

59. The classic account of the countermajoritarian implications of judicial review in American constitutional law is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For two influential but distinctive defenses of the practice, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press, 2d ed. 1986) (1962), and CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960). *See generally* Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1991); Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335 (1998); articles printed in 22 LAW & PHIL., nos. 3–4 (2003) (providing various perspectives on the interaction between judicial review, democracy, and constitutionalism). For the relationship between four contemporary theories of constitutional

genuine problem here it is not just whether judicial review is antidemocratic; instead, the question is whether constitutionalism itself is compatible with democratic rule. One classic textbook explains the tension between majoritarian politics and constitutionally entrenched restraints in the following terms:

> [T]here must necessarily be some formula or mechanism for the making of decisions or the selection of policies. In a democracy this formula is majority rule. . . . But democracy has to recognize that a majority can become a tyranny which may ruthlessly destroy the rights of minorities temporarily at its mercy. . . . Thus there must be a balancing of majority power and minority rights. This is the most difficult issue facing any democratic society. . . . For one thing, there is a certain logical dilemma to overcome here. No political philosopher and no constitution-makers have ever quite succeeded in explaining away this dilemma.[60]

An enormous amount of scholarly effort has been dedicated to explaining why constitutionalism is not antidemocratic, but the problem seems to me less serious than is sometimes imagined. The solution lies in recognizing that democracy and constitutionalism provide answers to different questions. Democracy is concerned with identifying *who* shall decide political questions, constitutionalism with specifying *what* government permissibly may do. In a constitutional democracy, "the people," directly or through their elected representatives, are entitled to make political decisions, but the constitution establishes limits on what the state, acting through its people, may do. The constitution might provide that the government is entitled to act with respect to matters A, B, C, . . . and W and further provide that it is not entitled to act with respect to matters X, Y, and Z. When the government acts with respect to A, it is the people who are entitled to decide the matter. But should a majority of the people, acting through their duly-elected representatives, adopt some legislation bearing on X, they will have exceeded the scope of the government's legitimate authority. There is nothing antidemocratic in saying that the X legislation is

review generally and the deliberative conception of democracy, see Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, 21 LAW & PHIL. 467 (2002).

60. ROBERT K. CARR, MARVER H. BERNSTEIN, DONALD H. MORRISON, RICHARD C. SNYDER & JOSEPH E. MCLEAN, AMERICAN DEMOCRACY IN THEORY AND PRACTICE: ESSENTIALS OF NATIONAL, STATE & LOCAL GOVERNMENT 29–30 (1955).

unconstitutional, for to hold that the people cannot legislate with respect to X is only to recognize that X matters lie outside the domain of proper state action. Recognizing constitutional limits on the government's authority just acknowledges that certain matters are beyond the scope of legitimate governmental action, wherever the power of decision making may be vested. It is not to deny the principle of democratic decision making with respect to those matters as to which the government is entitled to act.[61]

This distinction between allocating decision-making authority and limiting government power also exists in non-democratic settings, and its application there reinforces the conclusion that entrenched constitutional rights present a less serious problem for democracy than advocates of the countermajoritarian dilemma usually claim. In a constitutional monarchy, for example, the constitution might both assign political decision-making authority to a particular member of the royal family and establish, among other constitutional rights, the right to religious freedom. To hold that the constitutional monarch does not have the power to forbid citizens' practicing one religion or to compel practicing another does not deny the monarch's political decision-making authority with respect to proper governmental functions. Instead, it means only that restricting its citizens' right to worship freely is beyond the limits of the state's legitimate power, something that none of the state's agencies has authority to do. Recognizing a constitutionally protected right to religious freedom in a monarchy does not deny the principle of monarchical rule but merely imposes a limit on the government's legitimate activity. Thus, in both a democracy and a monarchy, constitutional rights merely circumscribe the proper domain of the state's authority. They do not seek to identify the agency or branch of the government having decision-making power within that domain.

Whatever one thinks about the merits of this strategy for resolving the countermajoritarian dilemma, the apparent conflict between constitutionalism and *deliberative* democracy cannot be resolved in this way. Constitutionalism restricts the legitimate sphere of government activity: people have certain rights and liberties with which the government may not interfere. But deliberative democracy

61. Of course, this argument presupposes that the constitution itself has a popular pedigree.

denies that there are matters beyond the ordinary processes of political decision making. Deliberative democrats endorse an expansive view of deliberation's domain, believing that all political issues that feature deep moral disagreement should be treated through deliberation. Although the deliberative democrat may admit that government is limited, deliberative democracy holds that the nature and content of the principles that limit deliberative decision making are themselves proper subjects for citizen deliberation. Both the procedural and substantive principles that may constrain deliberative decision making are provisional and are to be understood as systematically open to revision in an ongoing process of both moral and political deliberation. As Gutmann and Thompson put it, "Deliberative democracy does not seek a foundational principle or set of principles that, in advance of actual political activity, determines whether a procedure or law is justified. Instead, it adopts a dynamic conception of political justification, in which change over time is an essential feature of justifiable principles."[62] While constitutional democracy imposes constraints on democratic decision making that place some matters outside the bounds of ordinary democratic processes, deliberative democracy holds that any matter may properly be subjected to the deliberative process, including what procedural and substantive rights should constrain the decision-making process.

B. Constitutional Rights as the Products of Public Deliberation

Deliberative constitutionalists might try to reconcile deliberative and constitutional principles by claiming that deliberative processes will produce the same set of individual rights and liberties that constitutionalism recognizes. This argument might take two forms. It might be cast as a prediction that the *actual* deliberations among citizens, conducted under suitable conditions, will result in the recognition of the full panoply of constitutional rights. Alternatively, the argument could be framed as a claim that democratic citizens, in their deliberations, must appeal to the principles and procedures that would be agreed to under *hypothetical* conditions by free, equal, and fully rational beings and that when they do they would identify the full set of individual rights and liberties that constitutionalism would

62. WHY DELIBERATIVE DEMOCRACY?, *supra* note 29, at 132; *see id.* at 6–7, 57–59, 110–19, 121–22.

protect. But neither of these strategies can successfully integrate constitutional and deliberative principles. The first compromises an essential ingredient of constitutionalism, the second an important feature of the most appealing versions of deliberative democracy.

The first strategy depends on the wildly improbable empirical claim that actual citizens motivated by justice or the common good and willing to abide by democratic decisions regarding these values in fact will respect the individual rights and liberties that constitutionalists recommend, at least so long as the social conditions conducive to satisfactory deliberation for public deliberation are in place. At the level of practical implementation, the proponent of this strategy must believe that the happy confluence of appropriately motivated citizens and suitable social conditions can be realized often enough and consistently enough to guarantee the protection of constitutional rights and liberties. Of course, part of what motivates the constitutionalist to impose institutional constraints on ordinary political processes is a concern about the extent to which ambition, self-interest, prejudice, irrationality, and other factors will perniciously affect the outcomes of actual political processes, deliberative or otherwise. This difference between deliberative and constitutional democracy, therefore, might just reflect conflicting assumptions about human nature and about the prospects for realizing social conditions congenial to proper deliberation. But it certainly does entail very different recommendations about which political institutions are required for individual rights to be protected. The proponent of this harmonizing strategy must believe that the prospects of having properly motivated citizens and suitably arranged social conditions are likely enough for rights and liberties to be respected, whereas the constitutionalist believes that those rights and liberties must be insulated from the vagaries of everyday politics to assure that they are respected. Thus, this strategy seems to leave unresolved the conflicting practical recommendations that constitutional and deliberative democracy make about the kinds of political institutions democracy requires.

But this conflict at the level of practical implementation simply reflects the more serious reason why claiming that the actual deliberations of democratic citizens will respect constitutional rights fails to harmonize constitutional and deliberative principles. This approach accepts deliberative democracy's commitment to subjecting every question of legal, political, and social policy to the deliberative

process. It thereby accords priority to democratic decision making over individual rights. By contrast, constitutionalism requires institutional constraints on democratic processes that put decisions affecting certain basic rights and liberties beyond the reach of the popular will. It thereby gives priority to those individual rights and liberties over democratic decision making. To claim that the actual deliberations of properly motivated citizens under suitable conditions will respect constitutional rights does not reconcile constitutionalism and deliberative democracy. Instead, it simply chooses deliberative democracy over constitutionalism.

The alternative version of this strategy—that hypothetical deliberations will yield constitutional rights—is unsatisfactory for reasons internal to the theory of deliberative democracy. Deliberative democrats are sometimes unclear whether they defend a theoretical framework for actual social deliberation or merely a premise for a thought-experiment designed to determine what policies would be accepted if citizens were to undertake public deliberation under the proper conditions. Two prominent writers sometimes associated with deliberative democracy—Habermas and Rawls—employ hypothetical agreements, and for them the construct of hypothetical agreement provides the means for testing whether laws and institutions are just and for determining and justifying principles of justice.[63]

But most deliberative democrats do not explicitly adopt this kind of hypothetical deliberative construct to justify or apply their conceptions of democracy. Indeed, what matters for most deliberative democrats is not hypothetical deliberation but actual deliberation and agreement among citizens under conditions that assure their freedom and political equality. Gutmann and Thompson's influential account of deliberative democracy illustrates the importance of actual as opposed to hypothetical deliberation.[64] They claim that moral deliberation is inevitably a part of democratic discourse, and that democratic deliberation does a better job of

63. Jurgen Habermas's "ideal speech situation" relies on a model of uncoerced speech that is removed from the influences of power that operate in actual politics. *See, e.g.*, HABERMAS, *supra* note 6. John Rawls's hypothetical "original position" provides a heuristic method for determining what structure of political institutions people would choose behind a "veil of ignorance." *See* JOHN RAWLS, A THEORY OF JUSTICE 11–22 (1971). For the differences between Habermas and Rawls, see Jurgen Habermas, *Reconciliation through the Public Use of Reason: Remarks on John Rawls's* Political Liberalism, 92 J. PHIL. 109 (1995); John Rawls, *Reconciliation through the Public Use of Reason*, 92 J. PHIL. 132 (1995).

64. DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 41–43.

dealing with moral deliberation than do procedural or constitutional democracy.[65] From a deliberative perspective, a citizen offers reasons to support adoption of some law or policy that are acceptable to others who, in turn, are also motivated to find reasons for their preferred policies that are acceptable by others.[66] This is Gutmann and Thompson's principle of reciprocity.

An important implication of the reciprocity principle is that deliberation—that is, the process of mutual reason-giving among suitably motivated citizens—should take place not only in the privacy of citizens' homes or in their solitary reflections but also in public political forums.[67] Reasoned consensus about the laws and policies required by justice or by the common good is a normative ideal that actual deliberative democratic processes should approximate as closely as possible because the advantages of deliberative democracy are realized in actual social interactions, not in hypothetical thought experiments.[68] For deliberative democrats like Gutmann and Thompson, hypothetical justifications like those offered by social contract theories are not sufficient to justify imposing laws and social policies on citizens.[69] Such hypothetical justifications may play a part in the moral reasoning that citizens employ in the course of their private reflections, but that moral reasoning must be subjected to the test of actual deliberation among actual citizens if it is to justify laws and institutions to which citizens are subjected. For deliberative democratic theories, actual political deliberation is necessary to justify laws actually in force and to make them legitimate. Thus, one seeking to integrate the insights of constitutionalism and deliberative democracy must reject any appeal to mere hypothetical deliberation in order to preserve the values produced by actual deliberation.

65. Gutmann and Thompson identify four reasons why deliberative democracy deals best with fundamental moral disagreement. Deliberation (1) "contributes to the legitimacy of decisions made under conditions of scarcity"; (2) encourages citizens "to take a broader perspective on questions of public policy than they might otherwise take"; (3) "clarif[ies] the nature of moral conflict, helping to distinguish among the moral, the amoral, and the immoral, and between compatible and incompatible values"; and (4) "increases the chances of arriving at justifiable policies" over other decision-making procedures. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

C. Public Reason and Constitutional Rights

Both constitutional democracy and deliberative democracy recognize individual rights and liberties but provide different justifications for them. The two conceptions of democracy will conflict only to the extent that the rights they recognize diverge, so one potential strategy for harmonizing them is to show that the sets of foundational rights and liberties provided for by constitutionalism and by deliberative democracy are coextensive.[70]

To understand just what this ambitious strategy must achieve, we should recall the differential roles rights play under rival democratic theories. Procedural accounts conceive democracy solely as a political decision-making process employing majority rule, but procedural democrats still must recognize those basic political rights designed to ensure that political decisions reflect the popular will.[71] Constitutional democrats recognize political rights that constrain the popular will, but they also recognize a robust range of political, civil, social, and perhaps economic rights thought basic to the ideal of free and equal human beings. The rights associated with constitutional democracy include the whole panoply of liberal rights, and these rights enjoy priority over democratic processes. Constitutionalism does not specify any particular normative theory to justify these rights, and their justification is located outside of the political process.[72] Deliberative democracy might be viewed as a kind of *via*

70. Some deliberative democrats argue that deliberation entails a robust set of individual rights. For examples, see DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 199–229; WHY DELIBERATIVE DEMOCRACY?, *supra* note 29, at 23–26, 102–10, 136–38; HABERMAS, *supra* note 6, at 123; Cohen, *Democracy and Liberty*, *supra* note 4, at 185.

71. Procedural democrats thus recognize basic political rights like universal franchise and the equal right to vote and hold political office. Often they also recognize other political rights deemed necessary to establish and to maintain the political decision-making process, including freedom of political speech, freedom of the press, the right to form and to join political parties, freedom of assembly, the right to present grievances to the government, and (in some accounts) certain protection from discrimination against minority groups. *See generally* ELY, *supra* note 2.

72. Such rights often include the freedoms of thought, speech, press, religion, and association; the right to hold personal property; a right to liberty and the security of the person (including rights against torture or cruel, inhumane, or degrading treatment and against arbitrary arrest or detention); rights to equality and equal protection of the law; and so on. But constitutionalism is not committed to any particular foundational theory to justify these rights. The liberal constitutionalist might appeal to a Lockean theory of individual rights that takes them as something like moral primitives, *see, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977), or to a Kantian principle that autonomous agents are entitled to equal

media between purely procedural conceptions of democracy and constitutional accounts.[73] Like procedural accounts, deliberative democracy does not appeal to any antecedent normative theory to justify individual rights and liberties, instead recognizing those rights that can be justified from within the theory of deliberative democracy, that is, those rights integral to the deliberative decision-making process itself. But, like constitutional accounts, some deliberative conceptions entail not only the relatively limited range of procedural rights of political participation, but also those substantive liberties and opportunities necessary for citizens to take part in democratic deliberation as equals. Deliberative democracy thus may defend a robust set of rights, because it requires both political and social conditions in which democratic citizens can achieve the status of political equals and be capable of identifying and voting for what promotes the common good.

But the prospects for deliberative and constitutional principles generating the identical set of political, civil, and social rights do not seem promising. For one thing, there is no canonical set of individual rights and liberties that constitutionalism requires, so it is impossible to say in advance just which rights deliberation must be capable of justifying. Must it be capable of generating a right to religious freedom? To own private property? To be free from unreasonable search and seizure? To confront adverse witnesses in a criminal proceeding? Since constitutionalism does not itself specify any particular rights, any effort to prescribe some fixed set of individual rights and liberties deemed essential to the constitutional way of thinking is bound to be ad hoc. Moreover, deliberative democrats themselves do not all speak with one voice concerning the social and political conditions that must be in place for deliberative processes to function properly. Indeed, some do not address the question at all. Since both constitutional and deliberative rights are so much a function of the particular version of each theory, any attempt to describe a general strategy for reconciling

respect, *see, e.g.*, WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989), or to a contractarian theory that derives liberal rights from the hypothetical agreement of rational and self-interested persons, *see, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971), or even to the utilitarian principle that laws and policies should be designed to maximize human happiness or welfare.

73. *See, e.g.*, DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 39–49.

constitutionalism with deliberative democracy by showing that they both entail the same set of rights is not likely to succeed.

More importantly, there is very good reason to think that deliberative democracy lacks the resources necessary to generate *constitutionally entrenched* rights. For deliberative democrats, political decisions earn their legitimacy by means of the process of public deliberation. The idea of public reason requires that democratic citizens promote their preferred political outcomes by appealing only to reasons that other free and equal citizens can reasonably accept. This public reason principle excludes from public deliberation considerations peculiar to any particular moral, religious, or philosophical perspective. But no matter how robust this principle may be, it cannot produce individual rights that are insulated from ordinary politics as constitutionalism requires. Although it takes some reasons off the political agenda, it still admits the possibility of abrogating individual rights a constitutionalist would regard as inviolate.

To see why deliberative democracy cannot produce constitutional rights, consider Gutmann and Thompson's account of public reason and the right of religious freedom. Gutmann and Thompson's influential version of deliberative democracy recognizes a robust and expansive set of basic rights and liberties, so their account of public reason provides an excellent test case.[74] Moreover, although there is no canonical list of constitutional rights, freedom of religion is both widely recognized and reasonably uncontroversial. Although it is not a political right, freedom of religion is more closely associated with civil rights with a political component (like freedom of speech) than are other rights (like private property or freedom from arbitrary detention). So, if Gutmann and Thompson's account of deliberative democracy is not capable of generating an inviolate right to freedom of religion, then we have a compelling reason to doubt that deliberative democracy and constitutional democracy are likely to recognize the same rights and liberties.

As we already have seen, Gutmann and Thompson's principle of reciprocity is fundamental, for it determines the scope of public reasons and therefore the kinds of substantive principles belonging in a deliberative democratic theory.[75] Their reciprocity principle has two

74. *Id.*

75. *Id.*

requirements, one moral and one empirical. The moral requirement provides that "[w]hen citizens make moral claims in a deliberative democracy, they appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated."[76] Reciprocity demands that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact. The aim of the reciprocity principle is to help citizens seek political agreement on the basis of principles that can be justified to other citizens who share the aim of reaching such an agreement. It requires that citizens or their representatives actually seek to give one another mutually acceptable reasons to justify the laws they adopt.[77] The empirical requirement supplements this understanding. It states: "When moral reasoning invokes empirical claims, reciprocity requires that they be consistent with relatively reliable methods of inquiry."[78] Proponents of laws, institutions, and policies may not appeal to authority that is in principle resistant to the standards of logical consistency or to reliable methods of empirical investigation that should be mutually acceptable to all citizens.

Can this reciprocity principle generate an inviolate right to religious freedom? To be sure, it does rule out some kinds of arguments for the abridgement of religious liberty. Suppose, for example, that a religious majority—for example, Roman Catholics—propose legislation requiring all citizens to be Roman Catholics and forbidding the practice of any other religion. The argument offered in support of this religious legislation is that Roman Catholicism is the one true religion, and the evidence adduced in support of this claim is the testimony of the Holy Scriptures and the teachings and traditions of the Church. Such an argument surely will fail the reciprocity test, for the reasons given would not be "mutually acceptable." A citizen who does not already share a commitment to the Roman Catholic faith would not find appeals to its authoritative writings and teachings relevant; they would not count as the kinds of reasons he could accept and so would violate the reciprocity restriction. Gutmann and Thompson themselves seem to have this kind of argument in mind when they conclude that "any claim fails to respect reciprocity if it imposes a requirement on other citizens to

76. *Id.* at 55.
77. *Id.* at 52–55.
78. *Id.* at 56.

adopt one's sectarian way of life as a condition of gaining access to the moral understanding that is essential to judging the validity of one's moral claims."[79] Thus, a legislative initiative curtailing freedom of religion would be foreclosed by the reciprocity principle to the extent that it depends on arguments making essential reference to the content of a particular religious faith.

But now suppose proponents of the legislation make a different kind of argument. The Roman Catholic majority propose legislation compelling conversion to Roman Catholicism and banning other religious practices by appealing not to the tenets of Roman Catholicism but instead to principles of civic republicanism. One function of government, they argue, is to preserve social stability and to promote social cohesion and cooperation. One, perhaps the best, way to achieve these goals is to establish a strong, unified moral and religious code that binds together the disparate elements of the political community. Their reasoning might resemble that of Justice Felix Frankfurter in *Minersville School District v. Gobitis*.[80] The case involved two children of Jehovah's Witnesses expelled from public school for refusing to salute the flag as required by a state statute.[81] The parents challenged the flag salute statute on the grounds that it violated their religious beliefs; but, in an opinion by Justice Frankfurter, the Court upheld the legislation as a legitimate way to cultivate the identity of citizens as a community.

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create the continuity of a treasured common life which constitutes a civilization.[82]

Supporters of the hypothetical religious legislation might argue that its purpose is like the purpose Frankfurter identified for the flag salute statute: to promote a unity of spirit among the citizenry and to inculcate feelings of loyalty and commonality that will bind fellow

79. *Id*. at 57.

80. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

81. *Id*. at 591–92.

82. *Id*. at 596.

citizens to one another.[83] What motivates the choice of Roman Catholicism as the religion to achieve this unifying purpose is that, since the majority of citizens already are Roman Catholics, fewer people will be inconvenienced by the legislative mandate.

This civic republican argument for abridging religious freedom appears to satisfy Gutmann and Thompson's reciprocity principle. The argument contains four premises: (1) a proper function of government is to promote social cohesion; (2) a single religious practice has a certain efficacy in achieving that goal; (3) minimizing "inconvenience" to citizens is an appropriate basis for choosing among competing social policies; and (4) compelling conversion to the majority religion minimizes personal and social disruption. Certainly none of these claims requires citizens to adopt any particular sectarian view in order to gain an appreciation of the moral, political, or factual claim being asserted. To the contrary, each of them is "accessible to others," just because it is the kind of "mutually acceptable" reason that can be accepted by a citizen who is motivated to find reasons that are acceptable to others. Premises (1) and (3) certainly are normative claims, but they appeal to values that could be accepted by all citizens. In this respect, they represent claims that can be assessed and accepted by persons who are sincerely committed to any number of religious or secular ways of life. Premises (2) and (4) are empirical claims, but they surely are "consistent with relatively reliable methods of inquiry."[84] For example, whether compulsory establishment of a single religion promotes social cohesion in a morally and religiously pluralistic society seems to be the kind of factual question that standard anthropological, sociological, and historical methods of inquiry are suited to answer. The civic republican argument may be deeply flawed; one or more of its premises may be false, or the argument may fail to take into account other relevant considerations. But the reciprocity principle allows it a place in the public's deliberations, and a popular majority might be persuaded by it.

If these observations are right, then one important, well-developed, and influential version of deliberative democracy that recognizes a rich array of traditional liberal rights cannot guarantee a right to religious freedom that is invulnerable to ordinary politics.

83. *Id.*

84. DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 56.

Since that right is one of the relatively uncontroversial liberal rights recognized by constitutionalists, there is at least one very important point of divergence between the deliberative and constitutional versions of democracy. We also may suspect that, if deliberation is not rich enough to generate an inviolate right of religious freedom, it also may not have the capacity for generating other well-established constitutional rights. In short, it appears that the strategy for accommodating constitutionalism and deliberative democracy by appealing to the identity of constitutional and deliberative rights cannot succeed.

Before concluding this section, I should draw attention to an additional feature of deliberative democracy that undermines the identity of rights strategy. Deliberative democracy takes the view that all principles are provisional and subject to revision by means of the deliberative process. This commitment to provisionality requires that deliberative democracy subject its own principles, as well as other moral principles, to critical scrutiny. Thus, the possibility of revision applies not only to the substantive principles that deliberative democracy might generate, but also to the practice of deliberation itself. The principle of deliberation calling for the giving of moral reasons in public is not beyond reasonable disagreement, and some might claim that self-interested bargaining is superior to deliberative politics as a method for resolving moral and political disagreement. This is the kind of moral claim that should satisfy the reciprocity principle; and, should it carry the day, a democratic majority might choose to abandon deliberative decision-making processes in favor of interest-oriented bargaining. The implication of this feature for our present inquiry is this: even if the concept of deliberation were capable of generating a set of substantive rights and liberties that mirrored those recognized by constitutionalism, the deliberative principle itself is not immune from abrogation within everyday politics. If public deliberation and the reciprocity principle are vulnerable to the popular will, then whatever substantive rights that inhere in them are similarly vulnerable. As a consequence, even if the public reason principle had the resources necessary to produce an inviolate right to religious freedom (or any other constitutional right), its own vulnerability means that it cannot insulate individual rights and liberties from everyday politics in the way that constitutionalism requires.

D. Deliberation and Constitutional Moments

Deliberative constitutionalists might seek to harmonize deliberative and constitutional principles by confining deliberative processes exclusively to occasions for constitution making. Although constitutionalism presupposes that individuals have rights that government should not abridge and seeks to protect those rights by creating entrenched legal rules, it says nothing about the processes by which those constitutional limitations are adopted in the first instance. In addition, constitutionalism admits to the possibility of constitutional amendment by some extraordinary legal or political mechanism operating outside routine majoritarian politics.

Deliberative democrats therefore might avoid the conflict between constitutional and deliberative principles by claiming that deliberation guided by public reason should not be the normal mode of governmental decision making but instead should be limited to constitutional affairs. There will be no inconsistency between constitutional principles and deliberative democracy if deliberative democratic processes operate only within original constitutional conventions and constitution-amending proceedings and not within ordinary, day-to-day political processes. Democratic deliberation over what individual rights should constrain state action that takes place only within the founding constitutional convention or within the constitutionally prescribed amendatory process does not offend the constitutional tenet that such rights be immune to revision by ordinary legislative or other political processes.

In fact, some writers committed to both the values of constitutionalism and to those of deliberation are willing to restrict deliberation to constitution-making occasions. For example, Bruce Ackerman's dualist account of American constitutional democracy distinguishes between *normal politics*, in which the government makes decisions, and *higher lawmaking*, in which the people make decisions.[85] Ackerman recognizes that neither citizens nor their elected representatives are always or solely motivated by private advantage when conducting normal politics.[86] Nevertheless, people engaged in the processes of ordinary political decision making are often apathetic, ignorant, and selfish.[87] By contrast, the processes

85. ACKERMAN, FOUNDATIONS, *supra* note 6, at 230–65.

86. *Id.*

87. *Id.*

associated with higher lawmaking provide the kind of deliberative forums that support widespread and sustained public consideration of measures in terms of their contribution to the public good.[88] On this dualist account, only transformative national crises like the Constitutional Founding, the Civil War, and the New Deal can and do elicit deliberation among the American people as a whole.

But Ackerman's reason for limiting deliberative processes to such "constitutional moments" is not to preserve the conceptual consistency between constitutional and deliberative principles, but to avoid the practical limitations associated with deliberation. He recognizes that private citizens have other values and interests—family, friends, work, religion, hobbies, civic activities, and the like—that make legitimate claims on their time and energy, so that the capacity to deliberate concerning the public good is a scarce resource. So, for Ackerman, reasons of economy dictate that most public policy issues and most lawmaking occasions cannot and should not be subjected to deliberative processes.[89]

In any event, this two-track approach limiting democratic deliberation to constitution-founding and constitution-amending events cannot solve the conceptual problem with which we are concerned, for it purchases consistency at too high a price for deliberative democracy. The most robust versions of deliberative democracy hold that deliberation should orient and pervade all institutions, certainly all political institutions, at all times. Gutmann and Thompson, for example, emphasize the importance of deliberation in the ongoing processes of routine political activity, what they call "middle democracy."

> It is in middle democracy that much of the moral life of a democracy, for good or ill, is to be found. This is the land of everyday politics, where legislators, executives, administrators, and judges make and apply policies and laws, sometimes arguing among

88. *Id*. at 266–94. David Gauthier also defends a dualist view in which deliberation operates only in constitution-making events, whereas ordinary lawmaking rests on strategic self-interest. *See* David Gauthier, *Constituting Democracy*, *in* THE IDEA OF DEMOCRACY 314 (David Copp, Jean Hampton & John E. Roemer eds., 1993).

89. As Ackerman puts it, "Quite simply, American citizens don't work equally hard all the time. This point lies at the foundation of the two-track lawmaking system. The higher lawmaking track is designed to structure deliberation when we are working especially hard and productively as citizens; the normal lawmaking track, when we are not." ACKERMAN, FOUNDATIONS, *supra* note 6, at 299.

> themselves, sometimes explaining themselves and listening to citizens, other times not. Middle democracy is also the land of interest groups, civic associations, and schools, in which adults and children develop political understandings, sometimes arguing among themselves and listening to people with differing points of view, other times not. It is a land that democrats can scarcely afford to bypass. A democratic theory that is to remain faithful to its moral premises and aspirations for justice must take seriously the need for moral argument within these processes and appreciate the moral potential of such deliberation.[90]

The high value deliberative democrats ascribe to deliberation explains why it cannot be relegated only to constitutional founding and amending events. To be sure, deliberative democrats value deliberation for different reasons. Some emphasize its epistemic reliability. They contend that public deliberation should be the governing ideal for democratic politics, because it is the best or the only means available for ascertaining the truth about the common good and for establishing laws and policies that best promote it. Others identify deliberative decision making in a democracy as a basic moral ideal. They hold that public deliberation about the common good is a basic feature of a well-ordered society, because it is part of "an independent and expressly political ideal that is focused in the first instance on the appropriate conduct of public affairs—on, that is, the appropriate ways of arriving at collective decisions."[91] Still, other deliberative democrats appeal to the idea of public reason and claim that institutional principles must be justifiable in terms acceptable to free and equal citizens. For them, public deliberation is a requirement of political legitimacy. Governmental action must be justifiable according to considerations all citizens can reasonably accept if it is to respect their political autonomy, and a deliberative democracy increases the prospects that political power will be exercised consistently with these public reasons.

However much these accounts may differ in where they locate the value of deliberation, confining it to the domain of constitutional politics would deprive deliberative democracy of one of its central insights. Any theory of deliberative democracy that limits deliberation to constitutional moments will deprive everyday politics

90. DEMOCRACY AND DISAGREEMENT, *supra* note 4, at 40.

91. Cohen, *Democratic Legitimacy*, *supra* note 35, at 71.

of their epistemically most reliable foundations or will leave them to offend against an important moral ideal or will render them politically illegitimate, depending on the justificatory argument on which it is grounded. For deliberative democrats, deliberation is too valuable for it to be excluded from the processes of ordinary political activity. Limiting its role only to constitution-making events therefore entails too great a sacrifice.

E. Constitutional Entrenchment and Deliberative Amendment

Having considered several unsuccessful strategies for reconciling constitutionalism with deliberative democracy, we now turn to how that reconciliation can be accomplished. To recapitulate, the problem confronting the deliberative constitutionalist is that constitutionalism stipulates that some matters, like those involving certain fundamental rights, are simply beyond the reach of the popular will acting within ordinary political processes, while deliberative democracy requires that all procedural and substantive principles of political morality are subject to consideration and revision within deliberative democratic processes. The solution to this apparent dilemma recognizes that constitutional and deliberative principles converge at the very point at which they are in tension. Constitutionalism insulates individual rights from "the vicissitudes of political controversy," but it does not require their being entirely immune to revision. Conversely, deliberative democracy treats individual rights as morally and politically provisional, but it does not require that every principle of rights or justice be subjected to endless reconsideration and alteration.

Consider the first point. Constitutionalism puts fundamental rights outside the range of everyday politics, because they must be entrenched beyond any alteration that could be effected by the ordinary expression of political will if they are to function as effective limits on legislative and other exercises of governmental power. But that constitutional provisions must be difficult to change does not entail that they must be impervious to change. After all, constitutions are human contrivances; and, since human beings are fallible and susceptible to error, both the normative and empirical judgments on which constitutional principles are built may prove to be mistaken. The fundamental moral and political value judgments underlying the original constitutional configuration could change, so that the existing constitutional instrument no longer expresses the

most deeply held convictions of the people it governs. Moreover, citizens' perceptions of appropriate social goals and of institutional efficacy may change, so that what seems reasonable, desirable, and constitutionally required at one time may appear unsound or otherwise inappropriate at another. Furthermore, changes in social, political, or economic conditions may render the constitutional instrument obsolete as a means for achieving its fundamental purposes; or executive, legislative, or judicial decisions rendered within the constitutional order may have produced unanticipated ill effects that require remediation. Constitutionalism thus recognizes a power to alter or amend the provisions of the constitutional instrument. To be sure, it entrenches certain basic political institutions and individual rights, but it does so only to insulate them from the processes of *everyday* political decision making. The constitutional entrenchment principle leaves room for modifying constitutional limitations on the popular will, for all it requires is that constitutional rules may be modified or repealed only by recourse to a special, extraordinary, and more onerous amendatory procedure and not by the normal legislative process.

The provision for modification or amendment is not just a principle of constitutional theory but also a pervasive feature of constitutional practice. The constitutional text of every major nation expressly provides some mechanism for its own amendment, although the degree of difficulty in effecting an amendment varies widely among the various constitutional instruments. Two of the most deeply entrenched and difficult to amend constitutions are those of the United States and Australia. In the United States, a constitutional amendment requires passage by two-thirds of both houses of Congress and ratification by the legislatures or conventions in three-fourths of the states, or two-thirds of the state legislatures calling for a convention to propose amendments followed by the approval of three-fourths of the state legislatures or conventions.[92] The Australian Constitution requires that amendments be approved by both chambers of Parliament or by either chamber twice, followed by ratification by a nationwide majority of voters and by a majority of voters in a majority of each of the states and territories.[93] By contrast, some constitutions make amendments only slightly

92. U.S. CONST. art. V.

93. AUSTL. CONST. ch. VIII, § 128.

more difficult to enact than ordinary legislation. The Polish Constitution, for example, requires that amendments "be adopted by the House of Representatives by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators;"[94] while the Hungarian Constitution requires only the affirmative votes of "two thirds of the Members of Parliament" to approve an amendment.[95] Just how deeply entrenched any particular constitution should be will presumably be a function of the social, political, economic, and cultural conditions prevailing in the adopting state.[96] But the hallmark of constitutionalism is that there is a difference between the procedures by which ordinary legislation may be adopted and those relatively more demanding procedures by which the constitution may be modified, and even those modern constitutions providing for relatively lax amendatory procedures observe this distinction.

But deliberative democracy is no more committed to endless revisability than constitutionalism is to irreversible entrenchment. In part, deliberative democracy regards popular decisions as provisional for the same reasons constitutions provide for their own amendment: our knowledge and understanding are incomplete, our decision-making institutions imperfect. But its public reason principle and the idea of reciprocity also entail that democratic decisions be provisional. As we have seen, deliberative democrats require citizens to justify the laws they impose on one another by appealing to reasons that free and equal citizens can reasonably accept. To treat others as equals in the decision-making process, citizens are obligated to provide reasons for the laws, institutions, and policies that affect them, which they can regard as acceptable from the perspective of their differing moral, religious, and philosophical

94. KONSTYTUCIA RZECZYPOSPOLITEI POLSKIEI [Constitution] ch. XII, art. 235 (Pol.).

95. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. II, art. 24(3) (Hung.).

96. For example, some have argued that the relative ease with which some Eastern European constitutions may be amended is appropriate for those emerging democracies that must respond to rapidly changing conditions and whose democratically elected legislatures have yet to win full legitimacy. *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275, 282–88 (Sanford Levinson ed., 1995).

views. Just as citizens must give only reasons others could reasonably accept, so also they must be receptive to similarly acceptable reasons offered by their fellow deliberators and must acknowledge that the view they reject today may prove right tomorrow.

> The process of mutual reason-giving further implies that each of the participants involved should take seriously new evidence and arguments, new interpretations of old evidence and arguments, including moral reasons offered by those who oppose their decisions, and reasons they may have rejected in the past. . . . One implication is that citizens and their accountable representatives should continue to test their own political views, seeking forums in which their views can be challenged, and keeping open the possibility of their revision or even rejection.[97]

This openness to revision or rejection over time required by the process of mutual reason-giving allows that some issues of social or political policy will be more firmly settled than others. It certainly does not demand that citizens perpetually revisit every decision. Once a matter has been submitted to deliberative processes, citizens may properly determine that it has been more or less conclusively resolved and should be removed from the active political agenda. Deliberative citizens might be expected to conclude that there is little reason anytime soon to reconsider whether slavery should be prohibited or whether all adult citizens should have the right to vote or whether persons should be permitted to worship as they see fit. Where all the known arguments have been fully considered, the most compelling moral reasons line up on one side of the issue, and the relevant empirical issues are not open to serious dispute, deliberation may produce a near-universal consensus about what justice requires or what rights people should have. In such cases deliberative citizens also may determine that one or more of the reasons for constitutional entrenchment are implicated, so that the decision they reach should be put beyond the reach of normal politics and not be vulnerable to change without recourse to the more demanding processes in place for constitutional amendment. For other matters—in our times, abortion and same-sex marriage may be such cases—the weight of moral reasons on all sides of the issue, the widespread disagreement remaining after deliberation, and the uncertainty about important biological or sociological questions might well lead

97. WHY DELIBERATIVE DEMOCRACY?, *supra* note 29, at 111.

citizens committed to the value of reciprocity and the process of mutual reason-giving to conclude that any political decision should remain fully provisional. For our present purposes the essential point is that the deliberative democrat's commitment to provisionality is compatible with the constitutional entrenchment principle.

Recognizing that constitutional principles allow for amendment by extraordinary means and that deliberative principles admit to treating some moral and political decisions as settled opens up space within which constitutionalism and deliberative democracy may operate without conflict. For them to do so, the deliberative democrat must acknowledge this modest limitation on provisionality; namely, that the various restraints provided by constitutionalism—including constitutionally protected individual rights—be amenable to revision only by means of the extraordinary processes specified by the constitution and not by means of the ordinary processes by which routine political decisions are made. This more modest version of deliberative democratic principles leaves plenty of opportunity for deliberative processes to operate. Citizens may engage in public deliberation with respect to all ordinary legislation, institutions, and social policies. Democratic deliberation also may take place with respect to whether to initiate the constitution-amending process; and, once the amendatory process begins, deliberative decision-making principles may guide citizens in determining whether to modify the set of constitutionally specified governmental powers, reconfigure the political arrangements that operate as constraints on the exercise of those powers, or redefine the fundamental rights and liberties that demarcate the limits of appropriate governmental action. But what the deliberative constitutionalist cannot coherently permit is the alteration or abrogation of those constitutionally entrenched powers, institutions, processes, and individual rights without making use of the comparatively more onerous procedures required for constitutional amendment. Consistency between constitutionalism and deliberative democracy can be achieved, but only so long as constitutionally protected rights cannot be curtailed or eliminated by means of routine deliberative politics.

This strategy preserves consistency between the principles of deliberative democracy and constitutionalism without compromising either the values that deliberation is said to promote or the purposes for which constitutional entrenchment is designed to achieve. Democratic citizens and other political actors will engage in public

discussion and mutual reason-giving both in normal political decision making and in the constitutional amendatory process. The values of deliberation—its epistemic reliability, its contribution to the ideals of a well-ordered society, or its role in sustaining political legitimacy—therefore will be present in both normal and constitutional politics. Constitutionally entrenched institutional structures, political processes, and individual rights whose function is to constrain government action will remain subject to deliberative democratic processes, just as the deliberative democrat insists; but those constraints will be amenable to alteration or elimination only at the level of constitutional politics and not at the level of routine politics. Although constitutional rights will be vulnerable to change by the people deliberating, requiring recourse to the relatively more demanding processes in place for constitutional amendment renders them no more vulnerable to the impulsive behavior of popular majorities and the self-serving conduct of government officials than constitutionalism itself already allows.

V. CONCLUSION

My goal in this Article has been modest. I have not set out to justify either constitutionalism or deliberative democracy or to show that the deliberative constitutionalist project successfully exploits the strengths of each without falling victim to the weaknesses of either. Instead, I have sought only to discover whether constitutional and deliberative principles can be coherently integrated and have found that they can. Nevertheless, the three principal conclusions produced by this inquiry have implications for the deliberative constitutionalist project.

First, deliberative democracy's requirement that citizens and other political actors seek to adopt laws and policies calculated to promote the common good does not conflict with constitutionalism because constitutionalism is not necessarily committed to the view that political actors should act to promote individual or group interest when doing so. Since the most plausible justifications for democracy built on constitutional foundations are non-utilitarian, constitutional democrats will readily reject the preference-aggregating model of democratic decision making that would produce a contradiction. Accordingly, deliberative constitutionalism can retain the common good principle, since *constitutional* democracy is more compatible with political actors being obligated

to promote the common good than it is with their pursuing their self-interested goals.

Second, deliberative democracy's preference transformation principle coheres with constitutionalism, because any democratic theory will be entirely indifferent to whether the self-interested preferences of citizens remain fixed or be open to change during their political interactions, so long as that theory requires political decision makers to promote their judgments of the common good rather than their own self-interest. The common good principle makes the preference transformation principle an entirely expendable feature of deliberative democracy, despite the prominent place the latter has in many deliberative democratic accounts. Moreover, the preference transformation principle poses no logical obstacle for the deliberative constitutionalist project, since whether citizens' self-interested preferences remain fixed or mutable will also be irrelevant for any constitutional account holding that political actors should be motivated by the common good. Although the preference transformation principle poses no risk of contradiction with constitutional principles, it is superfluous. Therefore, a deliberative constitutionalist theory of democracy—indeed, for that matter, any deliberative democratic theory—can abandon it without loss.

Finally, deliberative democracy's public reason principle and its corollary holding that all procedural and substantive issues, including what individual rights should be regarded as fundamental, are provisional and open to revision pursuant to deliberative processes do not contradict constitutionalism's commitment to the entrenchment of individual rights. The purpose of constitutionalism's entrenchment principle is to remove decisions about fundamental rights from the ordinary political arena. Nevertheless, constitutional entrenchment is compatible with altering or abrogating even the most fundamental rights, provided it can be accomplished only by means of the comparatively more rigorous and exacting procedures established for amending the constitution. At the same time, deliberative democracy is amenable to treating some deliberative decisions as reasonably settled. Although deliberative democracy's public reason principle entails that political actors must be prepared to recognize that a decision reached at one time may have been wrong and so must be open to revision, this commitment to provisionality does not foreclose the possibility of treating some political decisions as revisable only by

means of those extraordinary amendatory processes. Matters of public policy as to which the empirical and moral issues appear to be well settled and not subject to reasonable disagreement may be suitable for constitutional entrenchment. The apparent contradiction between deliberative democracy's commitment of provisionality and constitutionalism's commitment to entrenched rights can be dissolved, therefore, if deliberative constitutionalism recognizes that constitutionally protected rights reside outside the domain of ordinary politics and may be abrogated or modified only by those means established for amending the constitution. This modest proviso to deliberative democratic principles should be unobjectionable to both deliberative and constitutional democrats, for it fully preserves the benefits of deliberation without undermining the purposes of constitutional entrenchment. Indeed, this minor concession to constitutional principles is compatible with the spirit of accommodation and compromise, which are the hallmarks of deliberative democratic theory.