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Demystifying Social Welfare: Foundations for Constitutional Design

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**DEMISTIFYING SOCIAL WELFARE: FOUNDATIONS
FOR CONSTITUTIONAL DESIGN**

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NORMAN FROHLICH**

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This work was greatly assisted by the opportunity we had to work with Gillian Brock at the University of Auckland. She had the insight to push the literature on needs into our framework, and the Auckland Philosophy Department afforded us a wonderful environment to consider these questions. Earlier, our work with Eduardo Frajman was crucial in developing our thinking regarding the relationship between democracies and welfare. The Universities of Manitoba, Maryland, and Montreal all have helped support this research over various time periods, as has the Social Sciences and Humanities Research Council of Canada. Comments by Karol Soltan, Peter Levine and other members of the Maryland CP4 Workshop were very helpful. Drafts were presented at the Faculty Research Seminar, Philosophy Department, University of Auckland; the 11th International Social Justice Conference, Humboldt-Universität zu Berlin, August 2-5, 2006; and the Maryland Constitutional Law Schmooze, University of Maryland School of Law, Baltimore, Maryland, December 1-2, 2006.

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Determining how to change and evaluate the performance of political institutions, rules, and constitutions requires a theoretical conception of what performance is and how it can be measured. But political performance has many different aspects: economic performance, delivery of social welfare, citizen satisfaction, durability, etc. The initial problem we face, then, is the selection of basic performance criteria that can be tied into a coherent and justifiable whole. Only after the selection of such criteria does it make sense to move on to the tasks of performance measurement, institutional evaluation, and proposals for constitutional change. In this Essay, we explore the difficulties of constructing such a metric, propose a relatively simple solution, and develop some early indications of how the metric might be operationalized.

Our starting point grows out of the theories of democracy, political economy, social choice, and distributive justice. In these fields, the welfare of the members of a society (in the aggregate referred to as “social welfare”) has a primary position in the evaluation of that society’s performance. The empirical motivation for this project was a simple and uncomfortable observation: although the established developed liberal democracies do not vary enormously in the rights they afford citizens, their per capita incomes, or their long-term economic growth rates, they *do* vary considerably in the physical, social, and economic safety they afford their citizens. This is partially reflected in the diversity of income and wealth distributions within their populations, their vastly differing incarceration and murder rates, their varying life expectancies, etc. These considerable differences in how democracies treat their citizens (especially their needy citizens) are a basic marker of their delivery of aggregate social welfare. From that perspective, social welfare is linked to social justice via the central role played by the satisfaction of basic needs. Hence,

by focusing on needs, this Essay touches upon some of the normative and theoretical chestnuts in the literature of social justice and social welfare and develops implications for constitutional evaluation and institutional reform proposals.

Our tactic is to build on the notions of Harsanyi¹ and Rawls,² both of whom argue that social justice must be understood through a lens of impartial reasoning. This leads one to regard citizens' rights and economic welfare as of foremost concern. Our own empirical work on impartial reasoning and social justice led to a focus on a sustainable minimum or floor.³ Gillian Brock has recently reinterpreted this in terms of needs.⁴ We follow her lead. By focusing on needs as a foundational aspect of social welfare, we will argue (along with Braybrooke)⁵ that two of the biggest conundrums of the social choice literature can be partially avoided: one need not have direct interpersonal comparability of individuals' welfare writ large, nor does one need to directly confront Arrow's famous impossibility result.⁶

If fulfilling basic needs is an important consequential implication of the normative justification for democracy, then needs satisfaction can be used as a foundational criterion for evaluating the performance of liberal democratic institutions and regimes. Such a move justifies a scale of basic need satisfaction as a metric for

1. John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 434–35 (1953) (noting that analysis of satisfaction in welfare economics requires an analysis of choice under conditions of risk and incomplete information).

2. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 14–19 (Harvard Univ. Press 1999) (1971) (discussing a theory of justice based upon concepts of rational decision making at an abstract level).

3. NORMAN FROHLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY* 35 (1992) (arguing that the most just distribution of income is that which individuals actually select under conditions of impartiality: i.e., where individuals set a floor constraint and then allow for maximization of income) [hereinafter *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY*]; see also Norman Frohlich & Joe A. Oppenheimer, *Choosing Justice in Experimental Democracies with Production*, 84 AM. POL. SCI. REV. 461 (1990) (discussing the outcome of various experiments that analyze the floor constraint principle in an attempt to identify a sustainable floor) [hereinafter *Choosing Justice in Experimental Democracies with Production*].

4. Gillian Brock, *Needs and Global Justice*, in *THE PHILOSOPHY OF NEED* 51, 51 (Soran Reader ed., 2005) (arguing that “needs are tremendously salient in developing any plausible account of global justice”).

5. See generally DAVID BRAYBROOKE, *MEETING NEEDS* (1987) (articulating a theory of justice and evaluation of social institutions using the concept of basic needs).

6. See Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) (demonstrating the impossibility of a single global societal preference order reflecting the actual aggregate preferences of individual members of the society).

evaluating democratic systems, at least among equally economically developed democratic states. Preliminary examination reveals considerable variability in need satisfaction among the world's developed democracies. This indicates differences in the normative performance of different states and gives a basis for examining the positive links between proposals for constitutional changes and the design of democratic systems.

I. JUSTIFYING DEMOCRACY

In a democracy, the community's political decisions are made by the people living in the state (or the relatively large subset of the adult population constituting its citizenry), or their elected representatives, via some voting procedures. A community's choice is deemed to represent what is good for the community. That communal good is decided by (or in a republican or indirect democracy, it is seriously informed by) the decentralized choices of the individuals within the community. For this method of decision making to make sense, the democratic decisions must be based on matters that can be potentially *knowable by the voter*. This bespeaks of an implicit epistemology regarding the "Good":⁷ no one, in general, is in a better position than the individual voter to gain direct knowledge of what is good (at least for herself) based on observation, discussion, consultation, and inward reflection.⁸ This is not to say that the individual necessarily has full knowledge of what is good for herself. Rather, it assumes that it is better for the individual to exercise her judgment regarding what is best for herself because, *in general*, she *can* have better knowledge than anyone else about her own welfare. One function of democratic processes is to aggregate these individual judgments.

In legitimating these judgments, liberal democracy reinforces the normative assumption that the welfare of individuals constitutes a major component of the societal Good. If the Good is knowable at all in a democracy, it is the individual's right to seek it for herself or to delegate the authority to recognize it to someone whom she reasonably believes has better tools to determine it (a doctor, a politician,

7. Eduardo Frajman, Norman Frohlich & Joe A. Oppenheimer, *Why and How Democracies Limit Pluralism*, Paper Presented at the 2003 Annual Meeting of the Public Choice Society in Nashville, TN (Mar. 21–23, 2003), <http://www.bsos.umd.edu/gvpt/oppenheimer/pluralism.pdf> (defining "the Good" as the welfare of the citizen as interpreted by that very citizen, and examining the role of this notion of the Good as the foundational justification of modern liberal democracy).

8. FREDERICK A. HAYEK, *THE CONSTITUTION OF LIBERTY* 110 (1960) (noting that individuals' information about their own welfare is distributed and decentralized as a matter of principle).

etc.). Implicitly, the welfare of each individual is given equal moral status.

Individual welfare is assumed to be directly reflected in each voter's considered choices. The democratic creed as applied to representative government thus deems the social Good to be more or less an equal function of each citizen's (voting) decisions and the resultant decisions of her elected representatives. It is a function of each citizen's estimation of what is good for her, or, if she wishes, her estimation of what is good for society. The justificatory structure of democracy is built upon these presumptions. That votes are cast on a one-person-one-vote basis implies a moral presumption regarding the equal status of individual welfare in the collective objectives of the society. By legitimating the vote, the state empowers the individual.⁹

But this leaves out the crucial and difficult problem of aggregation. If it evokes the search for the holy grail—a characterization of social welfare in terms of a social welfare function—it leaves out the precise form as well as the question of its achievability.

A. *The Problem of a Social Welfare Metric*

The possibility and impossibility of a social welfare function has been the subject of a celebrated mountain of scholarship that we need not review here. But we shall bring in some threads of that discussion to place our contribution in perspective. Traditionally, and in our argument, the welfare of the collective (the social welfare) is seen as determined by the welfare of the citizens of the society. More precisely, we might say that social welfare (W) is determined by, or perhaps a function of, the welfare of the individuals (w_i) that make up the society, or $W = f(w_1, \dots, w_n)$.

1. *Constraints*

Before continuing, it is important to note the constraints that must be placed on any W for it to make sense as an indicator of the quality of democratic performance. The premises of democracy include the equality of the individual's weight in the collective judgment of the actions of government, and in the protections given from and by government to individual rights. These act as basic constraints to

9. This is a bit of an overstatement. Obviously, the empowerment is limited by the structure of the agenda and the resources made available beyond the vote in order to persuade, cajole, etc. others. And if there is considerable asymmetry in the holdings of resources for communication, it may well be that individuals are given neither sufficient information to know their real welfare interests nor sufficient resources to protect these interests.

any conception of evaluating the performance of democratic governments.¹⁰ Let us explore these constraints a bit further.

To justify government by welfare, given the lessons of the logic of collective action literature, implies that people must have basic civil liberties. Otherwise, the demand for many valued public goods will neither be manifest nor factored into public decision making. Often, groups will not even know that there are common interests without the possibility of free communication. Indeed, this has been made apparent by how the Internet's low communication costs have led to greater awareness of the shared interests of such groups as gays and lesbians and other previously oppressed individuals. For groups to demonstrate the scale of their demands socially and politically, they must be capable of sharing the costs of the political efforts to change the public policies underlying their demands for public goods without undue costs being imposed upon them because of their identity.

In other words, for groups of people to meet their needs over time, they must have the freedom to organize themselves politically. If nothing else, this gives a solid justification for liberal political orders. Of course, there is no "ought" derived without a normative presumption. In this case, the normative presumption, which we argue is inherent in the justification of democracy, is that it is a good thing for people to get their shared needs met. If we subscribe to such values (and most do) then it follows that people ought to have these freedoms. Without such freedoms, even the identity of the shared interests will often remain unknown. This proactive justification for liberties goes beyond a more traditional justification, which turns on the need for "negative" protections from governmental intrusion.¹¹

And, of course, there are other notions of performance that must be considered side-constraints, including stability and a state's ability to defend itself in the face of threats.

2. *Considerations of a Metric*

It is counter-productive to focus only on these side constraints: one man, one vote, and basic liberties for individuals and groups. Any

10. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26-35 (1974) (positing that because individuals' rights must be considered inviolable, they are to be constraints on the state's policies to achieve any ends).

11. A nice way to conceive of the traditional view of any bill of rights is that it is the guarantee of a minimum level of protection against encroachments upon individual rights that citizens know cannot be removed even if they are among the "losers" in the political game. The emphasis we place goes beyond this to note that the guarantees are, importantly, also extended to individuals as groups.

such formulation leaves out the content of welfare and hence does not tell us what we demand of such a metric. Clearly, we will want to be able to make some judgments of form and content when we conclude that one system performs better than another (asserting that $W_1 > W_2$). In other words, we are interested in comparing the political performance of societies with one another. But when we ask what properties we might expect of this scale, we might begin by noting that *completeness* is certainly beyond us. We do not claim that all political systems, or even all democratic political systems, can be compared with one another using the same scale: the performance criteria for a developing democracy (e.g., India) might be quite different from those of a developed one such as Norway. Extraordinary differences in economic circumstances, security situations, ethnic rivalries, and so on may require a fundamentally different weighting of the constraints to the other elements of social welfare, or W . This will leave our comparisons to be solely between developed democracies, all of whom, we shall point out, share a number of major characteristics.

Abandoning completeness, however, does not eradicate all substantial normative tools. Sen argued that in considering how to judge and evaluate a metric for social welfare we might begin by analyzing the concept of best, or maximal, in terms of the properties that we want from such a metric.¹² He proposed two properties (α and β), and then analyzed the two to arrive at some conclusions regarding what is “best.”¹³ He argues that perhaps a common language notion of “best” requires both these properties, and proved that together they imply a full ordering.¹⁴ We have already abandoned completeness in the universal set of concern. To understand what is left, let us consider Sen’s properties.

Alpha is the notion that if something (X) is best among a set of items, if we then restrict our purview to a smaller subset of the items, and if X is in that subset, it must be best in that subset also. Note that this works for all naturally ordered relations such as “higher than” (e.g., McKinley is the highest mountain in North America, thus it is

12. See AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 1–20 (1970) (analyzing what properties we might demand of systems of collective choice and how this relates to our notions of best).

13. *Id.* at 17.

14. *Id.* A full ordering can be illustrated by a relationship such as “at least as hot as.” It implies *transitivity* (if a is at least as hot as b and b is at least as hot as c , then c is at least as hot as a); it implies *reflexivity* (a is at least as hot as itself); and it implies *completeness* in that all objects can be compared with regard to this relation (a is at least as hot as b or b is at least as hot as a).

the highest mountain in Alaska). Such a property may seem quite basic to any notion of best.

Beta has a similar feel: say two options, *X* and *Y*, are tied for best in a subset of available options, and one is best in the universal set. If so, they ought to be tied for best in the universal set. Again, this also works for all naturally ordered relations such as “higher than.” For example, say *X* and *Y* are tied as the hardest metal. Then if we consider a larger set, say woods and metals, if *X* is the hardest substance considered in the larger set, then *Y* is still tied with *X*.

Considering the properties in such an abstract fashion permits us to identify when they might be suspect: when the quality of “best” is a function of the environment within which the selection is made, we might question the two properties. *X* might be the best in the world because of the varied environments of the world. But restricting the environments to those of a subset, even were it to include *X*, may allow *Y* to excel in the subset where the items that detract from *Y*’s performance do not show up. In such a case, *Y* could be best in the subset. And *X*, though best in the wider mix of environs, does not show up as well as *Y* in the restricted set, hence violating Alpha. Similarly, if *X* and *Y* are tied in a subset, it could be that one of them thrives better in the more inclusive or varied environment, hence violating Beta.

The question, then, is the relevance of these properties for comparing democratic system performance across societies in terms of a metric such as *W*. It could be that the system that does best in the subset is trumped at the universal set because the environmental conditions in the universal set are different. Extraordinary differences in economic circumstances, security situations, ethnic rivalries, and so on could lead *W* to violate some of Sen’s suggestions. This might be because *W* may be context dependent—appropriate only for stable, developed democracies, for example. But in the absence of either property, the statement that a system delivers more social welfare becomes uninteresting, for the performance criteria is quite context dependent.

It is for such reasons that we restrict our comparisons to similar societies: the long-standing, advanced, industrialized, stable democracies. It still might be the case that such social properties as differences in the citizens’ ethnic diversity affect the ability of a democratic system to deliver comparable sorts of welfare, but we do not think so. Indeed, we argue that the long-term economic and socio-liberty context of these societies is quite similar, and that they also have moved to-

ward ever-increasing similarity on the ethnic diversity scale.¹⁵ And although one might argue that people in each country have differing desires, people everywhere appear to demand the satisfaction of basic needs. So, within the domain of our concern, it may not be such a daunting task for our metric W to give us some “ordering” of system performance.

B. Problems with Consequentialism for Social Welfare

Of course, it is one thing to argue that democracy can be justified in terms of its beneficial impact on the *individual* citizen’s welfare, and it is quite another to face the problem of what democracy implies for the collective (or aggregate) welfare (W). A claim that democracy is justified by its impact on the collective welfare runs into a brick wall defying both theoretical bashing and scaling.

One element of the wall is the seemingly insuperable problem of the incommensurability of different individuals’ welfare and, hence, the near impossibility of generating measures of aggregate welfare that are comparable across groups or polities. Utilitarianism, the most ambitious attempt to provide such a metric, requires full interpersonal comparability of welfare states. For an individual to accept utilitarianism, that assumption must be accepted. For a society to use it, there would have to be consensus on the metric. Such consensus is clearly not attainable. If one cannot measure overall welfare, it is odd to attempt to justify democracy on the basis of overall, or aggregate, welfare.

The second component of the wall is Arrow’s General Possibility Theorem.¹⁶ Arrow proves that one cannot expect democracy to re-

15. Of course, their historical paths to such diversity differ widely. Only the U.S. had a history of widespread slavery. England, for another example, achieved diversity via quite a different historical path from that of Canada, Australia, and New Zealand.

16. The problems identified in the “social choice” literature present problems for this perspective. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (2nd ed. 1963) [hereinafter *SOCIAL CHOICE AND INDIVIDUAL VALUES*] (proving and discussing the General Possibility Theorem); SEN, *supra* note 12, at 37–46 (discussing and analyzing Arrow’s General Possibility Theorem and its implications); Charles R. Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 *AM. J. POL. SCI.* 511, 517–54 (1976) (same). The unavoidability of cyclical majorities or, alternatively, the surrender of a desirable property of democracy, makes interpretation of political outcomes problematic. Presumptions of probabilistic decision making on the part of representatives or voters permit a reintegration of standard arguments regarding social welfare and individual choice. See DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 214 (rev. ed. 1989) (“[I]f voters reward a candidate who promises them a higher utility, by increasing the likelihood of voting for the candidate, then competition for votes between candidates leads them ‘as if by an invisible hand’ to platforms that maximize social welfare.”); Peter Coughlin, *Expectations About Voter Choices*, 44 *PUBLIC CHOICE* 49 (1988) (analyzing and critiquing existing models predicting

flect the decentralized citizens' preferences adequately and still yield normatively acceptable procedural and outcome qualities.¹⁷ Put simply, one cannot count on any reasonably acceptable democratic decision procedure to reliably produce results reflecting citizens' aggregate welfare in an acceptable way.¹⁸ Indeed, the same holds true if we merely try to mechanically aggregate individual welfare to generate a social welfare function. At least, that is the result if we have no interpersonal comparability.¹⁹

So the two problems with consequentialism for social welfare are related. Scaling this wall without interpersonal comparisons of welfare is high impossible. But we propose to tunnel below it. To tunnel, one has to pay careful attention to the floor. In this case the floor refers to something like a social safety net protecting the basic needs of those who are not well off in society. A relatively recent stream of experimental research and a growing set of philosophical arguments on the normative importance of fulfilling basic human needs provides some perspective on this approach. Indeed, our approach will be to

voter choices). Amartya Sen pointed out that a general restriction of values held by the citizenry would alleviate the problem. Amartya K. Sen, *A Possibility Theorem on Majority Decisions*, 34 *ECONOMETRICA* 491, 498 (1966). Other paths are opened by Nicholas R. Miller, who argues that one ought to conceptualize the relation between social choice and social good not in terms of any one decision but rather by the trajectories of the policy paths. See Nicholas R. Miller, *Pluralism and Social Choice*, 77 *AM. POL. SCI. REV.* 734, 742-43 (1983). Further work has helped mitigate the problem to a degree. See generally GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002); Richard D. McKelvey, *Covering, Dominance, and Institution-Free Properties of Social Choice*, 30 *AM. J. POL. SCI.* 283 (1986); Norman Schofield, *The Heart of a Polity*, in *COLLECTIVE DECISION-MAKING: SOCIAL CHOICE AND POLITICAL ECONOMY* 183 (Norman Schofield ed., 1996). Kenneth Arrow himself has argued that a shared conception of some forms of justice can circumvent the social choice problem. See generally Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Sense of Justice*, 70 *J. PHIL.* 245, 263 (1973), reprinted in 1 *COLLECTED PAPERS OF KENNETH J. ARROW* 96, 114 (1984); Kenneth J. Arrow, *Current Developments in the Theory of Social Choice*, 44 *SOC. RES.* 607 (1977), reprinted in 1 *COLLECTED PAPERS OF KENNETH J. ARROW*, *supra*, at 162. Moreover, in the most modern consequentialist theories, *W* is presumed, incorrectly, to be additively separable. Such an assumption amounts to a notion of "utilitarian" additivity of welfare. We build on this criticism in Norman Frohlich & Joe A. Oppenheimer, *Justice, Preferences and the Arrow Problem*, 19 *J. THEORETICAL POLS.* 363 (2007), available at <http://www.bsos.umd.edu/gvpt/oppenheimer/research/condwin.pdf> [hereinafter *Justice, Preferences and the Arrow Problem*]. Additive separability rules out all synergies and team interdependencies among members of society. As such, it does violence to the very notion of society and, hence, is perniciously wrong. Joe A. Oppenheimer, *Considering Social Justice: A Review of David Miller's Principles of Social Justice*, 15 *SOC. JUST. RES.* 295, 303 & n.11 (2002) (book review).

17. See *SOCIAL CHOICE AND INDIVIDUAL VALUES*, *supra* note 16, at 59 (setting out the conditions that could characterize "reasonably acceptable" structures).

18. *Id.*

19. Obviously, full comparability allows for results—that is the contribution of the original utilitarian argument.

assert this perspective, thus allowing enough interpersonal comparability to yield a partial metric: one that circumvents the strongest impossibility results. But first we look a bit more closely at the problem of interpersonal comparability.

1. *Interpersonal Comparability of Welfare*

In virtually all modern theories of democracy, the extent to which any outcome is deemed good rests at least in part on the relationship between that outcome and some notion of social welfare and group choice procedures. To some extent it is assumed that the voting rule can (usually) deliver the right results²⁰ given the citizens' preferences (R), and presumed choices. But, it is at this point that the traditional economic approach to characterizing the Good, and the better, has foundered for lack of interpersonal comparisons. This is because to understand the aggregate welfare from the set of individuals' welfare, we need some sort of metric for interpersonal aggregation.

To illustrate, let us start by presuming *no* metric. Then the traditional economic approach yields Pareto Optimality.²¹ Such a conception yields a "large" Pareto set. Without other considerations, one is powerless both to compare the social welfare of different possible states within the Pareto set, and to make any judgments regarding dis-

20. Amartya Sen has made telling arguments against the simple utilization of income or welfare as a metric. See generally AMARTYA K. SEN, *Famines and Other Crises, in DEVELOPMENT AS FREEDOM* 160 (1999) (arguing that political freedom and economic power must be considered in analyzing the causes of famine and social welfare generally) [hereinafter *Famines and Other Crises*]. See also Amartya K. Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 472 (1979) (critiquing the practice of measuring society's welfare "in terms of the 'median' person"); Amartya K. Sen, *Social Choice Theory: A Re-Examination*, 45 ECONOMETRICA 53 (1977). But capabilities, Sen's elaborate improvement on welfarism, does not fundamentally change our argument; indeed, it reinforces it.

21. The eponymous notion of Pareto Optimality was first articulated by Vilfredo Pareto, a traditionally liberal Italian economist of the late-nineteenth and early-twentieth centuries. Pareto Optimality is a condition or state that is desirable and is best first described by its failure. When a situation is *not* optimal, or is *suboptimal*, at least some of the individuals *could* be made better off without hurting anyone. On the other hand, when a situation is optimal, to make someone still better off requires that at least one person in the group must be hurt. The set of outcomes that satisfy this notion of optimality is usually referred to as the Pareto set. The notion ties into efficiency and also has a direct relationship to "unanimity" voting outcomes. A group that uses unanimity to make decisions would choose to move from a status quo only if all benefited and none were hurt, or perhaps even if some benefited and none were hurt (if abstaining did not count as a "nay" vote). The relationship between Pareto Optimality and efficiency can be understood quite easily: if one person's scraps are sufficiently useful to another so that the user will either pick them up or compensate for the clean up, then it is inefficient to leave the scraps unused. Note that no interpersonal comparisons are needed to make judgments as to what constitutes the Pareto set.

tributive justice.²² More content must be given to either *W* or *R* if one wishes to develop a more powerful notion of what is better within the Pareto set. The traditional behavioral model based on pure self-interest yields no clues as to how to formulate such a metric because, *by design*, such models posit *the absence* of links among the different welfare states of individuals. All solutions that go beyond Pareto Optimality and try to link aggregation of choices to any notion of welfare require interpersonal comparisons.

And then there is always a need to map the decentralized choices of citizens being aggregated in a democracy to aggregate welfare. For a simple illustration, consider majority rule: to link even majority rule to a sensible aggregate welfare notion, one would need to say both that (1) the difference between a yea/nay vote amounted to the same cardinal welfare gain or loss for each voter, and (2) that the voters ought to be counted equally. In general, two sorts of analytic moves are taken to minimize these problems.

The first has to do with the introduction of more sophisticated preference measures. So, for example, majority rule asks for very little information from the voter, requiring only the voter's first choice. Rather than using simple majority rule as an institution to elicit preferences, one might employ a Borda count. With a Borda ballot, the voter is asked to rank all the candidates. A higher rank is worth more points. For example, if there are, say, four candidates, the top rank is given four points and each subsequent ranked alternative is given one less (so a third place vote gives the candidate only two points). The winner is determined by adding up the total points given to each candidate, and the one with the most points wins. Of course, Borda can be said to do a better job than majority rule; after all, the voters are giving much more information about how the outcomes affect them. But there is still a need to map the votes being aggregated—in this case, the points—to aggregate welfare. And this merely requires different assumptions regarding what interpersonal comparisons must be made to treat the aggregate Borda vote count as a legitimate measure of social welfare; it does not let us avoid the need for direct comparison.

We now consider the second standard analytical move that is made to minimize the problems of mapping individual choices to aggregate welfare. This simplification is achieved by making assumptions

22. For example, if there are two persons, one very rich and one very poor, who simultaneously lay claim to a coin on the street, Pareto cannot say which of the two should receive it. Were the rich person to get it, one could not "redistribute it" to the poor without the rich person suffering a loss, and vice versa.

constraining preferences, or the cognitive or behavioral bases for choice. For example, one can employ a spatial model of the possible political outcomes. In this case, each individual has a preference for proximity of the outcome to their “ideal” outcome in the space. As long as the space is one dimensional we get an equilibrium with some normatively attractive properties. But how this is associated with W is left undefined unless one interprets the distances among the voters as equivalent. This is usually difficult to do since the space is defined with only an ordinal metric for the preferences over distance. Similarly, one can assume probabilistic choice responses by voters. That literature shows that we can generate Benthamite social welfare functions from two-party spatial competition in these circumstances.²³ But such conclusions require a notion that the individual’s probabilistic response is a basis for welfare comparison between individuals. In this argument, the interpersonal utility comparison is an assumption that equal responsiveness between voters reflects equal, comparable utility stakes. Of course, one also needs the assumption of each voter’s equal weight in the aggregate welfare calculus.

Such assumptions may be interesting for model builders, but they hardly take the place of more robust notions of comparability for justifying constitutional proposals. One is left with the notion that comparability of preferences is not going to be a rich vein to mine. But, of course, this does not mean that we can make no comparisons regarding individual welfare.

More recent conceptions of how aggregate improvements in welfare might be characterized are all developed on somewhat less demanding interpersonal metrics and have allowed the conception of justice to regain life in democratic theory.²⁴ Rawls in particular argues that social welfare reflects only the welfare of the least fortunate.²⁵ With satiability, or the idea that the least fortunate count as special

23. See DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 254 (2005) (reviewing the spatial voting and probabilistic literature).

24. See Kenneth J. Arrow, *Extended Sympathy and the Possibility of Social Choice*, 67 *AM. ECON. REV.* 219 (1977), *reprinted in* 1 *COLLECTED PAPERS OF KENNETH J. ARROW*, *supra* note 16, at 147 (upholding the view that such lexicographic principles of justice are sufficient criteria for generating coherent social decisions); RAWLS, *supra* note 2, at 10–15 (discussing justice in the context of democracy); JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY 2* (1998) (presenting alternative views to consider improving the worst off).

25. See RAWLS, *supra* note 2, at 65 (stating that a framework of institutions attempting to capture individual equality is only just if it “improves the expectations” of the society’s poorest members).

only when their welfare is below a “welfare floor,”²⁶ such a conception of welfare can lead to a partial ordering of social welfare states.

2. *Needs: A Proposal*

The notion that needs can serve as a major normative element in social welfare has a long history, but in recent times its status has grown anew from the seeds planted by Rawls.²⁷ In brief, Rawls built on Harsanyi’s insight that one might be able to identify what is fair in income distribution by conducting a kind of thought experiment in which impartial reasoning is induced.²⁸ In particular, Harsanyi wondered what people would choose from among many possible income distributions were they ignorant of that share of the income distribution they would get.²⁹ A lack of knowledge about which share they would get created impartiality.³⁰ Harsanyi argued that people would choose the distribution that maximizes the expected value of the group’s payoffs.³¹ He concluded that the emergence of the principle of maximizing expected value under conditions of impartiality lent the resultant preferences (and the chosen principle of maximized expected value, ethical standing).³²

Rawls elaborated and developed a similar scenario of imperfect information (he called a “veil of ignorance”), applying it to questions of distributive justice.³³ Rawls imagined a group of representative individuals charged with the task of choosing, “from behind the veil of ignorance,” a way of organizing income distribution (and other matters) in the (as yet unknown) society which they were to inhabit.³⁴ The trick built into Rawls’s veil of ignorance is that it stripped individuals of their interests.³⁵ They were assumed not to know their own places in society, their own particular skills, plans, advantages, and dis-

26. See CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY, *supra* note 3 (explaining that the welfare floor principle “considers only the welfare of the worst-off individual in society” and requires a presumption of insatiability, and that if as basic needs are met the welfare improvements are less important, a different principle is needed); see also *Choosing Justice in Experimental Democracies with Production*, *supra* note 3, at 463, 474 (concluding that individuals everywhere seem to believe that the welfare of the worst-off individual in a group should not fall below a certain threshold).

27. See generally RAWLS, *supra* note 2.

28. See *id.* at 15–17.

29. Harsanyi, *supra* note 1.

30. *Id.*

31. *Id.* at 435.

32. *Id.*

33. RAWLS, *supra* note 2, at 250–51 (discussing impartial decision making and distributive justice in the context of the “veil of ignorance”).

34. See *id.* at 118.

35. *Id.*

advantages.³⁶ No one knew what role they would play in the society to be formed.³⁷ This ignorance would require that each associate her or his lot impartially with that of every person in society.³⁸ Making decisions impartially would channel rational self-interested behavior in the direction of justice and fairness.³⁹ Rawls, however, came to a different conclusion than did Harsanyi. Using notions of minimax choice rules borrowed from game theoretic arguments, Rawls argued that under conditions similar to those described by Harsanyi, individuals would select an entirely different principle of distributive justice. He concluded that they would want to maximize the welfare of the worst-off individual in the society⁴⁰—a principle Rawls called the “difference principle.”⁴¹

One of the major problems with this conclusion was the potential insatiability of the aim of maximizing the welfare of the worst off.⁴² In the minds of many, the concern with the worst off would seem to be motivated by some notion not of place (worst),⁴³ but rather of substantive deprivation and ensuing poverty and despair. Our experiments⁴⁴ reflect that the concern induced by a veil of ignorance is not about place, but about substantive issues of poverty. These issues lead people to talk of establishing a welfare floor through social policy.

The use of imperfect information to induce impartial reasoning by Rawls and Harsanyi led them to focus on the pattern of the resulting distribution, rather than on other aspects of the problem. But other authors objected strenuously to their concentration on distributive patterns. Spearheaded by Robert Nozick, these critics underscored the role of property rights or ownership (just compensation for work and other entitlements) in questions of distributing property

36. *Id.*

37. *Id.*

38. *Id.* at 119.

39. *Id.* at 118–23.

40. Rawls introduces the notion of “primary goods” and discusses his principle in terms of increasing the primary goods available to the worst-off individual. *Id.* at 65. We occasionally use the term “welfare” as a shorthand for his technical term.

41. *Id.*

42. Charles R. Plott, *Rawls’s Theory of Justice: An Impossibility Result*, in DECISION THEORY AND SOCIAL ETHICS: ISSUES IN SOCIAL CHOICE 201, 202 (Hans W. Gottinger & Werner Leinfellner eds., 1978) (discussing the potential insatiability of the following principle: “Social and economic inequalities are to meet two conditions: they must be (a) to the greatest expected benefit to the least advantaged members of society; and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”).

43. It is logical that someone *has* to occupy the place of worst off.

44. See generally CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY, *supra* note 3; *Choosing Justice in Experimental Democracies with Production*, *supra* note 3.

and income.⁴⁵ From Nozick's perspective, emphasis should be placed upon fair procedures for maintaining entitlement to the rightful fruit of one's labor.⁴⁶ In theory, a clear tension exists between these two approaches: entitlement leads one to question the legitimacy of any requirement to redistribute well-gotten gains. By contrast, justice based on patterns usually requires some degree of redistribution as a minimal requirement of fairness.

Noting this tension between entitlements and redistribution, theorists have voiced concern about the potential instability of any patterned principle of distributive justice. Although a pattern principle may appear fair when chosen without full knowledge of any one individual's position in the system, that same principle could begin to chafe in practice, when individuals begin to feel entitled to the property they earn.

Rawls emphasized the welfare of the poorest individuals in his development of a metric and understanding of distributive justice.⁴⁷ In doing so, he skirted the issue of "preferences" altogether by classifying certain goods as having "special" consideration. In setting up his analysis, he did not explicitly focus on "needs," but perhaps it was implicit in his discussion. In any case, many volumes, articles, and experiments later, needs were picked up, explicitly this time, by Braybrooke.⁴⁸

Braybrooke initiated a recent stream of argument in philosophy, which was added to by Doyle and Gough,⁴⁹ and which has been recently elaborated upon and applied to questions of international justice by Brock.⁵⁰ Those arguments emphasize the advantages of using basic needs as a metric for an important component of individual welfare. Braybrooke argues that it is possible to identify the basic needs associated with physical and social functioning.⁵¹ Doyle and Gough underline the need for physical health and autonomy "to be able to participate in a cultural form of life . . . [to] have the physical, intellectual and emotional capacity to interact with fellow actors over sustained periods in ways which are valued and reinforced in some

45. NOZICK, *supra* note 10, at 171-72.

46. *Id.* (stating that the end result of distributive justice should be to give each citizen an enforceable property right in his or her share of the total social output).

47. See RAWLS, *supra* note 2, at 65 ("The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.").

48. See generally BRAYBROOKE, *supra* note 5.

49. LEN DOYAL & IAN GOUGH, A THEORY OF HUMAN NEED (1991).

50. Brock, *supra* note 4.

51. BRAYBROOKE, *supra* note 5, at 36.

way.”⁵² Brock argues that focusing on basic needs is a way of getting at what may constitute global justice.⁵³ And the common thread that runs through their arguments is that basic needs, although not completely free of ambiguity, are sufficiently clear to generate interpersonal consensus regarding their evaluation. With relatively little information, one can tell when another person is starving, freezing to death, suffering from heat prostration, illiterate, etc.

Experimental research on questions of distributive justice modeled on the “veil of ignorance” has, in the main, supported this line of reasoning. It has revealed considerable uniformity in subjects’ ethical responses to needs. Those experiments demonstrate a virtual consensus across a variety of societies regarding the importance of providing a floor of income for those who are incapable of providing for themselves.⁵⁴ The arguments subjects brought forward in support of such a floor are that there will always be individuals incapable of providing for their own basic needs, and that society has an obligation

52. DOYAL & GOUGH, *supra* note 49, at 69.

53. Brock, *supra* note 4 (arguing that “needs are tremendously salient in developing any plausible account of global justice”).

54. See, e.g., CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY, *supra* note 3, at 56 (noting that experimental subjects uniformly “reached consensus on a single principle of distributive justice as the ‘most fair’”); Doug Bond & Jong-Chul Park, *An Empirical Test of Rawls’s Theory of Justice: A Second Approach, in Korea and the United States*, 22 SIMULATION AND GAMING 443 (1991) (finding that Korean subjects’ individual preferences reflect a concern for a high minimum floor); *Choosing Justice in Experimental Democracies with Production*, *supra* note 3, at 463 (concluding that individuals generally believe that the income of the worst-off individual in a group should not fall below a certain threshold); Norman Frohlich, Joe A. Oppenheimer & Cheryl L. Eavey, *Choices of Principles of Distributive Justice in Experimental Groups*, 31 AM. J. POL. SCI. 606, 628–29 (1987) (finding that subjects were concerned not only with maximizing average social welfare, but also with setting a floor to protect the welfare of the poorest) [hereinafter *Choices of Principles*]; Norman Frohlich, Joe A. Oppenheimer & Cheryl Eavey, *Laboratory Results on Rawls’s Distributive Justice*, 17 BRITISH J. POL. SCI. 1, 1 (1987) (“[I]ndividuals are capable of reaching consensus” on a principle of distributive justice “which attempts to take into account . . . the position of the worst-off individuals.”); Michael Jackson & Peter Hill, *A Fair Share*, 7 J. THEORETICAL POL. 169, 176–78 (1995) (finding that subjects uniformly preferred “maximizing the average with a floor restraint”); James Konow, *A Positive Theory of Economic Fairness*, 31 J. ECON. BEHAV. AND ORG. 13, 33 (1996) (concluding that altruism, defined as “a selfless concern for the allocation of others which becomes particularly acute when their basic needs are threatened,” may sometimes impact individuals’ notions of justice); Grzegorz Lissowski, Tadeusz Tyszka & Włodzimierz Okrasa, *Principles of Distributive Justice: Experiments in Poland and America*, 35 J. CONFLICT RESOL. 98 (1991) (replicating Frohlich & Oppenheimer’s distributive justice experiment in Poland and finding that subjects preferred maximizing average income with a floor constraint); Paul E. Oleson, *An Experimental Examination of Alternative Theories of Distributive Justice and Economic Fairness*, Paper presented at Public Choice in San Francisco, CA (Mar. 1997) (unpublished Ph.D. dissertation, University of Arizona) (on file with author) (same); Tatsuyoshi Saijo, Shusuke Takahashi, and Stephen Turnbull, *Justice in Income Distribution: An Experimental Approach*, Paper presented at the 1996 ISA in San Diego, CA (Apr. 18, 1996) (same).

to care for the basic needs of its most vulnerable members. As in the arguments of Nozick and others noted above, subjects also argued that the safety net offered should not be so high as to impinge on the entitlements of those who are very productive or to unduly reduce the incentives needed in the society to encourage others to maintain a modicum of efficiency.⁵⁵

a. Needs and Interpersonal Comparability

This leads one to wonder how the focus on needs relates to the difficulties in defining or measuring social welfare (*W*). Consider comparability; obviously, it does not take a huge moral stretch to compare one person's starvation with another's banquet. In other words, easy accessibility to consensus on what constitutes a floor of basic needs may be the basis for partially undermining the barrier to interpersonal comparability of welfare, at least within the restricted range of needy individuals.⁵⁶

Given the notion that at least the most basic needs are lexicographically prior to other concerns regarding personal welfare considerations, the difficulties of some aspects of interpersonal comparability disappear.⁵⁷ We can identify some sorts of comparisons that can be made and others that cannot. Take two individuals: if one has all her basic needs met, and the other does not, then we can judge the first to be better off than the other. Otherwise we cannot make a judgment. But given that basic needs are quite fundamental, and that democracy has a presumption of equality, we can develop a rough estimation of social welfare in terms of the percentage of the population left without the satisfaction of their basic needs. Of course, there are other aspects of measurement that might be crucial. Take a family in poverty for example: the depth and duration of the family's poverty might be an important further dimension of analysis.

In any case, it is clear that as Braybrooke points out, at the theoretical level, Pareto Optimality is not what is left to utilitarianism without interpersonal utility comparison, unless we agree that preference

55. See, e.g., *Choices of Principles*, *supra* note 54.

56. This does little violence to Mill's conception of utilitarianism. As he argued, a happy life requires basic needs being met and little else: "The present wretched education, and wretched social arrangements, are the only real hindrance to [a happy life] being attainable by almost all." John Stuart Mill, *Utilitarianism*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 895, 905 (Edwin A. Burt ed., 1939).

57. Note also that life support needs are lexicographically prior to needs supporting social functioning.

satisfaction rather than needs satisfaction are to replace utility or happiness.⁵⁸

b. Needs: A Social Welfare Metric and the Arrow Problem

Braybrooke also conjectures that a focus on needs instead of preferences could get around some of the paradoxes of social choice theory.⁵⁹ But here, his conjecture is sure to lead to less headway than in the previous discussion. Although needs alone cannot help us get around some of the difficulties of voting cycles, they can point to ways of doing so.⁶⁰ Further, they do help us generate a slightly more interpretable mapping from the welfare of individuals to an aggregate conception of social welfare. But immediately we see that the victory will be incomplete. Without further assumptions, we will have little more leverage than that gained by Pareto Optimality. After all, once we note that a society has not met the basic needs of all its citizenry we will have difficulty assessing the degree of failure without further (normative) assumptions. The percentage of the population left without basic needs being met can be used to develop a partial ordering of social welfare; however, we will not get a full-blown ordering without severe assumptions.

TABLE 1: TOWARD A SOCIAL WELFARE METRIC

SOCIETIES	% OF POP NEEDY			SOCIAL WELFARE RANK
	ONLY IN D1	ONLY IN D2	IN BOTH D1&2	
A	0	0	0	1
B	10	0	0	2/3
C	5	5	0	2/3
D	0	0	10	4/5
E	10	10	0	4/5

But this need not mean that we should give up entirely. Consider the illustration in Table 1. Here we list five societies that presumably differ only in the percentage of the population that are “needy.” In

58. BRAYBROOKE, *supra* note 5, at 175–76.

59. *Id.* at 184 (“Agreeing to meet needs . . . before attending to matters of preference only may have extricated the most important questions from the difficulties of social choice theory.”).

60. To do that, needs would have to be weighed heavily in our preference functions. We show how this might generate a Condorcet winner. See generally *Justice, Preferences and the Arrow Problem*, *supra* note 16.

the illustration, there are two dimensions of neediness: *D1* and *D2*. Obviously, a society like *A*, which has no needy individuals, is ranked highest. In *B* and *C*, ten percent of the population is needy along one dimension. In *B*, they are all needy in one way, while in *C* they are split over the two types of neediness. Making no judgment regarding the weights of one or another basic needs, *B* and *C* would be tied for second and third place in terms of social welfare delivery. *D*, on the other hand, has the same ten percent needy, but now all of them are needy along two dimensions. Of course, one will need ancillary notions, such as, for example, that the “depth of need” is equivalent in all cases for each dimension, but given such assumptions, it is presumed that having two shortcomings (e.g., housing *and* food) is worse than having only one. So *D* is “worse” than *B* or *C*. But how we would compare *D* and *E* is unclear without further assumptions. Although there are more persons who are in need in *E*, they all have only one deprivation, while in *D* they have two.

The illustration gives us some insight as to what it would take to develop a more complete metric. One would need to specify tradeoffs between the numbers of people who are needy and the depth of their deprivation. And the metric for the depth of deprivation is also not unambiguous. There will be various statistical measures of it that may need consideration including minima and measures of dispersion.⁶¹

C. *Democracy and Needs*

The above discussion can be tied to the justification for democracy in the developed, liberal societies. For democratic citizens to play their role, they must (along with certain well-known rights) have the capacity to inform themselves and participate in the political process. In a democracy, it is important to maintain prosperity, handle ethnic strife, etc., *and* proactively deal with the basic needs of the citizenry. Assuming this to be demonstrable, then those citizens who lack the basic needs to provide for physical and social functioning are essentially disenfranchised, and the presumed fruits of democracy are de facto denied them. This has been recognized as far back as Aristotle, one of the initial—though limited—champions of democracy. In *Politics*, Aristotle discusses the functions of the democratic state:

First, there must be food Let me . . . discuss the distribution of the land . . . for I do not think that property ought to be common, . . . but only that by friendly consent

61. See generally AMARTYA SEN, ON ECONOMIC INEQUALITY (1973) (discussing statistical measures of inequality).

there should be a common use of it; and that no citizen should be in want of subsistence.

As to common meals, there is a general agreement that a well-ordered city should have them They ought, however, to be open to all the citizens. And yet it is not easy for the poor to contribute the requisite sum out of their private means, and to provide also for their household. . . . The land must therefore be divided into two parts, one public and the other private, . . . part [of the public land being] used to defray the cost of the common meals⁶²

Thus, Aristotle recognized the requirement that democratic states provide sustenance for the basic needs of their citizenry. In modern times, while acknowledging that differences among individuals may require different levels of resources to meet citizens' basic needs, Braybrooke argues that considerations of justice require that all basic needs be met to a minimum standard for all individuals in societies. He notes that these basic needs include the necessities for both physical *and* social functioning.⁶³ Within the realm of social functioning he argues that there are several basic roles in which all citizens are expected to perform: "parent, householder, worker, and citizen."⁶⁴ He offers a normative principle that a minimum standard be set for the resources necessary to insure physical survival and performance of each of the roles. While declining to assign priority to any particular requisite in any particular category of basic needs, he enunciates a principle of lexical provision within each category of need. By this he means that the appropriate method for society to meet basic needs is to set a minimal level of provision for each need and allocate resources so that after the minimum level for meeting needs in one category is achieved, no more resources are to be allocated towards them, and additional resources are to go to meeting needs in another category, until the minimal level agreed upon by society for all basic needs is achieved for all citizens.⁶⁵

Following Braybrooke's formulation, and given the justification for democracy noted above, we argue that the promise that democracy makes is that it will meet the basic needs of citizens across the various roles they are expected to play in the democratic state. Sen's

62. ARISTOTLE, *POLITICS*, in 2 *THE WORKS OF ARISTOTLE* 445, 532, 534 (Benjamin Jowett trans., W.D. Ross ed., 1952).

63. BRAYBROOKE, *supra* note 5, at 36.

64. *Id.* at 48. He also notes that, to the extent that individuals either opt out of one or more of these roles or are incapable of performing in them for insuperable reasons, the level of provision for their basic needs can be adjusted. *Id.* at 49–50.

65. *See id.* at 69–70.

observation that famines do not occur in democracies⁶⁶ can be taken as evidence that democracies take this charge seriously. But preliminary evidence shows considerable variance in the delivery of a floor for minimal needs, even for such natural disasters at which Sen was looking. Take three cases: an enormous ice storm in the winter of 1998 in Quebec that threatened hundreds of thousands—if not millions—in the province; the horrible heat wave in France in the summer of 2003; and Hurricane Katrina in fall 2005 in the United States. Although the events are not strictly comparable, the death tolls are staggeringly different: 25 in Quebec, 14,802 in France, and more than 1,800 in Katrina. Clearly, there is a difference in the quality of response to the needy in developed democratic societies.

1. A Preliminary Inventory of Needs

We still need some detail in order to approach an empirical task of evaluation. What, for example, constitute the specific needs that are under consideration? Although Braybrooke himself proposes a list of needs (as do others, including the United Nations) divided into two subsets: physical and social functioning of the individual, the list is quite sparse and intuitive. For physical functioning, he sets out: a life-supporting relation to the environment, food and water, excretion, exercise, rest, sleep, and preservation of the intact body.⁶⁷ Similarly, he identifies, for social functioning: companionship, education, social acceptance, sexual activity, freedom from harassment, life without constant fear, and recreation.⁶⁸ Now, not all of these are state responsibilities, although the state might be said to be required to insure that others (e.g., violent gangs or mobsters) do not deprive individuals of these basic needs.

Gillian Brock is a bit more abstract in her approach when she says: “a need is basic if satisfying it is a necessary condition for human agency.”⁶⁹ Brock notes that by linking inclusion on the list to agency, one

can circumvent concerns about how an account of such needs could be sufficiently “objective” . . . [to] . . . enjoy

66. See *Famines and Other Crises*, *supra* note 20, at 178 (“[T]here has never been a famine in a functioning multiparty democracy.”); Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 7–8 (1999) (“[N]o substantial famine has ever occurred in any independent and democratic country with a relatively free press.”); see also AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRAVATION 6, 6 (1988) (“[T]here are no famines in rich developed countries.”).

67. BRAYBROOKE, *supra* note 5, at 36.

68. *Id.*

69. GILLIAN BROCK, COSMOPOLITANISM AND GLOBAL JUSTICE (forthcoming).

widespread cross-cultural support For instance, by definition, to be an agent one must be able to deliberate and choose. In order to deliberate and choose one will need at least (1) a certain amount of physical and mental health, (2) sufficient security to be able to act, (3) a sufficient level of understanding of what one is choosing between, and (4) a certain amount of autonomy. Because of its important role in developing (1)–(4), I also add a fifth basic need that underlines the importance of our social needs; namely, (5) decent social relations with at least some others.⁷⁰

So we can see enumeration is possible, and given that each society is a bit different, there may be slight variations in what are the actual instantiations of basic needs, requiring quite different details in Brisbane than in Banda Ache. But food, shelter, health, education, and work (or other economic support when work is impossible) all come into play. Because there is far less variation in the structure of these items among the developed democracies than between any of them and members of the less developed and non-democratic countries, we can make comparisons regarding shortfalls quite easily.

But before entering the realm of empirical testing, it is important to enter a caveat. In the experiments on distributive justice cited above, subjects identified three normative components. Although needs were a pre-eminent factor, subjects were also concerned with efficiency and just deserts. While we acknowledge the necessity of paying homage to some economic efficiency and just deserts, which have normative standing in their own rights (while also being instrumental in achieving efficiency), we side with Aristotle and those others who give priority to basic needs. Accordingly, we propose that a first level evaluative criterion of democracies should be the extent to which they meet the basic needs of their citizens. This is in keeping with the formulation by Braybrooke that we fulfill needs lexicographically but with satiation.⁷¹

However, this argument brings us back to the observation with which we started: the differences in distributions of income and wealth within different developed democracies clearly lead to differences in the way and extent to which democracies meet (or do not meet) the basic needs of their citizens. Even in the most developed democracies where societal wealth is clearly sufficient to take care of the basic needs of all citizens to some reasonable minimum level (the social safety net), there are numerous individuals who do not get the

70. *Id.*

71. BRAYBROOKE, *supra* note 5, at 69.

minimal support they need. In some fundamental sense, then, the justification for these democracies is undercut. If “life” is interpreted as the requisites of fulfilling the societal roles of a parent, householder, worker, and citizen, then clearly, in virtually all developed democracies, variable numbers of citizens are denied “life.” Moreover, they have liberty only to function in a limited fashion, and are handicapped in their pursuit of happiness. It would seem reasonable to use the justificatory criterion of “satisfying basic needs” as a way of evaluating democratic performance.

II. EVALUATING DEMOCRACIES

Obviously, we have not developed sufficient fabric in the discussion of needs to give us a full template for the evaluation of democratic performance. For example, are we to evaluate societies only by the proportion of the citizenry in need, or also by their duration in such a condition?⁷² Are we to consider all individuals in need equally deprived, or are the levels of need and the number of needs that are left unattended to be considered? Raising these concerns indicates that there is more analytic work on the metric of needs that must to be done; however, at this point, we turn to another problem.

A. *Why an Exogenous Metric to Evaluate Democracies?*

Imagine a democracy that does not choose to satisfy the basic needs of its citizens. If the democracy is stable and people seem satisfied, who is to say that the result does not reflect the values of the citizenry? And what is to justify the imposition of a set of values that might be quite foreign to the populace? Indeed, looking at needs rather than preferences as an indicator of social welfare induces a major problem. Preferences are directly tied to choice. If preferences are given priority in considering social welfare, there is at least a presumption that the satisfaction of political preferences is via responsive collective choice. Social welfare is then tied directly to the satisfaction of individuals in their democracy by simple measures of responsiveness of the outcomes to the shifts in preferences of the citizens.

Moving to need satisfaction seems to involve an imposition of an exogenous measuring rod of evaluation, an imposition quite at odds with the entire normative justification of democracy.⁷³ In the tradi-

72. See generally ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* 7 (1999) (assessing welfare regimes by investigating several dimensions of poverty, including duration).

73. Indeed, Andrew Schotter argues that any evaluation of democracy requires a fully endogenous metric of justice. ANDREW SCHOTTER, *FREE MARKET ECONOMICS: A CRITICAL*

tion of economics such an argument would be quite devastating. Economists presume that each individual has a unique and stable preference structure. Such a view would mean that the citizenry's set of preferences are fixed, and although there can be instability in political outcomes for all the reasons identified above, as well as induced by changes in the environment, outcomes reflect the rules of the game and the set of preferences of the citizens.

The traditional view requires that individuals have unique, stable, well-ordered preference structures. So entrenched was this idea that only a few years ago most sophisticated political scientists and many economists presumed rationality to be a tautology; how could it be otherwise? Of course, much earlier, Kenneth May had shown that the premise was not a tautology.⁷⁴ But at least since the mid-seventies, the stability, uniqueness, and interpretability of preferences has been under attack by cognitive psychologists. Consistent maximizing might not be a part of human nature after all.⁷⁵ Indeed, the experiments that resulted in Prospect Theory demonstrated that the stability of preferences, and hence individual choices, are sensitive to the individual's interpretation of the decision context, and thus, dependent upon the way the decision problem is framed.⁷⁶

The clear conclusion of the experimental and theoretical work is that cues that are given in the decision context determine the value structures that are evoked, and, consequently, the choices that are

APPRAISAL, 121–24 (Basil Blackwell 2d ed. 1990) (1985). Exogenous theories, such as those of Rawls and Braybrooke, were criticized as not reflecting the inherent self determination behind the theory of democracy. *Id.* at 122–23. But Schotter goes on to show that an endogenous theory has problems of its own. *Id.* at 124.

74. See Kenneth O. May, *Intransitivity, Utility, and the Aggregation of Preference Patterns*, 22 *ECONOMETRICA* 1 (1954) (arguing that experimental evidence of intransitivity of preference structures could undercut the basic assumptions of utility theory).

75. See generally David M. Grether & Charles R. Plott, *Economic Theory of Choice and the Preference Reversal Phenomenon*, 69 *AM. ECON. REV.* 623 (1979) (discussing psychological data and theories that suggest that “no optimization principles of any sort lie behind even the simplest of human choices”); George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 *AM. POL. SCI. REV.* 719 (1988) (discussing the psychological and cognitive theory objections to the common assumption that economic and political agents tend to maximize utility); Matthew Rabin, *Psychology and Economics*, 36 *J. ECON. LIT.* 11, 11 (1988) (same); Eldar Shafir & Amos Tversky, *Decision Making*, in *AN INVITATION TO COGNITIVE SCIENCE: THINKING* 77, 93 (Edward E. Smith & Daniel N. Osherson eds., 2d ed. 1995) (examining alternatives to the rational theory of choice); Herbert A. Simon, *Rationality in Psychology and Economics*, 59 *J. BUS.* S209 (1986) (same); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS.* S251, S251–52 (1986) (same).

76. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI.* 453, 453 (1981).

made.⁷⁷ To demonstrate how context can evoke different preference structures, we crafted a set of dictator experiments with a slight variation.⁷⁸ Rather than simply *giving* dictators money to allocate, dictators and their paired other subject produced income by doing work.⁷⁹ Then the dictators allocated the total joint income anonymously.⁸⁰ Our conjectures were that the work context would (1) evoke “entitlement” values of a normative nature, (2) lead to more sharing on the part of the dictators than in a normal dictator experiment, and (3) cause the sharing to conform to some normative rules reflecting entitlement.⁸¹ The conjectures held up.⁸²

If, as demonstrated in the experiments cited above, preferences are unstable and manipulable, the evaluation of democratic performance in terms of its responsiveness becomes more problematic. Which preferences are being evoked by the democratic political institutions may determine many aspects of the policy outcomes in the democracy.

Are we to judge a democracy by its satisfaction of the expressed preferences of the individuals, disregarding the cues that led to their expression? Imagine two countries, similar in most relevant respects, but differing in how the political systems frame their (similar) crime problems. In one, the framing of response to theft is in terms of rehabilitation and social responsibility, and in the other it is in terms of fear and animosity. The political discussions in the two countries lead to differing outcomes regarding the treatment of their thieves. The first punishes them with forced restitution, community service, and rehabilitation programs. The second cuts off one of their hands and sends them to jail. In both, assume the same rates of recidivism and the like (in other words nothing is gained by the severity of treatment). What are the differing preferences involved? Are they basic differences, or a function of the nature of the political discussions? Is part of our evaluation of the differing political systems to include how they handle the discussion of, and present the policy alternatives regarding the issue? Or are we to say the two political systems responded equally to the expressed values of the citizens?

77. Norman Frohlich & Joe A. Oppenheimer, *Skating on Thin Ice: Cracks in the Public Choice Foundation*, 18 J. THEORETICAL POL. 235, 251 (2006).

78. Norman Frohlich, Joe A. Oppenheimer & Anja Kurki, *Problems in Modeling Social Preferences: Insights from Modified Dictator Experiments*, 119 PUB. CHOICE 91, 92 (2004).

79. *Id.* at 95.

80. *Id.* at 102.

81. *Id.* at 95.

82. *Id.* at 111.

We believe an aspect of the evaluation of a democratic system is normative, going beyond conformity with what the people want. If different contexts and frames generate different preferences, we may need to judge the frames as well as the conformity to expressed desires. Part of what is ethical involves choosing options through impartial reasoning. Political systems are likely to differ in how much they invoke impartial reasoning in the framing of the issues put to citizens in their elections.

The question then arises, what are the things people want from political institutions more generally when they invoke impartial reasoning? Obviously the social stability so prized by Hobbes is high on the list. Any examination of the African and Asiatic tragedies on the front pages of the daily newspapers give evidence to that. But beyond socio-economic stability, the question is whether there are common elements that people want from their social arrangements.

Experiments to examine the nature of justice from a Rawlsian perspective⁸³ have led us to observe a number of surprising uniformities. Subjects in groups of five were told that they would be doing some work, and would be paid on the basis of their productivity. They did not know what sort of work and could not, therefore, know their productivity relative to other group members. The subjects in numerous replications around the world were always willing to work toward a social contract, even if it took a substantial length of time to reach agreement. In other words, from behind an experimental “veil of ignorance,” individuals everywhere want to have a social contract. Further, they were able to reach one unanimously. In virtually all cases, the form of the contract remains the same: they want a welfare floor to take care of needs, room for incentives to reward effort so as to ensure just desserts and efficiency.

So there is a lot of agreement among people about a notion of justice, enough to support, at least provisionally, the hypothesis that there is a universal human consensus on one particular form of distributive justice: a social safety net or floor. This conjecture is the justificatory basis for choosing lexically satiable basic needs as a measure of social welfare. It provides a metric for democratic performance among relatively stable developed democracies: the stability, quality, and porosity of the social safety net.

83. See RAWLS, *supra* note 2 and accompanying text.

B. Differences in Performance

TABLE 2: GROWTH IN INCOME - POST TAX/TRANSFER 1984-95

<u>PER CAP INCOME GROWTH</u>	
Germany	17%
Holland	18%
USA	16%
<u>MEDIAN HOUSEHOLD INCOME GROWTH</u>	
Germany	14%
Holland	16%
USA	1%

Of course, markets rather than politics may be harnessed to supply much in the way of insurance. And there may be tradeoffs that must be considered: the moral hazards created by a safety net can conflict with economic performance. Increasing support for the poor could just decrease productivity.

Of course, one might wonder if, empirically, social welfare spending decreases productivity. Consider the work of Goodin et al., who looked at a long panel study (circa 1984–1994) having to do with various aspects of the political economy of Germany, Holland, and the United States.⁸⁴ Specifically examining the fate of the poor and the performance of the economy, they discovered that the United States' lack of social welfare spending meant that similarly performing economies produced very different results for the average citizen (see Table 2).⁸⁵

84. See GOODIN ET AL., *supra* note 72, at 98–119 (describing the long panel study of the United States, the Netherlands, and Germany).

85. *Id.* at 60–62.

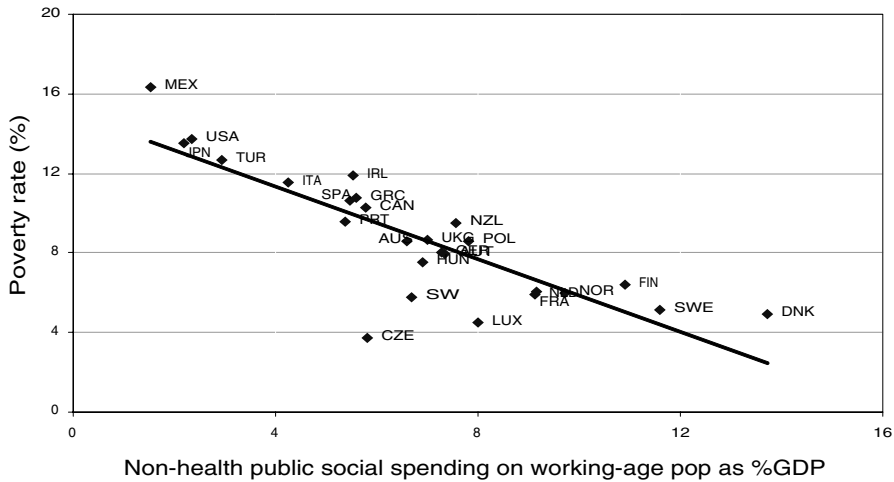


FIGURE 1: OECD RELATION BETWEEN POVERTY RATES AND SOCIAL WELFARE SPENDING ON WORKING AGED POPULATION (EXCLUDING HEALTH CARE)

The literature on this is interesting. One test of the political efficacy of social welfare policy might be the poverty rate as a correlate of social welfare spending. But if the poverty were mainly among the working poor and the social welfare spending were mainly in the form of old age payments, then there would be a mismatch of types and social welfare spending would not affect poverty. But the findings of the Organisation for Economic Co-operation and Development (OECD), using a definition of poverty as fifty percent of the median income, is that among the OECD members there is a very high correlation ($r = .824$) between spending on social welfare programs for working-aged people (excluding health) and ending poverty (see Figure 1).⁸⁶

Although these measures are not fully thought out for our purposes; they are suggestive, and indicate that considerable differences in performance, using our conception of social welfare, exist between developed democracies.

86. Michael Förster & Marco Mira d'Ercole, *Income Distribution and Poverty in OECD Countries in the Second Half of the 1990s*, at 28 (OECD Social Employment and Migration Working Paper No. 22, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671783.

III. EXPLAINING DIFFERENCES WITH POLITICAL STRUCTURES AND SOCIAL CONSTRAINTS

Fully explaining the differences is left for another day, but here we sketch the argument that it is mainly the checks and balances *against* democracy that protect *undesirable* (in terms of the consideration of individual needs) status quo policies and thus prevent some democratic systems from delivering better policies (i.e., those that could ensure higher welfare) to their citizenry.⁸⁷

By thwarting majority decisions via institutionally structured veto points inhibiting many decisions to change the status quo, the United States Constitution has in fact generated a government with less responsiveness.⁸⁸

Preferences alone when tied to problems of distribution are not likely to generate equilibria in majority-rule contexts. And even when they do, some institutional factors may well alter the outcomes. Discussing this, we necessarily break up the analysis of the factors as if they each exist independently, but this is preposterous. Rather, informal arrangements are encouraged, generated, and otherwise affected by the formal structures of the political system. So after discussing the elements singly we will attempt to try to round out the discussion by considering the interaction of the variables discussed. To begin, let us consider some contextual variables that exhibit considerable variance across the developed democracies and sketch their likely effects. We begin with the most obvious: turnout, and who is empowered to vote.

A. *Turnout and Suffrage*

It is easy to develop a sense of the importance of turnout in our models. Everywhere, the behavior of actually going to the polls to vote is a function of income. If the granting of voting rights is related to having an address, for example, then the homeless (obviously mainly very poor individuals) will not be able to vote. If criminal convictions are a function of income (they are), and if restrictions on voting are imposed for criminal behavior, then, again, the poor will be less able to vote.

Assume, as we have, that the interests in social welfare are also a function of income, and it is clear that turnout differentials that are

87. See TSEBELIS, *supra* note 16, at 2 (noting that the status quo is often preserved via the elaborate structure of veto points in democratic systems).

88. See Ronald Rogowski, *Institutions as Constraints on Strategic Choice*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 115, 129, 132 (David A. Lake & Robert Powell eds., 1999) (noting that checks and balances often “impede mobilization” on policy decisions).

correlated with income could affect the outcomes of otherwise identical political processes. In the simplest case, imagine that a disproportionate fraction of the persons who do not vote lean further left than most of the others do. This will shift the outcome (or the median voter) to the right.

Turnout and its correlation with income varies greatly across the developed democracies. We conjecture the outcomes regarding distributive matters across income classes will reflect who votes, and differences in who votes will be reflected in differences in whose interests are satisfied. A political system that allows states to effectively disenfranchise citizens and artificially keep polls unpopulated leads to systematic protection of status quo policies that favor the wealthy, and prevents the policies that could satisfy the basic needs of citizens.

B. Financing Politics

Our image of politicians in democracies is that of self-interested individuals who aspire to reelection. This helps us understand their interest in responding to voters' requests. But satisfying voters' demands is not the only factor needed to win elections. Voters are notoriously uninformed about the actual state of public policy and the role of the particular politician in it.⁸⁹ This leads to the need for publicity, advertising, and, hence, media access. We can think then, from the politician's point of view, there is a "production process" for votes: money, policies, and favors are factors of production.

There are enormous differences in the financial arrangements regarding media access and other aspects of electioneering among democracies. In some places, parties that are sufficiently "popular" or "supported" in the previous electoral cycle are often "certified" and must be given free or subsidized air time. This formula has considerable latitude in application. How much air time, at what cost, to whom, where, etc. all vary considerably. How much parties can spend on elections beyond that which they are "given" is also variable, as is where the money can come from.

Of course, money, like votes, is given to support policies and candidates one wants to win. When some corporate donors appear to give to both sides, it is not just out of altruistic interest in supporting the electoral system. Such behavior is correlated with policy or regulatory interests and support and, therefore, does not come free in terms of policy outcomes.

89. Indeed, this is a sufficiently important topic that we treat it more fully below.

In some countries the government has a major presence in the media and news markets. For example, we can think of few developed democracies that have a less well-established national broadcasting system than the U.S. These national media corporations are often required to participate quite heavily in the information dispersion process during election times, in giving free broadcast space for debates, etc. Without such subsidies, campaigning is expensive. And more costly elections, financed at the private trough, lead to wealthier corporate interests being more heavily weighted in the political processes. Similar to turnout constraints, financial constraints overweight the wealthier voters and their interests at the cost of meeting the basic needs of the citizenry.⁹⁰

C. Political Institutions and Equilibria Using Majority Rule

We can also sketch the relation between outcomes, equilibria, and institutional details. The lesson is that one cannot understand the outcome of a democratic process as a simple aggregation of the preferences or choices of the individuals involved, independent of the details of the aggregating, or decision-making, institutions. When there is a lack of equilibrium, political institutions may generate one, and were there an equilibrium, the details of the institutions could prevent that equilibrium from being attained. To illustrate, consider examples of how the detailed institutional elements help determine the outcomes of democratic choice in matters that affect social welfare. Perhaps no one factor is surprising, but together we expect they can be shown to account for much of the great differences in social welfare delivered by the different democratic systems in the economically developed world.

1. Formal Properties of the Institutions: Veto Points, Pivots, and Equilibria

Political institutions do not grow by themselves. They are generated by politicians in order to aid them in going about their jobs and getting reelected. Of course, the institutions often have a life that extends beyond their original purpose, but it is useful to think of how the institutions empower the politicians.

90. Considerable analytic work has been done on this. See generally MUELLER, *supra* note 23.

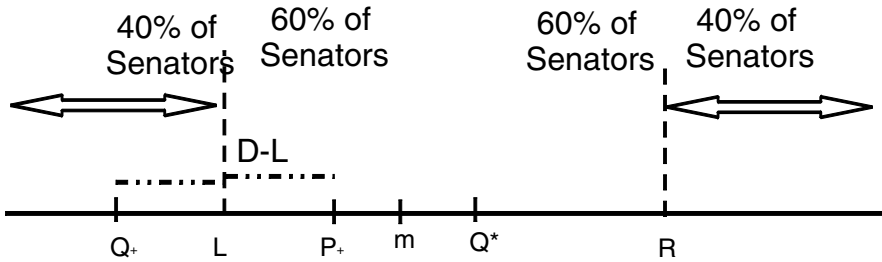


FIGURE 2: THE FILIBUSTER RULE EMPOWERING 40% TO PREVENT THE END OF DEBATE ON A BILL.

Consider the example of a particular institution, such as a rule to end debate in a legislature. We note how such rules create veto points and pivotal voters. Specifically, consider the rule in the U.S. Senate that enables filibusters. The rule stipulates that sixty percent of the members have to agree to end debate. Hence, a disgruntled forty percent can prevent voting on a proposal on the floor of the Senate. Preventing a vote prevents the status quo from being changed. Consider then how the institution works. Assume, for simplicity, that the issue is one dimensional and to be decided by majority vote. Then the median voter's position (m in Figure 2) is the majority-rule equilibrium and expected outcome. But the fortieth (and sixtieth) percentile voting members of the legislature are able to prevent the debate from stopping; they can veto the consideration of the legislation to move the status quo. There are two cases to consider, defined by the position of the status quo relative to the position of the fortieth percentile and sixtieth percentile voters along the line (see Figure 2).

The first case has the status quo (Q^*) between these two members' ideal points (L, R) (Q^* in the figure). In this case, moving the status quo from a position already between the two "veto players." Note that no movement is possible toward m . For if someone proposed legislation that moved from Q^* to the right, the left forty percent of the members would constitute a filibuster bloc and could be counted on blocking the move. And a similar outcome would exist if Q^* were to the right of m .

On the other hand, the status quo could be at Q^+ , beyond the space defined by the distance between the ideal points of the veto players: L and R . To beat Q^+ a proposal, P^+ , would have to be crafted so that less than forty percent on the left block would be against the proposal. Assuming that L cares equally about the distance to his ideal point on either side, then to garner his support, the proposal would have to be closer to L than Q^+ . After all, he would only vote for

a proposal that was closer than P^+ to L . In other words, the focus would be completely on fashioning proposals to attract L (or R); these are the “pivotal voters,” or “play makers.” People with interests about legislation will pay special attention to such play makers, and we expect that financial benefactors will as well.

An institutional structure that creates many veto players ensures that legislation will be relatively costly to enact, and that the outcome will not be particularly responsive to the median voter’s interests and positions. A further point can be made: there is a parallel between electrical circuits and political institutions in that we can consider institutions that are in parallel and those that are in series. If one can get something done in a number of ways, the paths are parallel. We would expect that costs are contained by such arrangements. On the other hand, when the action requires a particular route to enactment, then all the gate keepers (now in series) need to be dealt with.⁹¹ Of course, all real world processes are a mix of these things. Presidents can enact policy by “decree” but it does not have the same force, nor the same status or difficulty being changed as a law.

2. *Parties, Disciplined Voting*

In most parliaments where the survival of the executive depends upon the glue of a legislative majority coalition, political parties are able to demand strict loyalty for voting on the issues that come before parliament. And voting regarding governmental matters is determined in the “cabinet” of the prime minister. In keeping with the emphasis above on veto points and pivotal players, it becomes clear that the existence of disciplined parliamentary parties restricts the potential for a proliferation of independent “play makers.” These more specialized fiefdoms do not show up as a separate check or balance that can thwart the will of the majority.

IV. OTHER ASPECTS OF THE ENVIRONMENT

The above discussion focused on what we quite narrowly mean by “political” processes and political institutions. But there are at least four other, less immediately political, aspects of democratic societies that we believe impact strongly the translation of political processes on social welfare. We touch on each below.

91. See Avinash Dixit, *Some Lessons from Transaction-Cost Politics for Less-Developed Countries*, 15 *ECON. & POL.* 107 (2003) (outlining the differing constraints and considerations relevant to creation of successful policy in different developing countries).

A. *A Sense of Justice*

Elsewhere we have shown that even a partially shared sense of distributional justice can equilibrate a political trajectory so that the long-term end state regarding the distribution of welfare will conform to the shared conception of justice, and not lead to the expected voting or social choice cycles over distributional matters.⁹² The variable that determines the likelihood of cycles over distributional matters is the capacity of the political process and leaders to frame those matters in a moral light, causing citizens to think of them through an impartial lens.

Again, the more disciplined the parties and the fewer the independent play makers, the easier it will be to frame political issues coherently. The existence of many independent political veto points will mean that there will be a sharing of political power; checks and balances will disperse the message makers and, hence, the framing of political issues will be more a function of other interests rather than deliberate political strategy of teams of vote-getters.

B. *Mobility of Capital*

The ability to tax progressively is limited by the ability of individuals to move their income and wealth to jurisdictions to avoid taxation.⁹³ Insofar as the larger social insurance programs must be financed by taxes, and, if the benefits are to go to the poorest, part of the support of these programs must come from redistributive aspects of the taxes. Thus, the redistributive possibilities are limited by the mobility of capital and income.

C. *Information*

If public goods are defined as those goods distributed to a group of individuals, the outcomes of most political (as opposed to personal) decisions can be classified as public goods. We can draw implications from collective action analysis regarding how people will inform themselves about political decisions, such as voting. Information and information processing is costly. Consider Iris, a newspaper reader. She notices the variety of things to read and chooses within the constraints that she has (perhaps only one half hour available at breakfast). She spends twenty or more minutes on page one and then

92. See generally *Justice, Preferences and the Arrow Problem*, *supra* note 16.

93. See CARLES BOIX, *DEMOCRACY AND REDISTRIBUTION* (2003) (noting that one can predict social peace and democracy by modeling the mobility of capital as a "set the tax rate" game).

she skims; the headlines suggest to her many items of interest. On page four she sees something that looks negative and important concerning a candidate she was going to vote for in the next election, and a story on pollution at the beach she was planning to go to for vacation. Of course she is torn, wants to read both, but has only a few minutes. How to decide?

Let's consider why Iris is so likely to read about the beach and not the candidate. Getting information about the candidate can lead her to avoid the error of voting for the wrong candidate, someone she would rather not see win. Getting information about the beach can lead her to avoid the error of going to the wrong beach, someplace she would rather not swim. If it is an important office, the election could have a bigger impact (higher taxes, loss of programs that matter to her, perhaps a war, etc.) than a somewhat less nice vacation, *but*, gathering all the information in the world about the candidate is not likely to do more than prevent her from making a mistake in her voting. It is very unlikely to change the outcome of the election. Getting information about a polluted beach can allow her to avoid a ruined vacation with certainty.

Similar to the logic of collective action, the rational voter decides not to invest in the information about the public good, not so clearly because of self-interest, but because of lack of efficacy.⁹⁴ The argument leads to a law-like statement: in general, individuals have a radically discounted interest in acquiring information about political affairs. Citizens will, in general, remain rationally ignorant.⁹⁵

This has implications for the performance of democracies. To remain informed there has to be a "cheap" stream of information for the voters. For example, in the fall of 2005, all the citizens of New Orleans and the Gulf Coast region of the United States directly observed the effects of Hurricane Katrina. Many of them also directly

94. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 258 (1957) (noting that many rational voters do not put any resources into acquiring political information because "the returns are so low"). Reviewing one experimental design is revealing, running it in a class is eye opening. John Pisciotta, an economist at Baylor University, designed a simple in-class experiment about rational ignorance that is also a learning exercise for the participants. They are given a budget to spend on gathering information about a private purchase and a voting in a referendum decision. The values are similar for the outcomes in the two classes, and the students can choose what information to invest in. Round one leads to a split investment pattern. But quickly the pattern of investment in information shifts to the private decision as the students become aware that there is less to be gained in gathering information on what to vote for than what to buy. John Pisciotta, *Information for Market and Voting Choices: A Rational Voter Ignorance Experiment* (working paper), available at http://business.baylor.edu/John_Pisciotta/.

95. DOWNS, *supra* note 94, at 259.

experienced or were neighbors of those who experienced the failures of the response of the government in giving aid. In Louisiana, citizens knew first-hand that the levees gave way, that rescue efforts were dismal, that the poor were virtually left to die, and that FEMA failed in delivering help. Voters who felt that they too may have been abandoned need not have more information than that to know they wanted the government to be changed.⁹⁶ But not all information need be gathered in such a casual manner.

Wealth is invariably linked to significant private interests and greater incentives (and means) to acquire political news, not to mention the greater means to use the information to affect political outcomes. Thus, the wealthy will be far more politically informed than the poor. Without mass organizations such as unions or class-based parties, the poor generally will not correctly identify their political interests, but the wealthy may.

D. Private Property Rights

There is, perhaps, an interesting relationship to be seen between private property rights and the British common law tradition. For in common law societies (e.g., all former British colonies), what becomes law is a function of how particular legal precedents can be used to shed light on current cases. This means that the legal code is changed not one decision at a time, but on an accrual basis by courtroom decisions. In such a system, the decisions regarding one private property right, perhaps originally argued for only one form of property, can gradually be extended to other forms of property. Similarly, behaviors can be protected far beyond what was originally conceived as being covered.

For example, the free speech protections in the U.S. Bill of Rights were extended to cover corporate speech (i.e., advertising, etc.) in a manner totally unlikely to be consistent with the Framers' conception of the meaning of freedom of speech. The same path led to a strong protection for an equal role for corporate money in electoral politics, even though by doing this the free speech was being given neither to voters nor to associations of voters. Rather, the right to buy commercial political messages was being given to corporations.

96. Indeed, I should note the empirical finding of Amartya Sen that famines have never happened in a democracy. See generally AMARTYA K. SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRAVATION* (1981). Amartya K. Sen's theoretical discussion of this in *Famines and Other Crises*, *supra* note 20, is in the spirit of this Essay.

And although the property rights that slave-holders had in their slaves were terminated by the Civil War and the constitutional changes thereafter, such a cautionary tale may miss the point. Because slavery was contentious, and many cases were brought to court, many nuances regarding property rights were developed in the United States. The many protections built up by common law decisions securing the rights of property owners to slaves were extended to other forms of property, and served to extend the conception of private property rights in the United States.

V. CONCLUSIONS: PULLING TOGETHER INSTITUTIONS, OUTCOMES, VALUES AND PROPOSALS

How do the factors we have discussed come together to affect our ability to judge proposals to change the rules of the political game, or constitutional rules?

At the deepest level, we are saying that constitutional proposals should be evaluated in terms of a measuring rod of basic objectives. Without a careful assessment of objectives, there is no solid foundation for evaluating proposals.

Additionally, we argue that in a democracy the measuring rod of concern should be related directly to the welfare of the citizenry, or, social welfare. However, any such notion of social welfare has difficulties in getting leverage unless one can establish an element that is interpersonally comparable. Here, we argue that the element is the satisfaction of the basic needs of citizens.

If this is accepted, then constitutional proposals must be justified by their facilitation of the goals of democracy, which is to be understood as more than a mechanical working through of a voting process. Reforms should be targeting those aspects of the system that unduly privilege those status quo points that leave the needy with impossible and debilitating burdens, and hamper, rather than improve, our liberties and freedoms. In the main, unfortunately, such reforms in the United States may need to strike at the heart of the many checks and balances that were deliberately put in place to hem in democracy by our founding elites.