UNIVERSITAT DE BARCELONA

A Lockean approach to examining the development and sustainability of contemporary democracies

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RESUM

Els sistemes polítics contemporanis que es defineixen com a democràtics tenen una arrel comuna en el liberalisme de John Locke. Després que els Estats Units d'Amèrica iniciaren fa més de dos-cents anys el seu "experiment" mirant d'implementar les idees de Locke a través d'una nova concepció de la república, (revolucionària tant per la seva forma com pel seu contingut) en l'època contemporània els desafiaments que se li presenten a la democràcia ens empeny, en un exercici de responsabilitat, a analitzar si aquesta té els recursos necessaris per a fer-lis front. Aquests desafiaments són productes del nostre temps o sorgeixen a l'interior de la democràcia mateixa? La Constitució Americana va esgotar Locke o encara ens queda material per a contribuir a pal·liar la crisi liberal actual?

Aquest treball tracta d'adreçar la qüestió sobre la crisi de les democràcies liberals contemporànies des de la perspectiva de les diverses variants ideològiques que ha anat patint al llarg dels segles però atenent a la filosofia moderna de John Locke. Pretén, en última instància, oferir una forma d'aproximar-se a la situació política actual que ofereix possibilitats per a avançar en el perfeccionament (o, en tot cas, la millora) del model liberal contemporani en les nostres societats occidentals multiculturals i amb pluralitat de concepcions del bé.

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1 INTRODUCTION

The ultimate goal of this work is to contribute to the contemporary debate over the crisis of nowadays Western liberal democracies. We approach the debate from the perspective of political philosophy. We contend that in order to provide a more helpful and insightful contribution to the topic, we must focus on providing a deeper understanding of the present situation. To that end, we try to clarify the essential role that the British seventeenth-century philosopher John Locke had in the development of modern democracy. Afterwards we try to analyze the contemporary order based on what we learn from lockean theory.

To attain this goal we begin by outlining the state of the question reviewing the most relevant scholars' positions on Locke's theory since the emergence of the topic in the early twentieth-century.

Following the up-date of the present situation of the debate, we move on to review the political thinking prior to the emergence of lockean political philosophy with the aim of elucidating those most relevant political concepts that would end up having an impact on modern political thinking. We scrutinize two significant and very different construes of absolutism: those of Thomas Hobbes and Robert Filmer. We also analyze aspects of Robert Bellarmine's political philosophy that we believe contributed to the formation of modern political thinking.

Once the context prior to Locke is set, we then put forth the idea that the conception of political order changed altogether during modernity, with Locke as its main theorist. In order to justify this assumption, we first review what we hold to be the theoretical foundation for the typically modern natural rights liberal approach politics, i.e., that of John Locke. Following that, we open a new chapter in our dissertation in which we begin to focus on the United States of America's founding. We find that the philosophical-political process that brought America from

being a British colony to becoming its own independent state (and a very successful one, at that) has great value in helping us discern how exactly did the lockean ideas become a common practice in the modern times. We labeled this specific way of making politics, this combining of liberal and Lockean theory and practice, as the "liberal-lockean approach politics". First we look at Thomas Jefferson through the Declaration of Independence of 1776 to discover those revolutionary elements that were appealing to the entire humanity and were not restricted only to the American patriots. In discovering the essential role that man's rights played in the Jeffersonian political thinking and how the Declaration of Independence was actually a declaration of the rights of man, we then analyze in which exact way were those rights of man different to any other rights prior to that time. In that same section, we try to specify in which way were the modern rights of man articulated into the politics of America as a free nation.

Lastly, we examine the Declaration in terms of the Lockean connections we discover within it. We review concepts such as government, property, inalienability… that have a crucial role in the constitution of America and can be traced, from our point of view, directly to the liberal theory of John Locke.

Once we believed to have exposed the nature of the political-philosophical development in modernity, i.e., liberal democracies, we turn to observe the political-philosophical understanding of those concepts in the present time. We take the Spanish Constitution of 1978 and inspect those concepts that are most relevant for its understanding as a contemporary liberal democracy. We review the core values that the State professes -liberty, justice, equality and political plurality- and attempt to understand their meaning through their relationship with the structure of the State: a social State, a democratic State and the rule of law. We come across the social component as an important aspect that has apparently evolved from the liberal notion of rights. Nevertheless there seems to be come conflict between the

social responsibility of the government and the liberal command for freedom. While clarifying the conceptual implications that Spain's core values have for liberal democracy, we also make comparative notes on the side regarding its relation to the modern -American- take on liberal democracies.

The product of this analysis constitutes the final chapter of the work. In it, we feel like it is possible to distinguish certain differences between modern democracies and contemporary ones, yet we discover that this distinction is not so much substantive as it is formal. We contend there that there has been a misplacement of where the conflict really lies nowadays in liberal democracies. The tendency is to believe there is a deficiency within the very philosophy supporting liberalism and therefore its democracies, and that leads to questions such as should another kind of democracy better satisfy the of our contemporary culture? Or, is liberalism still an efficient way to justify and arrange political communities?

From our point of view, the problem is not necessarily in the philosophy sustaining liberal democracies, but it *could* be. In other words, liberal democracies are not in and of themselves a philosophical doctrine capable of sustaining the political order on their own; nevertheless, nowadays, they might have become just that. In our final conclusion we use John Rawls' categories to try to express how we can better understand the mix-up between a popular liberal political consensus on one hand and philosophical doctrines (liberal or otherwise) on the other and we suggest that by making this difference clear we can already consider ourselves to be moving forward when it comes to helping our political systems. If we wish to keep making steps in the right direction -we aim at justifying here- we must continue by giving relevance to those philosophical systems that can return to liberalism its substance, and therefore, its reason for being.

The methodology we follow in approaching our authors, but most specifically Locke, will be what we shall follow Steven M. Dworetz in calling a "substantive connection". That is, we shall detect the affinities between Locke and the author we suspect is using Locke, in terms of the general philosophical framework in which the idea of Locke's in imbedded. Through sound interpretation of both philosophies we believe we can reach a deeper understanding of both and of their meaning, and whether they are similar or not. We will not focus so much then on the "formal connections" between authors (citations, paraphrasing etc.), those that are not based on interpretation as much as on verifying the adequate use of Locke's theory and immediate context. Also, as will be made clear immediately, the interpretation of Locke's philosophy that we will be taken in this work is that of the "theistic" Locke versus the interpretation of Locke as a "bourgeois". There is much to be said in favor of both but we hope to express convincingly enough why we will go with the former instead of the latter despite not addressing the issue directly.

Lastly, we offer a complete reference list of those books, articles, websites and other such material that has been employed during the researching process of the making of this work.

2 STATE OF THE QUESTION

Scholars have devoted the past twentieth century almost entirely to dialectically quarreling over the impact of John Locke's ideas on the founding of the United States. Nevertheless the century before that also had its own share of understandings of the matter.

In the nineteenth century the thought of the Founders was conceived as one more piece in the general, unified rationale of the history of Western political thought. Accordingly it was seen to carry within it the principles that informed what was understood to be the Western tradition of constitutionalism.

Apparently Socrates, Plato and Aristotle had started this tradition back in Ancient Greece. Stoicism would have performed major changes to it and help give it a push towards a doctrine of moral equality amongst all men. But it was the advent of Christ and the teachings of the New Testament that proved to be effective with regard to the inclusion in the tradition of equality, humanity and compassion. This great tradition suffered at the hands of certain religious attitudes towards politics during the Middle Ages but it also encountered an enrichment and a useful systemization of its ideas on natural law via the Medieval Christian theorists as well as the scholastic ones (e.g., Thomas Aquinas, Francisco Suarez, Richard Hooker).

At that point, through the new and emerging theologians of Calvinism and separatism there seemed to have been a certain restoration. According to this constitutionalist thesis, the role of Enlightenment philosophers, especially Locke, was crucial. They re-launched individual rights, and especially property rights, supposedly through a theoretically based amalgam of the English common law and Calvinist covenant theology. The American Founding was thus, according to this

view, a comprehensible next step –if not the culmination- of this tradition of constitutionalism.

While this "great tradition" does have big gaps and contains a wide range of divergence within it, it was considered that its running through the centuries like a steady, traceable -albeit interpretable- thread proved it was, in fact, a continuum. The binding elements of this thread would be the notion of limited government:

> *"government, that is, of distinct and balanced institutions operating according to the rule of law, with the law itself bounded in part by the consent of the governed and in part by the appeal to an unwritten "higher" law. This unwritten higher law was understood to be "natural" law, in the sense of being accessible to the reasoning of man as man, although the "natural" law might well be conceived as enlarged and completed (though not contradicted) by revealed, or divine positive, law" (Pangle 1990, 7)*

The development in the twentieth century of two variants of totalitarian regimes, Fascist and Communist, that took place in the very heart of the Western civilization, plus the degradation of political life in the Western liberal democracies that were considered the carriers of this "great" tradition, easily exercised their strong erosion on this traditional ideal.

Furthermore the influence of nineteenth century Germanic thinking (Nietzsche, Marx, Weber, Freud) made its way into the retrospective views on the American Founders decisively. Nietzsche's proposed thinking entailed the loss of credibility of moral judgments by putting forth an understanding of them as historically conditioned commitments (to economic interests, religious faith, subconscious impulses) and laid bare the path for scholars to read the Founding Fathers with an aim at their unconscious motivations, therefore shifting the focus away from what it is those documents actually said and towards why they might have intended to say that.

This approximation to the Founding, which we have just described, brought about with it the perception that American eighteenth century thought was not only *not* simply one step more within an already existing tradition but it actually incarnated a distinctly modern spirit that broke with its heritage. Yet we understand that this "*distinctive spirit underlying modernity had to be explained not in terms of the explicit moral, political, and theoretical arguments of the Founders and their philosophic forebears, but in terms of deeper, subrational economic or religious motivations and impulses.*" (Pangle 1990, 11)

An Economic Interpretation of the Constitution of the United States (1913) is Charles Beard's analysis of the process that led to the writing and ratifying of the American Constitution. In this work, the author applies the Marxist view of history as rational, progressive and intelligible. He identifies the political actors from the period of the Founding and classifies them according to Marxist economic categories and thus proceeds to explain their political positions in supporting the Constitution in terms of economic self-interest.

Marxist scholars have tried since to maintain this thesis but with great hardship due to the difficulty in keeping the faith in the liberating role of the proletariat and the culminating moment of history given the actual facts of humanity's recent history. Until future more revealing re-readings of eighteenth century American political and philosophical thought by Marxist scholars, in the mean time there appeared to have been a desire to amalgamate certain key Marxist elements with those most compatible Weberian, Freudian, Nietzschean or even Heideggerian ones.

Although Max Weber coincided with the Marxist approach in that the American Founding produced a clean cut between the medieval and classical thought and the modern "capitalist" way of life, he by no means agreed as to how it came to be so. Weber's contention was that civilizations were shaped

predominantly by the force of religious belief. In *The Protestant Ethic and the Spirit of Capitalism* (1905) he argues how, in the specific case of the United States of America, the Protestant religious ideology monopolized the nascent culture taking sway of it to the point that it succeeded in developing the capitalist economic system that Protestant ethic is to lead to –he assures- inevitably. (This thesis could be viewed as a reversal of Marx's thesis according to which it is the economic base of society that determines all other aspects of it, including religious faith.)

Yet, following the Nietzschean train of thought, Weber was brought to believe in the impossibility of achieving a truly adequate grasp of human values and the ultimate human motivations, thus allowing for a permanent degree of uncertainty to surround the emergence of the "spirit of capitalism" and the modern ethos in general.

In the equator of the nineteenth century a number of distinguished scholars ripped the cobwebs off John Locke's works only to discover that his teachings had been well preserved in a very vivid way: through the shaping of the American nation. We will now turn to these scholars and see how they sustain such a thesis.

Carl Becker published *The Declaration of Independence* in 1922, which was then re-published in 1942. With it, the first liberal wave had begun. Becker initiated what would soon become a "liberal tradition" by furnishing with solid arguments one side of a debate that was destined to endure up to our days. Afterwards, in 1955 it was Louis Hartz "*who most cogently and comprehensibly argued the case for a Lockean America*" (Dworetz 1994, 13) in his work *The Liberal Tradition in America*, in which he supported and completed the theses that had been previously suggested by Becker as well as adding some of his own.

Despite their works having to face in later decades the criticisms of the "republican tradition" supporters, during the forties and fifties the consensus was general among scholars such as themselves, Clinton Rossiter, Richard Hofstadter

and others, with regard to the mode of thought that had dominated the Anglo-American political and constitutional tradition in the early modern period. Political theorists and historians agreed that the constitutional theory in America -as well as its political discourse- were deeply indebted to ever-present Lockean-liberal principles.

Lee Ward synthesizes them as follows:

> *"The distinctive features of this liberal consensus in the fields of both Anglo-America and early modern studies were an assertion of the centrality of individual natural rights, an instrumentalist or conventionalist understanding of government as a product of human artifice designed and directed to the securing of rights, and a statement of the importance of private property rights and the unleashing of essentially selfish and materialistic passions channeled through the political and economic institutions of a competitive, individualistic, and capitalist society. In sum, early liberal modernity peaked in Locke, and Locke was America's philosopher." (Ward 2010, 2)*

As for Louis Hartz, he was aware of both the Calvinist and the Marxist attempts to justify the Founders' political theory in terms of ultimately economic or religious motivations. To his understanding, the Calvinist explanations -with which he was extremely familiar-, were simply not compelling enough, let alone conclusive. As for the Marxist explanations, Hartz "*came to the conclusion that the experience of America and American history constitutes a kind of refutation of every hypothesis that tries to reduce ideology to economic factors*" (Pangle 1990, 26) rendering Marxist conclusions void when it comes to explaining the political theory the Founding rested upon.

However, Pangle[1] makes the following analysis of Hartz: Hartz was a reader of Tocqueville and had been open to his influence while at the same time he retained certain Marxist categories and outlooks. This combination produced a peculiar pattern of interpretation. He apparently persisted in the use of a Marxist ideology category (feudal-reactionary, bourgeois-liberal, progressive-socialist) to analyze modern thought and in doing do he applied a specific, static frame of mind to a revolutionary moment, and that would, in the end, prove to be distorting of reality.

The influence of *Democracy in America* on Hartz was a deep one when it came to analyzing the American democracy but Hartz apparently had a superficial understanding of Tocqueville's appreciation of said democracy or perhaps unfortunately oversimplified his interpretations. As a consequence of this stripped down transposition of Tocqueville's reflections, Hartz lost sight of some of the deeper contributions the French thinker had to offer, says Pangle. One of those rather overlooked aspects was the role of Puritanism in New England, and by not emphasizing it enough he therefore minimized the influence their ethos exercised in the shaping of the American thought.

Yet the basic problem with Hartz' thesis has more to do perhaps with the actual study of Locke -or the lack thereof. Thomas Pangle argues that Hartz never appears to have approached Locke ("*or, for that matter, any other thinkers', texts and arguments*") with the depth that his task requires (Pangle 1990, 27). This turns out to be quite a crucial aspect. His underestimation of the role of theology in the works of John Locke necessarily leads to an inadequate understanding of the depth

[1] For a full account of this analysis see Pangle, Thomas L. *The spirit of modern republicanism.* Chicago: University of Chicago Press, 1990, chapter 1.

of his work. Cutting Locke of this root from which all his thinking eventually develops, renders Hartz' account of Locke's theory virtually unrecognizable. As a result he pictures lockeanism devoid of its revolutionary elements, superficial and ultimately distorted. Locke's central concern with the natural law is not adequately appreciated due to Hartz' lack of understanding of it and that leads, in turn, to an incorrect appreciation of Locke's political philosophy. (Pangle 1990, 27)

Pangle contends:

> *"Still these errors that result from Hartz' impressionistic, careening sweep through the complex materials of historical interpretation do not entirely vitiate his thesis" (Pangle 1990, 27)*

This one being as follows:

> *"According to Hartz, American political society is, always has been, and presumably would continue to be, under the intellectual, ideological and psychological domination of Lockean liberalism- by which he meant, among other things, an ethos of individualism, economic self-interest, and materialist values" (Dworetz 1994, 13)*

This gripping sway Lockean liberalism was able to attain over seemingly all American intellectual and political life was brought about by Hartz' following of Tocqueville's insight of America as egalitarian and individualistic and standing in striking contrast to Europe's customary mode of society organization, aristocracy. Modernity would have found Europe struggling with Filmer, managing to throw herself into the arms of Lockean liberalism being freed only to fall into Marxism. The bonds of the feudal system were hard to loosen one way or another. Yet America did not have the constant need to fight off a historical dynamic that had never existed there- for those who reached the new land seemed to re-enter the state of nature Locke had once situated in that same location. Therefore, according

to Hartz, once the colonizers became aware of the unique opportunity they were faced with to kindle a new kind of political infrastructure, i.e. lockean liberalism, they seized it, and not having the ghost of the Antique Régime there to offer its resistance or to resist to, they succeeded.

The liberal tradition in the fifties was going to have as one of its core postulates this element of novelty of the American political thinking and practice. Hartz' knowledge of Tocqueville's ideas, albeit his use of them is unique, allowed him to grasp the essential modernity of the American Founding mentality. In this sense it is safe to say that despite the flaws that may be found in Hartz' work, his underlying theses, we contend, were not off track.

The other major supporter of the Locke model of interpretation, Carl Becker, focused more than Hartz on the effect of Locke's system of thinking upon the American Revolution itself. Becker's particular account as to why the American society would be so attached to Locke, has to do with the innovative nature of their governments. According to him, Locke's philosophy "*had furnished a reasoned foundation*" for their existence. Hence,

> *"how could the colonists not accept a philosophy (…) which assured them that their own governments, with which they were well content, were just the kind that God had designed men by nature to have! The general philosophy which lifted this common sense conclusion to the level of a cosmic law, the colonists therefore accepted, during the course of the eighteenth century, without difficulty, almost unconsciously" (Becker 1958, 27)*

While Becker places Locke's natural law and natural rights philosophy at the core of the American Revolution, Hartz places lockean liberalism, understood as materialist values and self-interest, as the basis of his influence in America.

In any case, beyond reaching complementary conclusions, it is relevant to notice the similar methodological singularities that accompany this liberal position.

Without disregarding the role of historical, economic, or theological influences in the formation of early American political thought, they asserted that it was the role of philosophy that was crucial- in particular the philosophy of John Locke. Becker, as well as Hartz, did not imply that all the colonists had actually read the *Two Treatises on Government* and agreed massively with what they had read.[2] Their contention was that there had been those who *were* readers of Locke and/or familiar either directly or indirectly with his ideas in both England and America and that they had been the ones who had spread an abridged adaptation of those ideas from the pulpits, the office, via their own writings etc. Naturally, this loose way of connecting Americans to Locke, via some sort of "*<intellectual osmosis> of ideas that were <in the air>, and not in available books"* (Dworetz 1994, 16) unleashed the methodological critiques of historians who in turn buried their heads in the actual political writings of the Revolutionary period.

The alternative methodological approximation to the issue plus a new frame of mind set for them ironically by two political philosophers, Leo Strauss and CB Macpherson, led to a new tradition- the "republican tradition". Their contribution as political philosophers to the historicist accounts in the 60-70's decade. Their new way of reading Locke leads to a new way of understanding his writing, and his influence in the US is very deeply undermined by the republican historians. Dworetz contends:

> *"Strauss and Pocock seem to agree on the meaning of Lock's thought (though not about his historical importance). And they both regard*

[2] See Dworetz, Steven M. *The unvarnished doctrine.* Durham: Duke University Press, 1994, p.15

> *Machiavelli as the decisive figure in the history of political thought."* (Dworetz 1994, 102)

They, as Dworetz goes on to mention, do not agree either on Machiavelli's historical function. Whereas Macpherson believes Machiavelli to be the filter through which civic humanism passed into the modern world (Aristotle, Polybus, Cicero), Strauss doesn't perceive the antithesis between the republican Machiavelli and the liberal Locke. He believes that, if anything, Locke perfected what Machiavelli had begun, which was not the medium for Aristotelian civic humanist ideals. In any case historians moved forth in their analysis using the bourgeois Locke, not the theistic one. Strauss uses "*the bourgeois Locke to complete the devil's work initiated by Machievalli*" (Dworetz 1994, 102-103)

What Macpherson manages to do is to cast a Marxist view on *The Two Treatises on Government* through his own work *The Political Theory of Possessive Individualism*. In it charges Locke with having transformed unlimited appropriation from a moral disability into a natural right. Property would be at the center of Locke's work, and natural right the façade to justify it. According to Strauss, putting forth a justification for acquisitiveness is also at the heart of Locke's intention, although he does it in an esoteric way.

During the 1960's and 1970's the historiographic revolution envisioned the liberal Locke as the problem of America due to its capitalist nature:

> *"Without directly attributing this view to Strauss or Macpherson, without applying any criteria of interpretation in adopting this view, and without acknowledging the existence of competing, no les credible but less hostile, intepretations of Locke's thought, the revisionists simply took Locke at hi worst: the possessive individualist, the apologist for bourgeois excess, the corrupt prophet of the 'spirit of capitalism'"* (Dworetz 1994, 12)

This republican synthesis, or civic humanism, extended over decades thanks to the works of scholars such as Bernard Baylin (1967), Gordon Wood (1969), John Dunn (1969) or J.G.A Pocock (1975) all of whom contributed to the view with their own intellectual idiosyncrasies but to the same end.

In 1978 and 1981 Garry Wills put forth in his works *Inventing America: Jefferson's Declaration of Independence* and in *Explaining America: The Federalist* the idea that the key to understanding the American philosophical heritage lies in acknowledging the link between eighteenth century Scottish enlightenment philosophers and the fundamental ideas behind the American Revolution. According to him, it is necessary to look to thinkers such as Francis Hutcheson especially, but also David Hume, Adam Smith, Thomas Reid, Adam Ferguson or Lord Kames when trying to understand the intellectual background of Jefferson or the Federalist Papers. Other scholars have indeed advocated for the Scottish Enlightenment cause as well yet in not such certain terms or quite as extremely.

It has been widely agreed upon though, that "blatant errors of fact" of the thesis of Wills and its lack of "scholarly substance" (Hamowy 1979) responds to poor research on one hand and to a misapprehension of the vast influence of Locke on the Scottish thinkers on the other. Despite Wills trying to prove the closeness in thought between Jefferson and Hutcheson it appears clear that the Scottish Enlightenment strongly shared certain core elements in the thinking of Locke and the opposition Wills alleges between Hume, Smith or Hutcheson and Locke is blurred substantially (Pangle 1990, 37).

It was not until the decade of the 1980's that the liberal approach to Locke's political thought revived under a not-so-gloomy light. It was going to be a second liberal wave. Works by Isaac Kramnick (1982), John Diggins (1984), Joyce Appleby (1984), Thomas Pangle (1988) gave the original Hartz and Becker interpretation of Locke a renewed impulse. We follow Lee Ward in our account of the new liberal

wave. Firstly, Pangle, *The Spirit of Modern Republicanism*, and Dworetz, *The Unvarnished Doctrine*, considered that the republican tradition had overstated the importance of non-liberal thought in the eighteenth-century Anglo-American tradition while systematically neglecting Lockean modes of thought.

Joyce Appleby in *Capitalism and a New Social Order: The Republican Vision of the 1790's*, believes any trace of republicanism definitely disappeared when Jefferson and is followers gained political weight. It was the liberal Locke that Whigs turned to, she contends, during the imperial crisis of 1760s and 1770s. Isaac Kramnick in *Republicanism and Bourgeois Radicalism* "*observed and underlying continuity of liberal thought from 1760s on"* (Ward 2010, 6)

Patrick Diggins in *The Lost Soul of American Politics* confirmed the centrality of Locke in the teaching of economic individualism for the shaping of American political discourse. Unfortunately for him, he notes the demise of the Protestant-Calvinist non-liberal alternative and confirms the importance of the liberal Locke in shaping the American mind.

In the 1990's and 2000 there came to exist what we may call the liberal-republican compound. The main representatives are Steven Dworetz (*Unvarnished Doctrine* 1990), Garrett Sheldon (*The Political Philosophy of Thomas Jefferson* 1991), Lance Banning (1992), Michael Zuckert (*Launching Liberalism,* 1994) and Jerome Huyler (*Locke in America: The Moral Philosophy of the Founding Era,* 1995). They are united in stating that the American Founders' consistent and coherent political philosophy was actually a product of the constant combinations they would of elements from both streams of thought, republican and liberal. It has since been believed that it was actually the historians who sneaked into the past the confrontation between the two points of view. Huyler maintains that it is the lack of a correct understanding of Locke's philosophy that brings to the displacing him from

the philosophy of the founding and to the opposition between republicanism and liberalism.

3 UNDERSTANDING OF SOCIO-POLITICAL ORDER PRIOR TO MODERNITY

3.1 TWO SIGNIFICANT CONSTRUES OF ABSOLUTISM: THOMAS HOBBES AND ROBERT FILMER.

In the seventeenth century two contemporary political thinkers, Robert Filmer and Thomas Hobbes, despite standing on different philosophical grounds, erected a similar building. The edifice of an absolute, unitary sovereign power was erected upon two strikingly opposed pillars: a very particular understanding of Christian theology on one hand and a revolutionary proposition involving a new concept of natural right on the other. It is important to dissect the philosophical roots of each one of their understandings of politics if we are to grasp the authentic dimension of their propositions for absolute power and its legacy. We shall soon discover how one of them, Filmer, exploits some specific traits of the divine power political philosophy tradition while the other, Hobbes, has in fact quite an original approach based on a renewed understanding of natural right. Nevertheless both authors had doubtless a strong impact on Locke's mode of thought, for one reason or another, as will be seen in the following section.

We must start though by examining what we may consider to be the fundamental issue in Hobbes, namely, his natural philosophy, which leads necessarily to the unclosing of a distinct philosophical system than that of Filmer (or any other philosopher up to that date, for that matter). According to Hobbes, who has a unique teleological if you will approach to man, we must not expect to

find any transcendental laws (not even in nature or religion) regarding how men should act or not or regarding what he should aim at or not. The only certainty we have is this: that men are naturally aimed at self-preservation and have the liberty to pursue whatever is necessary in order to attain it. Self-preservation is the one and only natural right men are born with and it is unalienable, says Hobbes. In this sense, at least, it is safe to say that men are free. Denying, as Hobbes does, the existence of a natural law in the way it had been understood previously, (i.e. as immanent in nature and susceptible of being known to man by either being perceived through reason or as the commandments of God), in a state of nature men are at absolute liberty to act as their considers according to their end.

This puts all men initially in a natural state of equality among each other, so much so, that Hobbes considers all men to be entitled to literally anything, even any body, necessary to secure their preservation. This does not raise any moral dilemmas within his system of thought when it comes to considering the likely incompatibilities regarding legitimate ownership of either things or bodies. There *is* no legitimate ownership as such, so it is not possible that men should quarrel on the grounds of whether something legitimately belongs to one or the other. Because of there being no natural ownership whatsoever, no ownership can be or not *legitimate* based on natural right without being arbitrarily so. It is considered all men have an equal right and therefore an equal free access to whatever they require for their preservation. No one person can thus be said to *possess* anything- not even their own body -in such a state since the concept of possession implies the exclusion of others' right to one particular possession, and in the state of nature, once more, all men are entitled equally to all.

Hobbes makes an analytical connection between property and justice by asserting that in there being in this state of nature no property per se, there is in effect no concept of justice either. Justice involves giving to each his own, yet it has

already been established that there is no such thing as "shares"- let alone *fair* shares- of possessions. Consequently it does not make any sense to speak of *in*justice either. The criteria for what each person's needs are is at the discretion of what their self-preservation might demand.

Under these circumstances, and bearing in mind the basic economic principle that all resources are limited, it is to expect that the state of nature will be in actuality a state of war of all against all, where everyone is attempting to procure for themselves what they deem necessary. Hobbes makes no conceptual distinction between one and the other. The lack of justice and of a sovereign power to determine and execute this justice allows for a rational and warranted use of force to secure one's own right. As can be concluded from this dynamic, nature has not supplied humanity with a "law" but every man with a "right" or a "liberty". This freedom entails a collision of rights, a natural situation of general hostility arisen from the individuals' clashing in the pursuit of their own good, rather than the common good.

This arrangement does not prove beneficial to the individuals' cause of self-preservation, furthermore, it poses a threat to it. So as far as human beings can manage to establish justice, and find the legal and political mechanisms to enforce and secure it, they accede to a general condition aimed at the common good for their own benefit. Yet, Hobbes reminds us, the fact that we call these rules of justice "natural law" does not render them natural or law. Nevertheless, this complying with a conventional law is just the tip of the iceberg of the lengths men are willing to go to in order to escape such a dangerous situation as is the state of war. For the state of war is man's most primary fear. This fear is the single natural number one motivation for human action; guided by this passion, men unite by means of a covenant under one sovereign to whom they yield entirely the power they originally have over themselves and others by right of nature.

We must bear in mind Hobbes does not expect us to understand this state of war as ever having necessarily occurred in the history of humanity. It is an inference of the passions as the only naturally given directive forces in human beings. What we learn from his extrapolation of human behavior is the fact that men are born in a condition of liberty, to a state of war against each other and with the inalienable right to self-preservation as a primacy. It is from these three basic premises that Hobbes proceeds to elaborate on the origin of political power.

Sir Robert Filmer opposed all three of these Hobbesian premises that supposedly lead to political power and grounded instead the origin of sovereign power on his Adamite thesis. As he put it himself succinctly:

> *"If God created only Adam and of a piece of him made the woman, and if by generation from them all mankind be propagated; if also God gave to Adam not only the dominion over the woman and the children that should issue from them, but also over the whole earth to subdue it, and over all the creatures on it, so that as long as Adam lived no man could claim or enjoy anything but by donation, assignation or permission from him." (Filmer [1680] 1991, 187)*

What this thesis amounts to is a frontal refutation of Hobbes natural rights theory based on Filmer's theory of Adam's right of dominion by creation on one hand, and his right of property by donation on the other. The bedrock of his contention is the naturalness of the family and the pervasive operation of divine providence.

Filmer's whole philosophical construction built for justifying absolute sovereignty as the necessary form of law and government rests on the naturalness and ubiquity of the patriarchal family. First, it is from the Bible from were we learn which is the relation of God with man: existence is granted to Adam directly by God and with it, it would seem, the dominion over the woman that is created from him

and the offspring that they generate. Apparently, to Filmer, it is consequential that this dominion be made extensible to all other descendants since Adam and that the power be passed on from one head of the family to the next upon decease. This hereditarily dynamic originated by God's first donation to Adam obviously renders Hobbes's state of nature unfeasible even at a conceptual- if not a historical- level.

In Filmer's system, the family is a natural hierarchy in which the father, as head of it, has absolute dominion over the governance of its members from the very beginning. It is thus not possible that there ever be a previous condition in which men were born absolutely free and not under the sovereignty of the father as in the Filmerian human nature. That is not to say that Hobbes did not believe men were born into families, only that according to him the relation between parents and children is one of a tacit pact for the benefit of the child's sustenance and his or her parents' right over them is extinguished as soon as the need for their support is extinguished.

This dim acceptance of the existence of families on the part of Hobbes is enough to fuel Filmer's argumentations on Hobbes' alleged internal contradictions. He exploits as much as is possible this acceptance and other contextualized concessions turning them into an acquiescing on Hobbes's part to the ultimate naturalness and ubiquity of the patriarchal family and of the *pater familias*' power in particular: *"Originally the father of every man was also his sovereign lord with power over him of life and death"* (Hobbes [1651]1994, 224)Filmer cites.

In a second contradiction Filmer believes to have found in Hobbes, he points out an element that hints at similarities between the two authors. Hobbes's state of nature theory is, according to Filmer, incompatible not only with the naturalness of the human family (that Hobbes himself supposedly acknowledges), but also with the principle of human freedom that Hobbes postulates. The only way to make the state of nature compatible with human liberty would be to affirm that the ones who

enjoy this freedom are solely the male heads of independent families (which is precisely an idea endorsed by the Adamite patriarchal thesis.) It is noteworthy that Hobbes's theory does demand a theoretical abstraction from the human family, and a contemplation of men as spontaneous individuals. From this point of view, it is antithetical to Filmer's argument. Filmer, on the other hand, as always throughout his argument, relies on the Scriptures for substance and the Scriptures "*teacheth us otherwise, that all men come from succession and generation from one man*" (Filmer [1680] 1991, 187).

Despite them both believing that at a certain point the male heads of family are free and that this premise is what allows them the possibility to originate civil government, the genesis of man is an important factor for Filmer to discredit Hobbes. According to him, what we can read from Hobbes's defense of the original liberty of man is twofold. Either it rejects the moral implications stemming from the very nature of human generation and subsequent family ties, or it allows for an unsound interpretation of the Bible by which we are to assume that God created a multiplicity of men at the very same time of Adam (and they therefore all share the exact same condition as far as God's creation and donation). Either way, always according to Filmer's approach, these are, in effect, the reflection of an atheist reasoning, given that Scripture, the only reliable source, clearly relates the original creation of one man alone and the subjection of the wife and offspring to this patriarch. This atheism is what most concerned, and ultimately what distinguished, Filmer from Hobbes.

An example of the deep philosophical implications of such understanding of the Bible in the political constructions of either author is easily found in the fact that Hobbes while not directly breaking the necessary subjection of children to their parents, envisioned this subjection more in terms of contract and consent that in terms of duties, as Filmer would have it. He comes about this conception as a result

of trying to make compatible the divine law with respect to children's due obedience to their parents while still maintaining man's natural liberty. He dodges this obstacle by affirming that children cannot be understood to be in the state of nature precisely because of the required obedience to their parents. Therefore, while Hobbes is strict in asserting that children need obey whomsoever it is that takes care of them, he is lax regarding whom this person might be (father *or* mother, for example, or even a surrogate.) Thus it is not the natural/divine order of human generation that makes this subjection flourish, but necessity. This recognition on the part of the children of a superior power to whom they owe themselves is temporary and transitory; only until the dependence is extinguished and then the former children gain their liberty.

For Filmer, regardless of the obvious necessity issue, there is doubtless the moral subjection issue that he deduces from the Biblical passage of God's creation. This kind of subjection transcends Hobbes's utilitarian one and requires it to be permanent. If, as Hobbes suggested, children were destined to be free at some point, we are to assume that every new born is either already free and out of necessity sees himself subjugated to another, or has in himself a potential right to liberty that needs be realized upon a time (when the necessity to be subjugated does not exist anymore). Both assumptions seem imaginary to Filmer.

Filmer has another bone to pick with Hobbes and that has to do with divine providence. The state of nature virtually annuls any possible effect of divine providence, as Filmer understands it. In a situation where:

> *"there is no place for industry ,…no culture on earth, no navigation,…no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man solitary, poor, nasty, brutish and short." (Hobbes [1651]1994, 76)*

there is no room for any account of God's intervention in order to secure the course of man according to His plan. Neither God nor human beings can secure justice or prosperity under these circumstances. Therefore it is one and the same, according to Filmer, for Hobbes to assert the reality of the state of nature as for him to deny the providential intervention of God in human affairs.

In another statement of Filmer's brandishing divine providence as proof against the state of nature, he observes that the idea of such a state does not constitute a realistic of account for the course human events take when there is lack of a common power. Moreover, what Hobbes describes is more akin to the development of a situation the product of scarcity. Scarcity, though, from Fimer's point of view, is not a sound scenario to contemplate given that God in His providence supplies bounty for men on earth. With this, Filmer argues, God prevents the only situation in which men would hypothetically turn against each other in a manner similar to that suggested by Hobbes in his state of nature.

Yet this distinction between the original situation of men in Hobbes and in Filmer proves to have deeper consequences than the mere plausibility or not of the state of nature depending on how much authority we grant to the Scriptures. The point at which Filmer reaches is a sort of juxtaposition of divine providence and the Hobbesian theory. As Ward puts it:

> *"Filmer's argument, rather, is that the institution of natural bounty by creation combined with God's perpetual providence remedies the only conceivable situation that would produce universal warfare. Filmer attempts to superimpose divine providence on Hobbes's preservationist argument in order to confound the state of nature on its own terms" (Ward 2010, 89)*

It is of the essence for Filmer to succeed in his intention of stating that natural bounty and divine providence are proofs of the historical incorrectness of the state of nature, for only then can he counteract the psychological factors

Hobbes describes as being the main war inducers among humanity. For, according to Hobbes, there are deep psychological human factors which cause war, such as diffidence and love of glory. Paradoxically, both the insecurity of one's own power when confronted with another one, (or a multitude of other ones,) within a general condition of equality, on one hand, and the existence of some, those for whom the pleasure derived from their victories seduces them, on the other hand, are equally causes that compel men to make war against each other.

Filmer is also baffled by Hobbes's re-interpretation of the law of nature. A so-called law of nature that is found out by reason and forbids men *"to do that which is destructive to his life, and to omit that by which he thinks it may be preserved"* (Hobbes [1651]1994, 79) requires some enforcing in order to be effective given that on its own it cannot secure the peace it intends. Filmer contends that for that purpose, nature must in the first place make man aware of the principle that life is to be preserved above all. Therefore, if this immanent principle of self-preservation is condition sine qua non for the specific commandments of Hobbes's natural law, we must consider it more of a duty, more primarily compelling perhaps, than the actual law prescribing against performing self-destructive acts. The dispute here is actually over right and law. Hobbes considers it a typical error of political philosophers to confound natural right and natural law. He is strict in his distinction between *ius* and *lex*. The guidance of natural law is an instrument at the service of this primary passion of preservation, seeing as that rights have primacy over law in Hobbes's argument.

On the contrary, Filmer, albeit maintaining the right/ law distinction, assigns a higher rank to the law and its binding force than to the right(which, according to Hobbes, would be a reflection of human freedom.) Filmer does not accept law of nature as being deducible from reason; it is necessary, in order to actually be law, for it to have a component of compulsion, a commanding quality in itself. This is

where he is in contraposition to Hobbes: a natural right of man could never in and of itself generate a natural law that is obligatory.

Another statement of Filmer in this regard has to do with the Scriptures. Hobbesian natural right is impossible not just ontologically but morally, if we are to follow Filmer's Adamite theses. For if natural law is a reflection of the due order of things established by God the Creator in the heart of man, then it is also out of a moral duty to Him that men must comply with its commands. Hobbes ignores this moral duty.

Besides Filmer's frontal rejection of Hobbes's theory of natural rights, the other point of contention between them has to do with the origin of political power. They both agree with the way power should be exercised by the sovereign but they do not converge as to how he should come to acquire it.

Hobbes natural theory has left us, as we have seen, with a scenario of war in a state of equality among all men, without any common power or natural law to guide them. There is no property *strictu senso* since they are all entitled to anything or anybody necessary to secure their own preservation. Therefore we cannot speak of justice or injustice either. Yet the state of war is not an ideal situation for men, not even a good one, since it does little to secure self-preservation-man's only natural right and aim. The key to understanding the transition to another state is fear.

Hobbes's approach to politics was -innovatively enough- a scientific one. This means the object of political science is subjected to either of the two methods available to man: either the compositive one ("synthetical"), or the resolutive one ("analytical"). Borrowing the techniques and principles of the mathematical sciences, and physics, and applying them to men and politics, he reached radically different conclusions regarding the origins of political power than did Filmer's more traditional, religious approach. Hobbes analysis of man is the result of a

comprehensive study of nature -men being a part of it. Human beings are envisioned as *"merely a special case of the general laws of matter in motion that govern all nature"* (Zuckert 2002, 9)

Consistent with this argumentation of men as parts of nature is the idea of them not being free, insofar as they cannot determine the causes of their motions (in the same way no other part of nature can). Notwithstanding the transmission of motion in living entities is indeed more complex than in non-living entities, let alone in human beings. Based on this estimate of the role the laws of nature play in humanity, Hobbes is compelled to deny human freedom, in the sense of free will. This is in plain contradiction to what had been generally sustained by the precedent Christian-Aristotelian tradition. The lack of freedom entails for Hobbes a necessary lack of responsibility. Though it is true that men have reason and that it cannot be underestimated, when it comes to determining human action, it does not make a fundamental difference. The passions are the ones responsible for establishing the desires towards which reason directs itself. Technically speaking, when the mind deliberates, contrary to the traditional view, it is actually pondering between appetites and aversions. Will is the ultimate appetite or aversion, the one that succeeds into causing or refraining from an action. Yet, despite not being decisive, reason's usefulness proves nevertheless to be important. It searches for means, it can manipulate to a certain degree the intensity of a desire if it is necessary, perhaps quenching unattainable ones, or intensifying more productive ones. Never, though, can it suggest new ends or endorse the pursuit of ones above others. The reason according Hobbes's study is purely instrumental reason.

Within the range of passions, Hobbes warns us, we find one that stands out: fear. That is because fear is most reliable when it comes to securing self-preservation. Those appetitions that are closely linked to or guided ultimately by fear, prove to be the most effective when attaining self-preservation. The trouble is

human life is subsumed in a continual disorder due to the lack of assertiveness of fear. Fear is too ambiguous and malleable a passion to have the necessary power to secure the means to civil peace. Civil peace in turn, as we have seen, is necessary for the end of human self-preservation. Hobbes suggests the only way out of this crossroad is to manage to arouse and mobilize fear in people in such a manner that allows for it to lead unambiguously and reliably to the true natural end of humanity.

This manner is via the Leviathan. The first of the Hobbesian laws of nature compels men to gather together in order to seek peace among themselves and to seek defense against those who are a menace to this peace. The rest of the natural laws, moral laws, revolve around the conditions to preserve this necessary state of stable long-lasting peace. A natural law that directly derives from this first fundamental one is the willingness of men to lay down their rights to everything and everybody whenever other men have the same willingness, and accepts just as much liberty against other men as he allows for other man against himself. This mutual concession of rights is actually the substance of the *social contract*. Through the social contract, civil society is born. All men within a multitude agree to oblige themselves through a contract with the rest, not to oppose the commandments of the one person or the one council they have mutually agreed upon as their sovereign. This pact comes into being as an imperative derived from the first principle moving all men to one's own security and preservation. Therefore it stands to reason that while entering this compact, and in doing so laying down their rights, nobody can be assumed to be actually resigning to those necessary rights without which the purpose of the contract is defeated in the first place. For instance, that is to say that while yielding one's rights to the sovereign, one is still free to defend oneself from whoever may attempt against one's life.

The following law of nature logically requires men to abide by their covenant. It is necessary that man not hinder those in whom he has confided his rights from exercising them or benefiting, in whichever way, from this cession. If men did not proceed in this way and did not lay down their rights for the exclusive benefit of the sovereign, then society itself would dissolve. What creates a civil society and keeps it together is not only the adherence of all the men who entered the compact, to that very compact, but also the honoring their commitment. As is to expect, to perform this covenant is another one of the laws of nature.

This auto-imposed moral obligation to perform one's own contracts leads to the existence of justice/ injustice. The breaking of such covenants results in injuries to the rights of others who had originally relinquished their rights in favor of the community and now suffer the affront in inferiority. Thus injustice is considered the breaking of the covenant, the exercising of the right that had been already given up. Genuine legislation is then the result of self-legislation, and its violation is a form of self-contradiction since one is acting in a manner in which one had previously decided against.

All duties and obligations to others have their origin in covenants. Nevertheless covenants require a certain degree of trust among the members of that covenant that they will continue to be obliged by it in the future. In the state of nature there is a constant fear that renders this trust impossible for there is always a reasonable uncertainty regarding whether or not other members will at any moment break the treatise. In order to keep the passions in check and to guarantee the respect of the covenant there appears the Leviathan as sovereign. The sovereign must guarantee the necessary degree of punishment so as to keep the fear of punishment higher than the level of benefit breaking the covenant could procure anyone. The manipulation of fear is thus the key to concentrating and retaining in the sovereign the power necessary for the development of society.

There is no appeal to the moral duties of men for either acquiescing to the power or honoring the social contract.

The sovereign's power must be absolute. No greater power is to be conveyed by man to any man. Sovereigns do not have to obey the civil laws, for these laws are the commands of the very sovereign and so he can release himself of them at will. In the same way, since all property is established by law, nobody can claim to have any property rights against him. This one sovereign not only does but also must concentrate all branches of power: executive, judicial and legislative. Men will only obey the power whose punishment they fear.

As is expected, Filmer agreed with this account of the exercise of absolute power but did not find acceptable the means by which it was acquired. His rejection of the contract theory was based on the incompatibility of it with his own argument for paternal right. Also he detected two problems within the Hobbesian theory that abated its credibility: one has to do with the problem that arises from the hypothetical possibility of various regime types, and the other has to do with the ever-conflictive issue of resistance to power.

As far as Filmer is concerned, the right to exercise sovereignty, and to do so in an absolute, exclusive and unitary way, is rooted in the Scriptures. As has been discussed above, the right of Adam to property was originated by the donation God made directly to him of all that is on Earth. His right to dominion is originated by the creation dynamic according to which he is the first man to be created by God, through him all others are generated and by him all others are to be subjugated following God's command to him.

Filmer's aim in refuting Hobbes is to show how Hobbes himself also recognizes that paternal rule over family is the center and the model for political authority. He hopes to demonstrate how Hobbes fails to confer enough importance to his own acknowledgment of paternal power as root of all political power. Hobbes

political philosophy revolves around the idea of a strong institution being the depositary of all political power, whereas Filmer's rests on the idea of paternal power ultimately justifying all political power. Nevertheless Filmer points out instances of the *Leviathan* where Hobbes admits the potential of paternal power in terms of resulting in actual political power:

> *"the 'father being before the institution of a commonwealth' was originally an 'absolute sovereign' 'with power of life and death', and that 'a great family, as to the rights of sovereignty in a little monarchy'" (Filmer [1680] 1991, 185)*

However, he does not intend to criticize Hobbes's view on sovereignty here since the two authors agree that sovereign civil power is able to and in fact does usually place limits on the power of fathers in families. What Filmer is aiming at is to attack the root of Hobbes's contractualism. Once he's lured Hobbes into supposedly recognizing the indisputable grasp of paternal power over every man's life, he questions him as to how it should be possible that humans be as free as Hobbes expects them to be in order to in liberty consent to the creation of a government. Hobbes theory of consent though is actually so deep in his thought that he considers the ubiquity and efficacy of paternal dominion not a product of natural generation but of consent, reached through a contract. Parental dominion therefore, according to Hobbes

> *"is not so derived from the generation as if therefore the parent had dominion over his child because he begat him, but from the child's consent, either by express or by other sufficient arguments declared." (Hobbes [1651]1994, 128)*

Hobbes rather disregards subtleties in believing children enter into a contract with their parents, and Filmer quickly picks up on that.

> *"How a child can express consent, or by other sufficient arguments declare it before it comes to the age of discretion I understand not." (Filmer [1680] 1991, 192)*

Naturally the contention between them has less to do with the character of reason and more with the primacy of the source.

Nevertheless the bitterest difference between the two at this point is inevitably the recognition of a distinct anti patriarchism in Hobbes that contrasts conspicuously with Filmer. For instance, Hobbes claims that the mother is originally the one who possesses the actual government of her children, being she the one who brings them forth and nourishes them the first. It is from her and her status that the father secondly derives his rights over the children. According to Hobbes the explanation of the prevalence of patriarchy has to do with the fact that women are in need of securing their children in the state of nature and require men in order to attain this security. Also he alludes to the fact that *"for the most part commonwealths have been erected by the fathers, not by the mothers of families"*. (Hobbes [1651]1994, 129) The idea he is trying to put forth is naturally the opposite of Filmer's scriptural thesis. In Hobbes's traumatic subjection of women and children to men there is the logic of grounding any authority that is to be legitimate in a contract of some sort. Whereas Filmer, on the other hand, considers these subjections only to be one more reflection of the natural condition of all human beings as subjected creatures. No matter how we are to understand the individual, from the Filmerian point of view, it will always lack the necessary power to create moral obligation.

Another issue that Filmer disputes within Hobbesian contractualism has to do with the regime classification Hobbes suggests as well as with the principle of representation. Filmer is generally satisfied with the account of sovereignty rendered by Hobbes yet in this particular case, when speaking of the actual political

technicalities, Filmer is to a certain degree disappointed in Hobbes and his lack of absolute devotion towards the monarchical institution. Hobbes maintained the possibility of there being various viable institutions for governance: monarchy as well as aristocracy and democracy. Filmer observes that even though Hobbes contemplates the hypothetical possibility of a democracy or an aristocracy ruling a country, if we are to follow the logic of his argument, only monarchy results in a satisfactory regime. So even if his typology admits for the existence of the other two regimes, Filmer points out how "*he affirms in words, yet by consequence he denies*" (Filmer [1680] 1991, 185) them.

According to Filmer, Hobbes's concession to democracy is contradictory with his own understanding of the social contract. If all men are, before the creation of civil society, equal and free and thus in a situation of making pacts and committing to each other, Filmer questions who is it that could legitimately and coherently be representative of all those men entering the compact. Especially when all of them are meant in a democracy to represent their own interests, Filmer questions, who will enter the covenant? In his own words:

> *"If every man covenant with every man, who shall be left to be representative? If all must be representatives, who will remain to covenant?" (Filmer [1680] 1991, 185)*

From Hobbes's theory we learn that the sovereign cannot be a party to a covenant, therefore Filmer points out the impossibility of democracy by institution since it is not compatible according to Hobbes's own theory, both a multiple-party covenant and a shared sovereignty. If all individuals are able to and actually do enter a pact, then there we cannot speak properly of there being any sovereign power; yet, if in turn we focus on that all individuals are sovereign, and they retain all their natural rights, it is actually the state of nature that we must be referring to

in which there is not any compact. The fact that Hobbes envisions the pre-social community as a community of democratic individuals, each holding born in inalienable rights, works against the possibility of there being an actual democratic government within the civil society.

As far as aristocracy is concerned, the problems to discern in this regime are similar to those detected in dissecting the possibility of a democratic regime in a Hobbesian civil society. The problem yet again stems from the idea that the sovereign is and must be out and above any covenant with those subject to his power. Parting from this premise Filmer points out it makes it impossible to sustain the possibility of an aristocratic regime. All the men forming the aristocracy assembly ruling a commonwealth must have sovereign power, other wise they would not be aristocrats but subjects of that power. Yet, in holding that power they are virtually entitled to put into effect any acts they consider, even the killing of their subjects since they are not in a covenant with the subjects. Also they could legitimately kill other members of the assembly since they all hold the same position of power regarding one another; they are all in an identical state of nature with each other.

Filmer here takes advantage of his contempt for Hobbes's rights theory and in trying to prove the inadequacy of aristocracy he kills two birds with one stone. He uses a Hobbesian frame of mind to prove how it is inconsistent in and of itself. According to Filmer, if we are to stick to the Hobbes's natural rights theory we will soon see how any body representative will inevitably lead to a massive amount of violence against its subjects and to a struggling within the body itself.

As far as the issue of the conquerors establishing a contract with the conquered, Filmer observes it makes no sense, for in order to be able to establish a contract one must have the liberty and the power to do so, but having been

conquered means precisely the having been relinquished of such benefits. Thus it is incompatible to consider a man conquered and in a situation to make pacts at once.

As Lee Ward puts it: *"His attack on the more practical aspects of Hobbesian contractualism results in his affirmation that Hobbes's theory of sovereignty is only consistent with absolute monarchy, which, Filmer adds, does not have contractual but a paternal origin".* (Ward 2010, 92)

What Filmer seems to resent the most out of Hobbes's whole account of regime typology is what could appear to be a classical element in his theory. In other words, Filmer "accuses" Hobbes of being and undercover Aristotelian. While he does recognize Hobbes's effort to cut away from the more hardcore elements, it is not satisfactory enough for Filmer given that he respects his regime typology. In opposing the classical distinction and clinging univocally to an absolute monarchy as the only truthful political sovereignty, Filmer proves his will to break radically with the classical.

As we have seen, Filmer's objections to Hobbes have not to do with the concentration of power in one absolute sovereign, but with other issues that are involved in his theory. The question of resistance is one of the most elaborate attacks of Filmer on Hobbes's social contract theory.

Hobbes maintains that unless all other men lay down voluntarily their rights as one self, it makes no sense for any of them to do so in the first place. To which Filmer annotates that unless each and every single man does so, then it makes no sense talking about there being a commonwealth at all. From here he goes on to state the obvious: that such a standard of universal consent cannot be expected to be attained. We must bear in mind though that the main point of contention is the fact that both authors have a different understanding of what consent is. Hobbes admits that the only way for a commonwealth to come to be is through the uniting of a plurality of voices into one will, and then that one will is to appoint the one

man or assembly who is going to be ruler of them all. In contrast, Filmer requires unanimity for an assembly to conform one will. It is not plurality of voices that can conform one will, but the totality of them. What Filmer is pointing at is to beware of the fact that Hobbes sets a standard for the unity of political action that cannot exist but only in an absolute monarchy. He implies this: *"It seems Mr. Hobbes is of the mind that there is but one kind of government, and that is monarchy. For he defines a commonwealth to be one person"* (Filmer [1680] 1991, 193)

Nevertheless, it is the significance of the covenant itself that gains major relevance in Filmer's argument. Filmer attacks Hobbes's affirmation by which men surrender themselves to the sovereign on the grounds that this surrendering does not necessarily imply the restriction of the individual's own former liberty. In stating that *"I authorize and do take upon me all of his actions"* (Hobbes [1651]1994, 142) the individual does not lay down *all* of his rights. The argument that authorizing the sovereign does not automatically suggest the alienation of natural liberty holds individualistic implications that make Filmer reject it. For instance, if the sovereign must punish criminals, the fact that I have authorized him to do so, even if it be potentially myself, does not jeopardize mine or anybody else's right to self-defense. In trying to resist a legitimate absolute power, an individual's chances at a successful self-defense might be slight to none, but conceptually, in the Hobbesian system, their outcome is equally legitimate to the attacks from the sovereign. The chances of this theory fueling incendiary reactions, according to Filmer's view, are only too high. *"Hobbes's postulation of inalienable rights subverts the very idea of absolute sovereignty he is trying to defend inasmuch as the proposition that "a covenant not to defend myself from force by force is always void" encourages rebellion and disobedience"* (Ward 2010, 93) The main problem Filmer raises with regard to these otherwise logical consequences has to do with technicalities. Technicalities that he uses to discredit the whole of Hobbes's postulations on the

matter. Filmer questions, for example, who is to decide whether or not the sovereign commands that we might intend to fight at a given time, are in fact "dangerous and dishonorable" and, thus, legitimate? Filmer concludes it will end up being up to each individual–i.e., the people - to decide and this poses an obvious threat to the absolute authority of the sovereign. Filmer concludes Hobbes's natural right defense leads to the thwarting of the sovereign's ability to execute waror provide efficiently for the national security, since the use of force implies the risking of one's own physical integrity, to the point of jeopardizing one's life, and this will always clash with one's natural right to preservation. This way, Filmer hopes to make clear the manner in which the logic of resistance is an integral part in the political theory of Hobbes.

In other words, the key of Filmer's critique of Hobbesian contractualism can be explained as follows: the plain laying down of individual rights on the part of the members of the commonwealth is not enough to secure the attaining of the ends for which the commonwealth is established. Despite agreeing on the general absolute character of political power, from Filmer's point of view, at the heart of sovereignty there should be nonresistance, whereas from Hobbes's view, there are significant limitations to political obligations. Additionally, Filmer misses in Hobbes's theory a positive obligation that compels the subject to obey the sovereign directly. He feels Hobbes only provides for the subject refraining from acting as he wishes but not for his obligation to do as the sovereign commands. Hobbes was not unaware of this problem- he could not expect the obligation of obedience to arise from a contract between sovereign and subjects since that would in and of itself impose limits on the sovereign incompatible with his being absolute. Hobbes offered two ways to solve this inconvenience.

The first has to do with the above mentioned consent subjects give when entering the social contract and that includes a recognition of the sovereign's power

and one's own obligation to obey him. The second one has to do with the sovereign being the one free political agent. The fact that the sovereign is not obliged by the contract of the commonwealth puts him in a position to use anything or anybody he deems necessary to execute his power. Filmer is not convinced by either of the solutions to the problem since, according to him, the real objection has not been addressed: the simple willingness to obey the sovereign on the part of the subjects is not morally compelling enough to guarantee their submission. Especially if we take into consideration that they effectively retain a portion of their individual rights-the portion that in certain discretional cases involving their self-preservation, legitimizes them not to obey and to go to any lengths necessary in their disobedience. In sum, Filmer is skeptical of Hobbes' absolute power insofar as subjects are not bound to absolute obedience and complete nonresistance.

The main contention between Filmer and Hobbes has to do with the fact that Filmer points out: Hobbes's argument for absolute power is that it is the most effective, perhaps the only way, of securing man's ultimate aim, namely, self-preservation, while, at the same time, his argument provides as well for the diminishment of that same power. *"The inalienability of the preservation right makes government, which is instituted to secure that right, a cipher. Auto-interpretation of obligation, Filmer cautions, is the very problem of the state of nature"* (Ward 2010, 94) Filmer follows the same argumentation to dispute the issue of property. If we are to infer from Hobbes's theory that the means of preservation must always be available to the individual for that purpose, then we cannot consistently consider the pacts to have any real value; any contract can be broken as soon as one individual feels the need either to restore one's own property or to acquire someone else's for the purpose of self-preservation.

It might appear to be a frail connection that which makes Filmer's and Hobbes's theories of absolute sovereignty coincide. Nevertheless, despite the

differences in their approaches, and the different bases for their absolute power defense, they both agreed on a very specific form of exercising power. Power must be held by a single political institution. This institution must comprise within it all the powers of the commonwealth: the legislative, the executive and the judicial. By its very nature, sovereign power is absolute. Being this so, mixed regime is not a proper form of government, sovereign government must rule exclusively, it must be indivisible.

"So that it appeareth plainly, to my understanding, both from reason and Scripture, that the sovereign power…is as great as possibly men can be imagined to make it" (Hobbes [1651]1994, 135)

As far as the law goes, they both agree it is the ruler's will. This implies constitutionalism makes no sense: we cannot set limits to the power that sets the limits. If there is a constitution hierarchically above the ruler, then the ruler is actually not ruling but abiding the constitution and therefore submitted to those who wrote it. If it was he himself, then he cannot be subjected by his former will. If it had not been him who wrote it then it means there are others with more power than him, and so, he is not the sovereign anyhow. Law is designed to restrict freedom. No law can restrict the ruler's freedom. It should not be possible that the law contradict the sovereign power given that the former is merely and expression of the latter.

"*Together*", Lee Ward analyses, "*Hobbes and Filmer stripped of any meaning the moral claims of ancient constitutionalism and popular consent by common practice. As such they denied the antiquity of Parliament in the English constitutional order and any moral authority for representative institutions that these arguments suggest. What Filmer likes about Hobbes's theory of law was its hostility to the logic of constitutionalism. Hobbes articulates a conception of sovereign power that resists constitutional limits."* (Ward 2010, 96)

3.2 CONTRIBUTIONS TO THE DEVELOPMENT OF MODERN THOUGHT: ROBERT BELLARMINE.

Much at the same era when Hobbes and Filmer were trying to consolidate the notion of an absolute political power that would at the same time absorb the maximum religious authority on earth, the Italian Jesuit cardinal Robert Bellarmine was establishing a conceptual separation between religious and political power. Bellarmine was heard and read at his time throughout all of Europe, with preoccupation by some and with interest by others. Out of all of his contributions to the philosophy of politics, there are some specific ones we believe to be relevant to our study; those concerning the origins of political power and the extent of the political power's authority regarding spiritual affairs. The main controversy that arose at the time from his works has to do with the fact that he was postulating for a lack of political inference in religious matters as well as for an actual, albeit indirect, papal power in temporal matters. In 1586 the *Controversies* were published. The political theory he put forth might have been extraordinary as far as its exposition, yet the conclusions he presented were not unique strictly speaking. The conclusions he reached were in the line of those "*taught by medieval scholastic theologians on the origin of civil power, the indirect authority of the popes over the temporal power of princes, and the people's right of resistance against tyranny*" (Bourdin 2010, 132) This connection between Bellarmine and the scholastic doctrine of Thomas Aquinas is a natural one given that following the Salamancan Dominicans the Society of Jesus's learning of theology in Bellarmine's time was almost exclusively Thomistic. Besides the theological debt to Aquinas, Bellarmine's political thinking, like that of his Society, also owed a lot to Aristotle. Proof of this is found in the controversy *De Laicissive Saecularibus* in which the conceptualization

Bellarmine offers of temporal authority runs parallel to Aquinas's account of Aristotle's *Politics*.

The basis of that account consists in the affirmation- in direct opposition to Hobbes's theory of the origin of human relations- that humans are social, understood as political, by nature. According to Bellarmine, a Creator God would have designed the animal reign with such precision that the various animal's natural instincts and physical conditions allowed for them to realize their ends according to their species. On the contrary, the human race would have received merely incipient means. Human rationality needs a great degree of development before it acquires enough skills to provide for survival and the human body requires work before it is able to elaborate tools for subsistence in the environment. From this it is inferred that for humanity to reach its end, it requires the transmission of knowledge in the community through extended periods of time. The communitarian element is key and based on the fact that no individual is capable in solitary to provide and acquire all that is necessary for survival on his/her own. It is safe to say from this point of view, then, that men are by nature social and, thus, political. The very basic need for means for living draws men together in collaboration to share their wisdom and efforts. In this specific intellectual context the social tendency of the human race is envisioned, not as accidental-utilitarian as Hobbes would have it, but as a trait of the human nature as designed and thus willed by God.

This is true to the point that if we are to suppose the extraordinary case of a man subsisting on his own, being as it is in his nature to live in community, he would be forced to do so when faces with an offense of either a beast or another man who wishes him harm. Besides the physical dangers living alone exposes a man to, there is also the fact that in solitude he would never achieve the purpose

he, as a man, is born to: "to cultivate our mind and our will" (Bellarmine 1856-1862, 2:316).

4 THE LIBERAL-LOCKEAN APPROACH POLITICS

The topic for this fourth chapter is succinctly stated by Jacob T. Levy as follows:

> *"My notion of the origins of American constitutionalism, drawn from my mentor Bernard Bailyn, was that eighteenth-century Americans had conceived of constitutionalism in instrumental terms—as a consciously contrived mechanism for yoking limitations on government to the will of the people in a dynamic, geographically distributed manner. American constitutionalism was thus distinguishable at the time of the American Revolution from the organic and taxonomic British notion of a constitution as little more than a historical description of the proper functions of a government.*
>
> *And indeed something like this picture-- modern, American constitutionalism as rationalist and contractarian and, therefore, constraining on the state, as against ancient, British constituionalism which was customary and, therefore, descriptive rather than normative-- is, I think, pretty common in the American academy, when ancient constitutionalism is noticed at all.*
>
> *One does see disagreements about whether contractarianism is the more important strain in modern constitutionalism or whether, as Walter Murphy would have it, the rationally-discoverable objective values of individual rights and equality before the law are the essence of modern constitutionalism, taking priority over any contractarian pedigree. This position allows Murphy and others to identify Britain as [modern] constitutionalist, because of its adherence in practice to the relevant values; from contractarians one hears instead the claim that Britain has no constitution. The British "ancient" constitution does not enter into either picture at all." (Levy 2002)*

Levy speaks of rationally discoverable objective values as a key to the difference between modern and ancient constitutionalism. Let us turn to the origin of those values in the first place. Later we will follow the analysis of their effects on the constitutional.

4.1 THE THEORETIC FOUNDATION FOR THE LIBERAL APPROACH POLITICS: JOHN LOCKE.

Locke begins the second chapter of the *Second Treatise of Government* with the affirmation that men are *rational* and that they all find themselves originally in a state of *liberty* and *equality*. On this basis he edifies his defense of the constitutional state and the rejection of political absolutism. In the *Treatises* he shows the consequences human nature has by beginning with the more abstract implications and focusing more and more until he makes them necessarily interconnect and then offer a rather specific contractualist theory of the state. Popular sovereignty, the rule of Law, the separation of powers, we must understand all these modes of organization of men as irrevocable and necessary expressions of his own human nature.

If, according to Locke, men are at birth equal and free, we must review how this liberty and this equality are affected by man's inclusion into society. Locke motivates in detail the doubtless benefits that man gains from entering society and, as has just been explained, we are to suppose, it is the logical path men are doomed to follow. So much so, that entering a society must become to man as a *second* nature, since in the original state of nature there *was* no political authority to obey nor was there a system that generated inequalities that must be dealt with.

John Locke did not invent the term state of nature. Although he would eventually redescribe its meaning for good, the combination of words appears to have been used in the late scholasticism to describe that state of man in which he is innocent, as opposed to being in a state of sin or in a state of grace or redemption. It was taken to mean the condition of man previous to the Fall.

Because of its deep moral sense and lack of any necessary direct political consequence, thus understood, the concept would be of little use to political theory. However Hobbes eventually transformed the original strictly moral sense of the state of nature sentence into a revolutionary political understanding of humanity: Hobbes' understanding of the state of nature was to be the basis for an unprecedented doctrine of natural rights, the social compact and sovereignty (as has already been noted in the previous section of this work). In turn, John Locke used these new doctrines as a plank from which to develop his own ameliorations. These variations stemmed in great measure from a revised understanding of the modern-Hobbesian sense of state of nature and they produced as a result a new comprehension of man as a social creature along with all the consequences this new comprehension entailed: the political ones but also moral ones. These consequences have proven to be most crucial to the modern Western understanding of political theory and exercise of political practice.

As we have already pointed out, what Hobbes calls state of nature is according to himself, *de facto* undistinguishable from a state of war. Yet Locke manages to redirect the state of nature concept towards a reflection that has to do with the natural freedom and equality of men. According to Thomas L. Pangle[3] through these concepts he expresses the fundamental constitution of man; a

[3] We will follow Thomas Pangle's analysis of the Lockean political philosophy for our general statement of the liberalism of John Locke.

constitution that is disorderly, as are the passions within him, and the limitation and relative scarcity of the benefits he can draw out of the environment which he inhabits. As a result of this constitution and these conditions man is drawn towards an uncertain state of society in which the ties that unite the individuals are rooted in the passions of man: lust, envy, triumph, fear, dominion… Their mutual dependence for survival makes it so they are dawn together as a group in order to favor the possibility of assistance over time. Yet it so happens that this spontaneous community lacks organization of any kind being that it does not follow any pattern or any established order. In this context, the most common and strongest human passions take on a dominating role by which men tend to become a threat to one another, especially when aided by reason, thus jeopardizing the primitive motivation to remain together. Once the awareness of one's own safety being at a constant risk has arisen among the individuals, it compels them to utilize reason in order to arduously establish rules and order. That will lessen their natural freedom and equality up to a point yet in turn it will allow for a certain degree of security to take place.

Therefore we have a starting point -not necessarily a historical one- in which men may temporarily live at ease with one another and their natural and created environment. Nevertheless, reason -through which the rules for a peaceful coexistence are developed- also becomes self-aware of the human condition: a condition of economic scarcity and insecurity. In spite of the regulations that men may manage to lay down in the state of nature, there still is an open door for hostility and conflicts of interest to arise between them, and no matter how peaceful a community is at a certain place and time, it is always susceptible of becoming a state of war; if not of all against all, at least some factions may arise to oppose others at any time, alternatively.

Always in the Lockean view, man's reason becomes self-aware as it comes to comprehend on the one hand, the deep economic and psychological sources of conflict existing amongst them and on the other, the fact that reason itself has a rather deeply unreliable support from the passions. He concludes that men cannot understand the dictates of his own reason and that, even if and when it could, he could not be trusted to follow them.

The chief condition that allows for this potential situation is the fact that each person retains his or her executive power. In a state of nature, being all equal and free, and lacking of a superior judge, all are entitled to exercise their power to judge and condemn and execute he/she who has committed offense. This makes it so that even those who follow and support reason will most likely end up making abusive use of their executive power by disproportionately and single-handedly resolving the inevitable conflicts that are doomed to arise in such a state of nature given the condition and circumstances of man. This dynamic accounts for the state of nature being always on the verge of war -when not directly in one.

At this stage men agree to set up a government, i.e. an institution that is created out of the aggregate of the executive powers yielded by all the individuals who conform the society that is to be submitted under such government. At this point, Locke considers, men enter the *civil* society ruled by the *civil* government. In abandoning the state of nature and entering the civil society, men expect to secure their property -i.e. "*the preservation of their lives, liberties and* estates" (Locke [1689] 2003, II 123) - and to that end acquiesce to the rule of rational terror:

> *"the rational terror is obtained when every person who makes up the "commonwealth" resigns to the commonwealth his executive power to enforce the rules of reason, but, at the same time, gives the commonwealth the right to employ his force in its executive enforcement." (Pangle 1990, 245)*

According to Locke's understanding of what natural law is (which we will more thoroughly review in the following pages), it makes sense that all men should coincide to feel the impulse to unite into society in such a way as has been described:

> *"the magistrate's sword being for a terror to evil doers, and by that terror, to enforce men to observe the positive laws of the society, made conformable to the laws of nature, for the public good, i.e. the good of every particular member of that society, as far as by common rules it can be provided for; the sword is not given to the magistrate for his own good alone" (Locke [1689] 2003, I 92)*

Next, Locke alerts us, is the crucial point at which the community must take care not to fall into Hobbes' terribly misleading mistake, i.e. to believe that the "power of the sword" should be monopolized by a paternal government. Together with the age-old heritage of the patriarchal family, the new society could fall into the temptation of allowing or even endorsing a single-handed executive power, an absolute monarch, that would concentrate and use to its own discretion a power that a priori belongs individually to the members of the civil society and had been only yielded to a government for their own protection and well-being. When entering civil society the members deprive themselves of their right to execute the law, they do not to deprive themselves of any other liberty. Or rather - they *should* not since:

> *"whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and nor by extemporary dictates and undermined resolutions: for then mankind will be in a far worse condition than in the state of nature" "wherein they had a liberty to defend their right against the injuries of others" (Locke [1689] 2003, II 225)*

From all this we gather that "*wherever there are any number of men, however associated, that have no such decisive power to appeal to, they are still in the state of nature*" (Locke [1689] 2003, I 85) We must point out though how this "state" is a "*mixed mode, put together by the mind to clarify the natural bent of the passions*" (Strauss 1958, 230) and not necessarily a specific time in History. This is a way to express how Locke's state of nature is an idea that reveals a latent reality, a set of diverse possibilities, that remains hidden behind all civil existence and that at the same time explains the meaning for its being.

The property issue is an essential one in Locke's doctrine. It defines the relationship between God and men, and also the one among men themselves. Insofar as it defines human interaction from within, it lies at the core of what civil society is and how it relates to God's design for men. The existence of property, its protection, is the reason men enter civil society. Nevertheless, Locke's concept of "property" requires further analysis; it is complex and comprehends many different aspects, deeper ones than those easily associated with the perhaps more simplistic notion of strictly material property.

Locke's property is composed of three elements: life, liberty and estate. Each one of these three components entail a series of rights, duties, and consequences all of which begin with the basic axiomatic premise that men, when born, automatically acquire the right to preserve that life into which they have been born. Locke maintains men are born to life naturally and are thus God's creatures, as is the rest of the Creation; there appears to be no reason for any man or group

of men to dispose of another man's God's sent gift of life[4] –or of their own for that matter-.

Locke assumes that through "natural reason" the right to one's own preservation and to that which is needed in order to attain it (such as food, drink, shelter etc) appears as evident to all (Locke [1689] 2003, II 25) but he also gives us a second way to rest assured that all men have the equal legitimate right to the means for self-preservation, which is revelation. In the Bible there is explicitly exposed

> "*an account of those grants God made of the world to Adam, and to Noah, and his sons, it is very clear that God (…) has given the earth to the children of men; given it to mankind in general*" *(Locke [1689] 2003, II 25, 26)*

Yet Locke is aware that despite the "clearness" of the inheritance of the Earth by all men, it nowhere in the Bible states that men have the right to *possess* any of it. He then reasons as follows: "*nobody has originally a private dominion*" since "*earth and all inferior creatures be common to all men" "yet, every man has a property in his own person: this no body has any right to but himself*" (Locke [1689] 2003, II 26, 27) Therefore if and when one labors and by the work of one's body removes or manipulates anything whatsoever from its original state in nature, that automatically generates a right to that's person's possession over it, having combined one's own person with the object and therefore rendering it unfit for anybody else to dispose of it. Labor generates the original right to private property. Yet this rational transformative action exerted on external things to secure subsistence will not be henceforth the only or even the most prevalent source of

[4] Except when somebody poses a threat to the community or has been harmful to it totally or partially, in which cases their "property" should be dealt with by disposing of it in a way proportional to their offense or to the measure of their threat by those holding the executive power

private property. What Locke is asserting here is its original legitimacy and sets up the basis for understanding its development in modern societies. Positive laws cannot and do not undermine this principle of acquisition (Locke [1689] 2003, II 30).

There are though limits to this acquisition and the root of these are the same as the root that provides us awareness of the property rights: "*the same law of nature, that does by this means give us property, does also bound that property too.*" (Locke [1689] 2003, II 31) In which way does it bind property? Locke tells us we discover the two limits to the acquisition of property stemming from the very principles of our right to acquire it: if we labor nature in order to enjoy its fruits, then we should not accumulate more than we can labor or more than we can enjoy, for "*Nothing was made by God for man to spoil or destroy*" (Locke [1689] 2003, II 31)

With the introduction of money, men found its way around these limits thus distorting the intrinsic value of things, i.e. their usefulness to the life of man:

> *"this I dare boldly affirm, that the same rule of property, (viz.) that every man should have as much as he could make use of, would hold still in the world, without straitening anybody; since there is land enough in the world to suffice double the inhabitants, had not the invention of money, and the tacit agreement of men to put a value on it, introduced (by consent) larger possessions, and a right to them"* (Locke [1689] 2003, II 36)

Whether it be by tacit consent among a group of men or whether it be by positive laws that bind an entire community, the fact is that once money has been established as an acceptable means for gaining and -through this legitimacy-securing private property (as opposed to that which is common to all), compacts and agreements are in order. Labor and industry began that which, with money, only regulation can attempt to control. So much so that once money irrupts in the

process of acquisition of property it transforms it rendering the natural appropriation of the fruit of one's labor rather an obsolete resource.

As we have previously stated, according to Locke, property is threefold: life, liberty and estate. Life, we have discussed, is a man's first and most basic form of property. It directly derives from God's will and should have no voluntary human interruption. In order to preserve this life, man must have access to a second form of property, which Locke calls by the general title "estate". Originally being the fruit he gained from nature through of the labor of his own body, the essence of acquisition of estate has been modified with the appearance of money. Nevertheless, man preserves his right to possess what is necessary to survive.

It is in this context that we must search for the meaning of Locke including "liberty" of man as a necessary, independent component of the concept of human property. The need to do this is clear when we grasp the linkage between freedom and self-preservation. It is a matter of coherence. Locke deduces that in order for a man to successfully preserve his life he must not only secure himself the *means* for preserving it; he must also necessarily secure himself the *dominion over it*. In other words, it is not enough for others to not have a right to end one's life; man also needs for them to not have any access to the benefits that come with it. In his Fourth Chapter of the Second Treatise of Government, Locke explains how man is born free, yet there is liberty of two kinds:

> *"The natural liberty of man is to be free from any superior power in earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the domination of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it" (Locke [1689] 2003, II 22)*

Locke reminds us next that "*the freedom from absolute arbitrary power*" is so intrinsically united to man's preservation, that one cannot give up one's freedom without forfeiting one's own life as well. If man gives up his freedom, he is giving up with it the necessary capacity to manage his estate and his life as he deems fit. And one cannot leave up to another person those issues, since:

> *"a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases" (Locke [1689] 2003, II, 23)*

And so it is than man by birth, is entitled to his own life, to the means for preserving it (estate) and to the liberty that is necessary to ensure the other two. To these three necessary –thus we are to assume, legitimate- possessions humans are potentially entitled to, in common and generically, Locke refers to as "property". From this standpoint it is likely to sense the radical consequences this peculiar and complex notion of property might have on a theory of civil government. But let us first turn to issues more directly affected by this understanding of freedom- natural and in society.

Locke begins his Second Treatise reflecting on human nature:

> *"we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their personal possessions and persons as they think fit, within the bounds of the law of nature wihout asking leave or depending on the will of any other man" (Locke [1689] 2003, II 4)*

His first premise is that any born man, by virtue of being a human being, possesses the faculty of reason. This means all persons are capable of

understanding their surroundings up to a certain degree. By this people become aware of their state and of their needs and so individual interests are generated; *"(preservation of) life, liberty, health, and indolency of the body; and the possession of outward things, such as money, lands, houses, furniture, and the like"* (Locke [1689] 2003, II 16) The managing of these interests is ruled by a series of non-written norms that are present in all men's minds: the law of nature. The law of nature is a law accessible to anyone "*who will but consult it*" (Locke [1689] 2003, II 6) and that is solely and necessarily accessible through reason. Given that all men share the same faculty of reason by birth and that everyone without exception is ruled by the same rules, these being equally obliging for all, they award no special privileges or authority to any one in particular:

> *"Creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection" (Locke [1689] 2003, II 4)*

In the state of nature this equality goes so far as to legitimize justice being executed by any person in case of the law being trespassed. This is just one of the consequences of the literality of Locke's account of men's natural equality by birth. Nevertheless our author is fully aware of all sorts of inequalities existing in the past as will in the future between people because of different reasons: physical strength, mental or physical handicap, between parents and children… Yet he does not consider these incompatible with the notion of equality we are seeing here. We could qualify the afore mentioned inequalities as superfluous, given that real equality consists in "*the equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man"* (Locke [1689] 2003, II 54) and this equality is not affected by simple natural differences among

people, such as may be sex, age, mental agility… What is key is that equality exists in relation to natural liberty. The fact that all men are equal, confers to them access, an equal access, to their own liberty that Lockean contemporaries did not perceive. Contrary to Filmer, Locke sustained that people when born did not automatically acquire a series of servitudes that eventually evolve into political ties that subject men to a society's authority irrevocably. Despite certain conditioning factors we will revise in the next few pages, Locke believes that man's liberty awards him an authority and a self-determination that cannot be subtracted without incurring in a violation of human nature.

We must now examine whether this specific notion of Lockean human liberty, taking into account its traits of rationality and equality, is compatible with the apparent obstacles we seem to run into regarding this issue within his own writings and that could seem contradictory at the least: divine authority, parental authority and political authority.

As for parental authority it is important to notice how he uses the word "parental" and not the more commonly used "paternal" quite by design. His intention with this choice of words is to abandon once and for all the associations of ideas that have brought so much confusion to the debate about authority[5]. As far as he is concerned, there are two persons who constitute parental authority, father and mother, and it is they who are obliged by nature's law to watch after their children from birth until their coming of age. This "watching after" them actually means that the children are to all effects under the parental authority and the direct apparent consequence of this relationship is that the children are not equal to the adults but in a situation of dependence on them. Locke will recognize that:

[5] Naturally, the argument goes far beyond simple nomenclature but the issue is completely out of the scope of this work.

> *"children, I confess, are not born in this full state of equality, though they are born to it. The parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after, but it is but a temporary one"* *(Locke [1689] 2003, II 55)*

Having been born "to it" is a formula that allows Locke to maintain that liberty is inherent to the human being while at the same time it forces him to link its execution to the use of reason in order to justify its delay in time. Minors are not equal to adults when underage but are potentially equal in so far as they are called to become their own masters one day: when they gain full use of reason. Through reason they will be able to become autonomous, legitimately brake with their parents' authority and in doing so, dispose of their own liberty i.e be equal.

Besides exposing the compatibility between childhood inequality and the children's liberty qua persons it is interesting to put some more attention on parental authority and dissect the nature of the subjection children are submitted to. It is true Locke concedes, that children are under parental jurisdiction until their reason is mature enough for perceiving the law of nature. It is also true though that for that same reason, what deprives them of their liberty is not the subjection they are submitted to but their own immaturity:

> *"The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to construct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will" (Locke [1689] 2003, II 63)*

By this we understand how legitimate parental authority does not arise in any case as an obstacle to the liberty and eventual equality of children, on the contrary, it helps to preserve them by orienting them with their rules and their guidance towards the time when they *will* be prepared to exercise their freedom

and thus, be equal to their parents. In reasoning thus, Locke affirms categorically that men are born rational and free, in spite of not being able to exercise either one until they are mature in the former, which brings with it the latter.

This is not the exact same case but still does bear a lot of resemblance with what occurs with men regarding divine law. Locke has explained how minors *are* free but cannot *exercise* their freedom, so they are in a temporary state on inequality while they are children but only so as to eventually reach equality fully qualified when they come of age of reason and are able to summit themselves to the laws that reason illuminates them with. When it comes to divine law, men simply never come of age. This becomes all the more obvious if we understand, as does Locke, that natural law that is discovered by the mature and informed reason is a law of divine origin; it is God who predisposes our nature so.

> *"Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable (...to) govern his actions according to the dictates of the law of reason which God had implanted in him" (Locke [1689] 2003, II 56)*

And, like Adam, all his descendants, according to Locke, are under the same law of reason. Now the natural law, the law of reason, could appear to pose a new obstacle for the liberty and equality as Locke understands it. Yet what we can realize is that if we take into account his notion of what the law is, man being free and at the same time summited to natural law is completely compatible:

> *"Law in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law" (Locke [1689] 2003, II 57)*

When it comes to the law of reason -and that is what Locke is writing about in this paragraph- we can see yet again how he is referring to adults in equality, ie

to those who are reasonable. Once more, children are not included, and cannot be said therefore to find themselves under the law of reason. Nevertheless it would be a mistake to consider them to be freer than adults due to the lack of norms subjecting the, but in any case, less free. Even though they are not submitted to the natural law, we have established they are submitted to their parents: from this authority adults have already been liberated. Secondly, the lack of law does not make us freer, yet, Locke argues, the opposite:

> *"The end of law is not to abolish or restrain but to preserve and to enlarge freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: but a liberty to dispose and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is" (Locke [1689] 2003, II 57)*

The lack of a natural law would situate people in a state of uncertainty and helplessness when faced with others arbitrary will and force. As Locke has explained occurs in the state of nature where men cannot develop their liberty amidst the constant threat of being attacked by other men's interests. And it is so that divine authority, disposing human nature towards its own benefit through the use of reason, far from thwarting its liberty, what it does is, it takes it upon itself for men to be able to exercise it.

Locke does not expect man to be considered free agents when forgetting their nature and giving in to free will. In doing so they would be following a path of auto-destruction. That auto-destruction is not desirable we know by the fact we established earlier: men's basic instinct is towards preservation of the self and of one's liberty. Therefore it is not possible that a freer life consist of less rules since less rules brings upon the annihilation of life, and thus, of liberty.

What is key for us to understand here in regard to lockean equality is how he uses the law of reason is a tool to both guarantee said equality and at the same time allowing for obvious inequalities to be accounted for. By summiting all men to the law of reason but at the same time summiting its discovery by each individual to their capacities, he is allowed to justify at once its common ground – through its divine origin- and its disparities –through its subjective perception by the individuals. The most prominent inequality in this aspect is between children who have yet to mature enough to perceive the law and those adults who already have. Yet being reason an indissoluble part of man's nature, once again, we find all men to be "potentially" equal (only children will have to wait for maturity to exercise/ develop their freedom under the law.)

After having discussed parental authority and the authority of God's law of nature, next we encounter political authority as the third obstacle to human equality. It appears evident and unavoidable if we are to have any form of political authority on Earth, that there be inequalities between those who have the power and those who are under it. Ironically enough political authority is in Locke's system of thought going to be the bulwark of equality amongst all citizens. In order to properly expose this we must begin by considering the link between political authority and human liberty. Locke distinguishes between two types of human liberty: natural freedom and freedom of men under government.

Natural freedom on Earth refers to man being free from any superior power on Earth and not being subject to the will or legislative authority of men, but to have only natural law as guide. Freedom of men in society in turn refers to not being under any other legislative power than that one established by consensus nor under the dominion of any will or confinement of any law but that one which the legislative believes to be convenient. It is in this sense that Locke speaks of:

> *"freedom of men under government is, to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man" (Locke [1689] 2003, II, 22)*

Therefore when all men in a society have agreed upon a legislative organ and a legal system and they submit to it voluntarily we must not confound them having made use of their liberty with them having allowed that liberty to be taken away from them. Locke defends liberty under these circumstances as a voluntary submission to consensual norms and not as a total lack of social norms.

He is so consequent in his argument that he contends that liberty is so intrinsic to man that he cannot give it up ever, not even voluntarily. It it is so intimately connected to man's preservation that giving it up would imply destroying oneself:

> *"for a man not having power over his own life cannot by compact, by his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another, to take away his life when he pleases. No one can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it" (Locke [1689] 2003, II 23)*

When speaking of man's political freedom Locke is not referring to a lack of rules or lack of a governor, not even to auto-governance (that would be the state of nature, not in society, and therefore we could not be speaking of *political* liberty). He is instead exploring the second kind of liberty we have exposed, the liberty in society, whose basis we find in the free pacts that are fruit of free decisions of members of a society. Should those pacts not be freely entered by free individuals, their submission to the norms would be oppressive and the government who laid them down, tyrannical.

Locke would explain the nature and aim of civil laws as follows:

> *"So much virtue as was necessary to hold societies together, and to contribute to the quiet of governments, the civil laws of commonwealths taught, and forced upon men that lived under magistrates. But these laws, being for the most part made by such who had no other aims but their own power, reached no farther than those things, that would serve to tie men together in subjection; or at most, were directly to conduce to the prosperity and temporal happiness of any people" (Locke [1695] 1958, par. 241)*

From these human laws Locke believed it possible to discern up to a point, certain clues as to what the law of nature dictates. Yet this extrapolation, he warns us, is highly dubious owing to the fact that there is a strictly human, mundane, power-oriented reason for establishing civil laws and this inclination distorts the true nature of the law of reason.

The main motivation behind the establishment of civil law appears to Locke clearly to be the desire for triumph or dominion in men. Yet it required a strong self-conscious intellectual exercise on Locke's part to distance himself from the idea that men tended towards the Summum Bonnum and that that tendency was reflected in the establishing of laws. After thorough reflection it seems to him that the drive for the "greater good" is not, as was commonly accepted by civilized and educated men influenced by priests, theologians, and philosophers, the strongest one. In fact, Locke eventually identifies the most powerful human motivation in the desire for happiness-more specifically in the desire to be free from all uneasiness. He identifies the volition in man's actions not to be directed towards:

> *"as is generally supposed, the greater good in view: But some (and for the most part the most pressing) uneasiness. (…) For we constantly desire happiness; and whatever we feel of uneasiness, so much, 'tis certain, we*

> *want of happiness; (…) so that even in joy it self, that which keeps up the action, whereon the enjoyment depends, is the desire to continue it, and fear to lose it" (Locke [1689]1979, II xxi 31, 39)*

It so happens, Locke observes, that "*the greatest Happiness consists, in the having those things, which produce the greatest Pleasure; and in the absence of those, which cause any disturbance, any pain*" (Locke [1689]1979, II xxi 55) This, he teaches us, justifies the limitless desire of men for such things as power, property, dominion and triumph and explains the establishment of civil laws for that benefit.

> *"Whereby it comes to pass, that as long as any uneasiness, any desire remains in our Mind, there is no room for good, barely as such, to come at the will, or at all to determine it. (…) the will can be at leisure for nothing else, till every uneasiness we feel be perfectly removed: which in the multitude of wants, and desires, we are beset with this imperfect State, we are not like to be ever freed from this World." (Locke [1689]1979, II xxi 46)*

Because of the nature of the volatility of human happiness it is also subjective. Hence the real reason behind the lack of consensus regarding the specific content of human happiness. Ironically the same does not apply when it comes to the opposite; what makes men unhappy. There seems to be much more agreement as to what jeopardizes human happiness (whatever it may be that generates it in each individual). It is not easy and perhaps even impossible to ascertain that which makes all men, as part of a human being species, happy, yet it is a simpler task to successfully pin down what makes all men shiver equally: the fear of death. Avoiding or at least postponing an eventually inevitable death and the suffering that is premonitory of it, turns out to be man's most deeply rooted passion; self-preservation.

It is important to note that this particular passion is inherent to man in a way far more deep that other passions. Self-preservation is a "natural Inclination", "*wrought into the very Principles of their Nature*" (Locke [1689] 2003, par. 86,88), of men and animals alike. Yet men have a rational capacity (that animals lack) and that offers them an assistance that is key when trying to procure for themselves the means for optimizing their chances of self-preserving. Reason offers men foresight, this concern for the future entails that the basic need of survival becomes a desire for comfort. While degrees of comfort no doubt make the present existence more pleasurable, it also makes the future –near and far- uncertain, for the fight for survival extends itself further than only preserving one's own life also to those means which sustain it and that sustain "*the comfortable Provisions for this Life*" (Locke [1689] 2003, I 97).

Men enter society to minimize this uncertainty, this uneasiness, and in so doing, they gain security in their self-preservation. It is in this sense that men achieve some degree of happiness when entering society, in so far as they are reducing their prospect of uneasiness. For this purpose men form a "*Society distinct from all other creatures*" (Locke [1689] 2003, II 128) through which all benefit thanks to mutual collaboration.

In order for the desire for self-preservation to transcend the status of mere desire and to become an actual right -a *natural right*- the members of the society must recognize theirs and all other men's desires for self-preservation as a *natural right*. All members recognize with this, three things: one, they want to be allowed to pursue the satisfaction of their desire; two, they commit to other's same desire and grant them the same prerogative as they do to themselves; three, they are willing to fight off those who might oppose or deny men's *natural rights*.

Whoever infringes upon the natural rights of men, Locke lets us know, is automatically susceptible of being punished by those who are in the community.

The conclusion Locke teaches is as follows: from the expression of the desire for self-preservation as a *right* there follows a duty, a *law of nature*. Each man has vested in him a power to execute it "*by the Fundamental Law of Nature, Man being to be preserved, as much as possible*" (Locke [1689] 2003, II 16). It so happens then, that nature does provide for a guide to human behavior to be elaborated.

But the step from the passions to the rules is by no means automatic. Men must restrain their imagination, their passions, their desires, using reason. The aggregate of the most essential rules that man's reason comes up with, will eventually come to define in an approximate universally valid way, the system of behavior that best suits man's pressing desire to liberate himself from any uneasiness. These rules that reason will deduce from nature and man's natural condition within it Locke will call *laws of nature* or *laws of reason.*

Looking back at the idea of happiness according to Locke that we developed a few paragraphs ago, we understand how the pursuit for happiness, while being every man's most pressing desire, is not homogeneous in content (whatever it may be that alleviates each person's uneasiness) nor in form; in the pursuit for happiness men seek to pursue and preserve their life as well as their liberty and their property. Unfortunately for us natural law, or the law of reason, is not in perfect harmony with our search for happiness either. Even if the strongest passion, the desire for happiness, does entail a guide for rights and duties, as seen, it is far from offering definite material with which to work out a flawless guide to what is moral and what is not. Yet, Locke contends, it is nevertheless the plank from which we should to jump up to regulating our morality and, what is most interesting, our politics.

Locke's rather complete reflection on the nature of human beings, their passions and their patterns for interacting, constitutes the foundation for his

constitutionalism. One of the most preeminent features of his theory of state is that of equality understood in terms of lack of hierarchical power. We have seen the evidence he offers that allows him to endorse a radical equality of all men by birth and that, at the same time, accounts for the necessary equal share of political power of all the community.

As a result of this understanding, he feels justified in rendering politics as the link between the blurred line of the law of nature -every man's reason- and the positive laws of commonwealth justice. For the latter intends to be but a formalization of the former through the use of politics; through covenants and compacts, through mutual recognition of equality and through general consent. Political agreement among equal citizens as to the nature and extent of government, and the consent for its monopolizing the executive power are the best available guarantees, Locke contends, for pressuring people into observing the man-made guide to the God-given law of nature. For it is not only the vagueness of Nature's Law that makes it difficult to follow, albeit it being imperative for the well-being of the community that it do so, but also, or, perhaps more so, the lack of sanction. Locke kills two birds with one stone when he presents government as both the legitimate legislator and the legitimate judge. What allows him to do so without falling into an absolutist way of governing is the fact that its legitimacy is not inherent but comes from the people it represents. The commonwealth does retain the original principles of equality and justice found in the state of nature, only it manages to make them viable within a community through legislation and human sanction. The fact that the citizens have an active role as definers of their community is key to the modern concept of power, for, traditionally, the power was not redefined nor was it open to discussion. Whether it be an absolute monarchy or an aristocracy, the rules were the wise men and the regimes were the correct ones.

This classical-Aristotelian approach, a patriarchal view of the law and the political organization, clashes with Locke's constitutionalism. Locke's radical equality theory exposes a certain unsoundness in having a political power determine what is best for its citizens, define what their happiness is, impose a concept of virtue or even select for them the way to their soul's salvation. By the same token, that equality which entitles all men legitimately to participate in political power, i.e., to protect their liberties, also enables them to determine which are the liberties to be protected.

In other words, Locke's account of human nature also accounts for the very nature of politics. It begins when, having established the nature of humanity, Locke makes it appear to be in everyone's interest that a compact be made among all and it is general agreement on that there be an authority to supervise the observance of said compact. Having all entered the compact freely and sharing all equal power (being all equal by nature) it becomes necessary that they all yield their executive power to only one authority which will monopolize the executive force. It is by this measure that the nature of this authority -albeit being openly consensual and mundane, free from any transcendental interference- is strictly linked to the human nature. It is actually completely in line with the human need that created it; it is a natural development of that need: to protect their covenants. It has no other origin that the need of the people to forge guarantees of respect on the part of others for towards the covenants that ensure their pursuit for happiness, in whichever form they choose it.

If at any point, in accordance with Locke's theory of government, the magistrate is tolerated certain powers to supervise men's morals, it will only be to protect men from themselves in order to better secure their liberty. Otherwise the magistrate will have no power over such matters whatsoever:

> *"Whichever matters do no detriment to the possessions of others, and do not disturb the public peace, even in those places where they are acknowledged as sins, are not coerced by legal censure." (Locke [1689] 1963, 70-71)*

The nature of the political agreement that produces government makes it so that there are natural limits implicit to it -in content, but also in form. Civil society can only come to exist through a unanimous and equally weighted consent of all the members. This mechanism explains why:

> *"(…) the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it(…)" (Locke [1689] 2003, II 149)*

It is necessary, Locke observes, for the supreme -although not unlimited- power of the people to be delegated and divided. There is a need for power to be delegated since not all the people can administer all the government all of the time. The factions of government suggested by Locke into which the power of the commonwealth should be divided are not a novelty in and of themselves: legislative, executive and judicial. What constitutes them as worthy of being noted here is their being subject to the will of the people and to the people's judgment of whether the political powers are pursuing legitimate ends or not. Notwithstanding this proviso, there is still a need for a mechanism of control that will thwart possible intents of encroachment of the different powers.

The main pragmatic measure to avoid the tyranny of one or two power/s over the other/s consists in separating all three powers from each other effectively; delineating the exact channels of communication amongst them, their functions and

their limits. Devising different interests for each power that will, by design, make them collide with the other's interests makes it so that ambition is naturally counterbalanced by the separation of the three powers.

However, the foundation for these powers acts as their strongest conceptual limit. Locke understands the legislative power as strictly representing the people of the commonwealth; their commands are not those of the "God-like Princes" whose rule seems to "partake" of God's "Wisdom and Goodness" (Locke [1689] 2003, II 166) They are the legal expression of the people's free will. So is the executive power that has no distinct interest but that of the people. In his political system there is no attribute (no virtue, no wisdom) that conveys political power with the legitimate authority to regulate over people's private lives or public lives- for more than is strictly necessary for the public's well-being (Locke [1689] 2003, II 163). If anyone is to comment on personal or political issues aiming at re-directing the people's souls that is only the philosopher, the intellectuals. Locke thought the only right way to achieve a sound government was not through persons who believed they had the authority to rule wisely over all, regardless of any other consideration, but through educating citizens whose representative powers would reflect their own wise will. In this context the influence of the political thinkers or intellectuals over government is legitimate, in so far as they exercise a non-coercive, strictly guiding role.

In spite of these considerations Locke notices the endemic danger in a power such as the executive whose very nature demands a high degree of discretion to be functional. He is nevertheless confident in the fear that such a citizenry as he projects, will instill in the members of government. The only reliable source for counterweighing the potential excesses of executive prerogative is in the fear or respect that the executive might feel for the spirit of the people. The same can be said to be true for the less likely but not inconsiderable danger of the

legislative tyranny. In order to win such respect, the people must have reliable means for, and stand permanently on guard, to defend their rights. The willingness and ability for resistance -should the need arise- must be credible if it is going to be at all a useful dissuasion.

Locke is not so naïve as to believe that it is possible to attain a perfect society made with perfect citizens which will perfectly carry out their political duties. Quite the opposite, he believes to be very realistic on the subject: the men and woman he tries to enlighten and whom he expects will lead everyone else into the new future society "*will partake of only an imperfect freedom, rationality, and dignity*" (Pangle 1990, 266).

Nevertheless Locke´s "realism" does not seem to diminish his expectations of civil society or to lower the demands of what he considers to be due to any citizen *qua* human being. He begins his first of the *Two Treatises on Government* explaining how

> *"slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation; that it is hardly to be conceived, that an Englishman, much less a gentleman, should plead for it" (Locke [1689] 2003, I, 1)*

thus explicitly rejecting slavery as a viable state for man and rendering liberty as the only acceptable one. He nevertheless baffles us a bit when in the Second Treatise he treats liberty not exclusively as an independent superior human good.

> *"This makes him willing to quit a condition, which, however free, is full of fears and continual dangers; and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a*

> *mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property". (Locke [1689] 2003, II, 123)*

He many times refers to freedom as subordinate to the self-preservation instinct, to the extent of asserting that one cannot forfeit one without forfeiting the other (Locke [1689] 2003, II, 17, 85). The aim of entering Civil Society after all is actually self-preservation and security, not a perfection of man's birthright to freedom per se. Civil Society is awkwardly enough the result of the discovery of the apparent and in any case ambiguous superiority of self-preservation above liberty:

"*the people (…) provide for their own Safety and Security, which is the end for which they are in society.*" (Locke [1689] 2003, II, 222)

The step from the state of nature to the state of Civil Society is one of quality of freedom: from unchecked to restrained by laws. We find an explanation in the following passage in which we are taken a bit deeper into the relationship between liberty and the law:

> *"Law, in its true Notion, is not so much the limitation as the direction of a free and intelligent Agent to his proper Interest and prescribes no farther than is for the general good of those under that law (…) So that however it may be mistaken, the end of the law is not to abolish or restrain, but to preserve and enlarge freedom; for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (…) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is in, and therein not to be subject to the arbitrary will of another, but freely follow his own." (Locke [1689] 2003, II, 57)*

Weather we are convinced by it or not, this is Locke's argument for justifying how in Civil Society it so happens that liberty *is* being taken up a notch after all:

"the ends of the law…is to enlarge freedom" he says. On these grounds we can build the assumption that what Locke considers to happen when men unite into society is that they better secure human liberty through better securing self-preservation.

This argument begs the question "which comes first"? It appeared earlier that the author was convincing us of the necessary sacrifices liberty must undergo in order to secure self-preservation in society. But through this reasoned explanation of the relationship between liberty and self-preservation, we understand how neither one, liberty nor self-preservation has absolute priority; as we have said, they are intimately linked, and law is the instrument responsible for securing *both of them* at once.

When reflecting upon the establishment of civil society, Locke appears not to be precise about the specific motivation for it; the reason alleged is always for the securing of certain human superior goods, but these may vary in order, appearance and priority with no apparent established criteria. These usually are-varying in order and appearance-: preservation/ self-preservation, life, liberty/ liberties, property, estate, … When referred to in these lists, some of them acquire different connotations and even different meanings. We may take "property" for an instance: it can mean one's possessions in the material sense or it can allude to the group of those material possessions, plus the other "higher" possessions: life and liberty. The word liberty itself is also ambiguous in this context as it is sometimes singular (liberty) and sometimes plural (liberties).

We have tried to establish already to a certain degree of certitude that self-preservation and liberty are at the top of the list. We also tried to establish that the law secured both and was not a limit to either but a necessary bulwark.

4.2 THE UNITED STATES OF AMERICA AS PARADIGM OF THE LIBERAL-LOCKEAN APPROACH POLITICS.

4.2.1 The liberal-Lockean Approach Politics' Applied Theory: Thomas Jefferson.

In this section we will endeavor to show how the colonists' analyses of the political establishment of their time, and Thomas Jefferson's in particular, were understood, posed and answered in terms "*distinctively and often explicitly Lockean*" (Dworetz 1994, 67). The theoretical question of the American Revolution can be considered to be the one of the extent of civil power; a central question in Locke's political philosophy. The answer is a Lockean answer as well: as a civil government, there are limits to Parliament. When confronted with the British government's assertion of abolishment of liberty and property in America, the American answer was a political development of the Lockean-liberal theories of refutation of absolute power.

We endeavor to show how Locke's ideas supported the Revolutionist cause and how the American Revolutionists used his ideas and his language, upon occasion even textually, in order to express and argument their view of the situation. Our aim here is to illustrate the substantive connection between the Lockean system of thought and the American Revolutionary one in order to put forth a specific view of the character of the American political ideology and the philosophy on which it is founded. In doing so we are not trying to establish the quality nor the quantity of a hypothetical *influence* of Locke over the American Revolutionary thought. (Besides the conceptual and methodological complexity of that issue, there is the fact that that is simply not our object here.) We will focus in stead on the specific character of the revolutionary American political philosophy. In

doing so we will come across the well-known discovery that it has a defining liberal component that re-directs us necessarily towards Locke[6].

Although we cannot here reproduce all the evidence that supports this last assumption we take for granted and which we base our work on, we nevertheless do recognize -even if just for argument's sake- the possibility, however remote, that the revolutionary thinkers might have drawn their inspiration for their position on consent, taxation, representation and property from other similar-thinking minds, not necessarily John Locke's. Yet we believe that, should these alternatives be true, it would not however subtract from their thought any of its underlying lockeanism/liberalism, which we believe to constitute the essence of their character. As Stephen Dworetz puts it: *"the point is not who influenced whom, but that Revolutionary thought was of a certain character. Judging by the concerns and positions in Revolutionary thought, a vitally important element in that character was Lockean-liberal. "Influence" is strictly an academic concern and ultimately a futile one. But we can show that the American Revolutionists held liberal ideas about politics".* (Dworetz 1994, 68)

Moreover, and in any case, we consider Locke to be the most visible and traceable source of their ideas that we can access[7]. We consider it academically valid to attempt to build a theoretical bulwark for modern democracy on a base that

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[6] For bibliography supporting this thesis, see: Hartz, Louis *The Liberal Tradition in America*. New York: Harcord & Brace, 1955; Pangle, Thomas L. *The spirit of modern republicanism.* Chicago: University of Chicago Press, 1990; Dworetz, Steven M. *The unvarnished doctrine.* Durham: Duke University Press, 1994; Sheldon, Garrett W. *The Political Philosophy of Thomas Jefferson.* Baltimore: Johns Hopkins University Press, 1991; Zuckert, Michael *Natural Rights Republic.* Notre Dame: University of Notre Dame Press, 1996.

[7] Idem.

others[8] find, in some cases at the very least, shaky. It serves our purpose well in writing this work.

We will build on the formal Lockean connections we believe exist objectively without underestimating other plausible, proven influences. We feel (as will be shown in the following pages) that the Lockean connection is the aspect of the American political heritage's construction that entitles us the most when we are arguing in favor of the principals of modern liberal democracy. Therefore our aim shifts away from "exactly how Lockean is American political thought and practice?" to "in which exact way is American political thought and practice Lockean (or liberal, for that matter)?" Acknowledging that the American Revolutionist thought has liberal ideas about politics that are to some degree and extent traceable to Locke, we expect will come in handy when trying to find a source of philosophical and historical legitimacy for contemporary American constitutional politics.

We do not mean to say that the Revolutionists came into contact with Locke's political ideas and upon reflection they decided to try and implement them, as they appeared to them to be most sound. On the contrary, over the century previous to 1776 there had developed in America a specifically American –Lockean-liberal- way of politics, which rested upon specifically Modern-American views of power, society and the individual. This "American way of doing politics" which we will be dissecting throughout the following pages, we maintain ran parallel to John Locke's philosophy and therefore it makes perfect sense that they would rely on his vocabulary to express themselves and on his system of thought to analyze and solve their political situation.

[8]See section 2 "State of the Question" of this work for more on the republican synthesis-civic humanism.

To top it off, Locke offered a comprehensive view of politics that stemmed from human nature itself, thus turning his political approaches into necessary expressions of a valid understanding of *all* humanity. This conferred a universality upon the Revolutionist cause that justified their appealing to all of humanity for sympathy. The American cause was to be fought in the name of all humanity and for the future of all humanity, hence the generalizations:

> *"When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them to another (…) a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation"* (Hamilton, Madison and Jay 2003, 528)

The Declaration of Independence did not have an immediate purpose only - to better the political situation in the continent- but also a long-term one for which it set the general context for human governance, not just the American one. Its long-term purpose of offering a general theory of legitimate, rightful, and just government, set the standard for its own immediate purpose.

The Declaration did not aim at bad-mouthing Britain to get away with unilaterally pursuing its own political interests. The Declaration intended to expose the grievances suffered at the hands of Britain in terms of the origins and ends of legitimate public authority. In doing so and in doing it in this particular fashion, with the particular structure it has, the particular choice of words it uses and concentrating on certain specific aspects of political theory and not others, what the Declaration does is it extrapolates universal truths on civil governance from Locke's overall philosophy and then applies them to a specific historical context. We believe that in doing so the American founders were setting a new scenario for politics that would not allow for a way back, they were weaving the liberal-Lockean approach politics.

Just as Locke had one hundred years earlier tried to spread an innovative understanding of natural rights, property, political representation and constitutional sovereignty, so did the American Founders try to spread innovative political practices based on those Modern/Lockean approaches to politics. At the same time though, they were set on making that intent public and submitted it to a legitimation process so that humankind and its posterity would share it. Burying their rhetoric roots in "self-evident"[9] principles on one hand and in "the doctrine of reason and truth"[10] on the other, apparently served that purpose.

As they proceeded towards their ends, both theoretical (long-term) and practical (immediate), they left us the significant evidence of their means: the Declaration of Independence being perhaps the most notable. It is known the Declaration was drafted by Thomas Jefferson, revised by John Adams and Benjamin Franklin, and the final text was then adopted by the whole of Congress. The Declaration is one of the strongest foundations we have of the liberal-Lockean approach politics. This document is a very powerful statement, which contains the nature and ends of civil government according to the modern understanding of the natural rights of men.

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[9] The Declaration of Independence of 1776 appealed to all humankind with the following declaration of human rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these there are Life, Liberty and the pursuit of happiness.-That so secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed.-That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." (Hamilton, Madison and Jay 2003, 528)

[10] The full quote is as follows: "This is Mr Locke's doctrine, it is the doctrine of reason and truth, and it is, sir, the unvarnished doctrine of the Americans" Junius Americanus (Arthur Lee), *Boston Everning Post* (May 4, 1772)

Jefferson, Adams, Franklin and the entire "General Congress assembled"[11] are the undersigned "representatives of the United States of America" whom declare the causes that impel the whole nation to independence. From the standpoint of the representatives, it is fair and it is "of right" that they should pursue their independence. To understand this conclusion, which was not as apparent to the rest of the world, and the modernity it entails we must understand where it comes from.

The United States of America had already on July the 2nd 1776 resolved to unilaterally break free from the political bonds with Great Britain, come what may. Why then a Declaration two days later? Even if the Declaration is a political document, not a treatise on political philosophy, it fulfills de mission of both stating a political fact ("hereby declare their independence") and establishing at the same time the reasons that motivate that political fact. Knowing it was to be the first of its kind (in the liberal-Lockean approach politics) and aware of its idiosyncrasy, the American representatives stated they owed "*a decent respect to the opinions of mankind*" (Hamilton, Madison and Jay 2003, 528)

We do not hold here to be true, as has been said elsewhere, that the Declaration was just a rhetorical political strategy on the part of the Americans to publicly state their contempt with the British in order to secure an alliance with France. What sense would that have made? The French still abided by the medieval political standards; they still held a medieval concept of power that justified the absolute divine-right French monarch and his aristocratic ministers, just as the British did their own. Why would the Americans ever consider it would appeal to the French to ally themselves, even if against a common enemy, with a motley crew

[11] The name of the document in the draft reported to Congress is officially "A Declaration by the Representatives of the United States of America in General Congress assembled"

united under the motto of natural equality and rights, consent of the governed, and the right of revolution? From this standpoint, they were highly unlikely to become partners indeed.

So why *did* the American representatives insist on exposing their political intentions openly to whomever would read them and go to all the trouble of specifying each of the political grievances they had been submitted to as a people and, moreover, go to the lengths of justifying themselves in the light of those political atrocities? The answer is because they were not simply political atrocities. What turned political differences into "atrocities" is the fact that they were not political anymore, but became a question of human rights. The American Founders realized they were not fighting the British on political ideological nuances, as Otis or Dickinson might have envisioned themselves doing (we must not forget there existed within in the US and among fellow American great ideological differences[12]), they became aware of themselves struggling for a new understanding of politics altogether.

They did not declare their independence so much to pursue a understanding of politics yet to be explored rather they declared their independence in order to legally and politically regulate and consolidate a new understanding of politics that already existed, the liberal-Lockean approach politics*.* This new way of doing politics included the need for the American nation to express the unique aspect of their political actions. The liberal-Lockean approach politics would justify its political actions with expositions in certain documents (the Declaration of Independence, the Constitution of 1787…); nevertheless in the American case this would take a bit more of explaining than it would have ordinarily since not only were they to explain

[12] See Ward, Lee. *The Politics of Liberty in England and Revolutionary America.* New York, NY: Cambridge University Press, 2010.

why they acted in such a way, they also had to *justify* why that (modern) explanation was to be accepted as a valid one.

By taking a look at its structure[13] we can observe exactly what shape these argumentations toke. We can consider the content of the Declaration of Independence as composed by two syllogisms were the conclusion of the first serves as the major premise for the second.

We find the first syllogism in the second paragraph of the Declaration of Independence and the following conclusion is reached and the end of it: "Whenever any form of government becomes destructive of those ends [securing rights], it is the right of the people to alter or abolish it, and to institute new government." This idea will become the major premise for the second syllogism –which takes up pretty much the bulk of the document-. The minor premises will be the list of grievances and the conclusion to this second syllogism will become the actual resolution of independence.

It goes as follows:

> MAJOR PREMISE: "Whenever any form of government becomes destructive of those ends, it is the right of the people to alter or abolish it."
>
> MINOR PREMISE: "The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states,"

[13] I follow Dr. Michael P. Zuckert in formally analyzing the structure of the Declaration of Independence; Zuckert, Michael. *Launching Liberalism: on Lockean Political Philosophy.* Lawrence, Kansas: University Press of Kansas, 2002.

i.e., the king's government is a "form of government…destructive of these ends," (a claim "proven" by the list of "facts submitted", the grievances.)

CONCLUSION: Therefore, "these colonies are and of right ought to be free and independent states".

We will pay attention to the content of this outline to discover the breaking Modernity in puts forth. The appeals the American Revolutionists make in order to justify their conclusion depart significantly from those appeals that would have historically been expected from them. We move on to demonstrate in which way.

On How the Declaration of Independence Was a Declaration of the Modern Rights of Man

> *"May it be to the world, what I believe it will be, (to some parts sooner, to other parts later, but finally to all,) the signal of arousing men to burst their chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government. That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. (…) the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred to ride them legitimately, by the grace of God."* (Jefferson 1984, 1,517)
>
> *Letter from Jefferson to Roger Weightman, June 24, 1826*

Such was Thomas Jefferson's opinion on what he believed the Declaration of Independence of the United States should mean to the world. He states explicitly what the Founders were attempting to do in that document -to open the eyes of all to the *rights of man*; and on that basis, to establish themselves as a new nation-

state. The whole purpose of the American Revolution is primarily concerned with natural rights[14]. It was from their modern take on what natural rights were that they would reach their political claims.

This process had been a lengthy one. We draw on Lee Ward's account of the process. It had taken some one-hundred years for Locke's philosophy to be read in Europe first, to then swim overseas, be generally accepted and finally integrated into the American system of thought.[15] Pamphlets, sermons, newspapers, and any other kind of public opinion creation media were saturated with a profuse and consistent natural-rights-appeal discourse which would only culminate in the Declaration. Before it was even designed, though, there had been many other political documents that established a series of "self-evident truths" as a pillar for its power.

The Declaration holds as "self-evident" among other "truths": *"that all men (…) are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; [and] that to secure these rights governments are instituted among men."* During the 1770's, when the American States were still officially colonies of Great Britain, parallel to the British laws, there emerged many American legal documents that were already regulating according to standards of Modern natural rights. Together with the Declaration in 1776, and briefly after in the 1780's, there emerged even more similar-spirited legal documents and political declarations that pushed Modern natural rights into the spotlight of legitimacy statements and political guidelines.

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[14] See Zuckert, Michael *Natural Rights Republic.* Notre Dame: University of Notre Dame Press, 1996.

[15] For a detailed account of the process see Ward, Lee. *The Politics of Liberty in England and Revolutionary America.* New York, NY: Cambridge University Press, 2010.

In 1772 Samuel Adams had drafted the Boston declaration of "The rights of the Colonists and a List of Infringements and Violations of Rights" which included not only the right to life, liberty and property, but also, (perhaps flirting with rebellion?), the right to defend them in the best manner possible (Zuckert 2002, 275). Appealing to "the immutable laws of nature", the Declaration and Resolves of the First Continental Congress of 1774 established also the three famous rights to life, liberty and property. This one was perhaps the most significant document up to the date previous to the Declaration as is was a statement made on behalf of the future nation and marked the way for future declarations.

Once the independence of the colonies was a declared fact, the states rushed to establish their legality within their new status. Many of them included in their constitutions the same Modern understanding of natural rights as we find in the Declaration as the fundamental principles to sustain their constitutions. In the Virginia Declaration of Rights (June 1776) George Mason recognizes all men to "*have certain inherent natural rights…among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety*." He also significantly attributes these rights to "their posterity" and as a "basis and foundation of government"

Also in 1776 the Pennsylvania Declaration of Rights basically copied the Virginia statement of rights and in 1776 as well, in September, the Delaware Declaration of Rights also shared the common view of man's natural rights and established liberty of religious cult and the right to have secured the enjoyment of one's own life, liberty and property.

The Georgia Constitution of 1777 does not openly declare a list of natural rights yet we know these to be the founding principles of the document when it considers the acts of the British government: "repugnant to the common rights of mankind". The context of the rest of the document gives us no reason to believe

there is any distinction with the rights declared in the other documents. That same year New York established their people's right to secure a government based on and aiming at securing Modern natural rights: "to institute and establish such a government as they shall deem best calculated to secure the rights, liberties, and happiness of the good people of this colony" Vermont followed the Virginia declaration very closely and also evoked the echoes of legitimate rebellion already heard in the Declaration of Independence.

In 1780 and 1784 the last two revolutionary constitutions were written: Massachusetts and New Hampshire. Both include in their statements an appeal to the natural rights of men: "the end of the institution…of government is to secure the existence of a body politic; to protect it, and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life".

We consider it now safe to say that the consistent, systematic and constant appearance of the Modern understanding of the natural rights of man in the foundational documents that built the United States of America is a valid indicator for asserting that the American Revolution was a revolution about the modern natural rights of man. Now we should turn to them and try to understand what they are and what they were to the American Founders.

On the Revolutionary Aspect of the Modern Rights of Man

The American Revolutionists, as we have seen, were concerned with enlightening the world about a new understanding of man's natural rights and to find the political measures that were most apt to secure them. That is because according to them the previous understanding of natural rights was insufficient and lacking. (This is definitely a feature they had in common with the French Revolutionists of 1789 who would in their turn issue a statement that paralleled the

American one when it came to natural rights.) We will now focus here on which these are, but more specifically in determining its parting points from those traditional natural rights held by the British.

Let us begin with the source of the rights. We find the Declaration traces man's natural rights to "the Creator": *"that all men are created equal, that they are endowed by their Creator with certain unalienable rights"*. Yet this "Creator" cannot be considered to be strictly the God of Christianity or Revelation without a lot of reserve, for in its first paragraph the Declaration asserts: *"the Laws of Nature and of nature's God entitle them*". As we have previously stated[16], it is a distinctly Lockean approach to divinity and morality that one which allows for an inference of God through the physically perceptible laws of nature. The American Revolutionist's God is a modern one; the source of all men's rights is the God of Nature.

The English Declaration of Rights on the other hand had rested the English rights on the English tradition or the History of England. Therefore those rights pertained specifically to the English people. Their list was not nearly as specific as the American one, it was a rather vague and generic reference to "ancient rights and liberties" and most interestingly to us here, it did not trace their origin back to a divinity at all but, if anything, to antiquity (of all things!).

The diversion of bases for man's rights has consequences for us when trying to determine the beneficiaries of those rights. It is consequent that the rights of man held by the Americans would be an endowment of all humankind, literally. They held that all men are created and created equal by the God of Nature. If all humankind shares in the same Nature it stands to reason they will all also share the rights that spring from it. The same cannot be said for the English rights. They

[16] See section 4.1 of this work "The Theoretic Foundation for the Liberal Approach Politics" for an account of the influence of Locke's theology in American political thought.

stated o their document that those rights mentioned belong to "the people of this kingdom", and not to "all men". It is also worth mentioning how most of the rights proclaimed are technically not even men's rights per se; the right-bearers are mostly political entities. They do not refer to particular rights that individuals possess as such but to the rights of certain political bodies to exercise their authority in a manner that is legal and thus not harmful to the people of England. Even if the commitment to constitutional government and to the limitation of absolutism is not incompatible with man's natural laws, it is not the same thing.

Americans were all in favor of constitutionalism, yet the transcendence of their natural rights philosophy allowed for the individual to be conceived as viable out of society as well as within it. The rights of man from the American standpoint do not depend on their linkage to an organized community, as was understood to be their origin in the Declaration of Rights. Americans envisioned natural rights as more primitive and original to mankind that societies were. American rights are an endowment of each of God's creatures, in equality, regardless of their position in society or if they even belong to one at all.

The priority of the natural rights over society has vast and deep Modern implications. The order has been inverted to such extent that for the Americans, society will have been set up to protect those rights of men which are pre-existing to society and inherent in every man, in stead of those rights being associated to the existence of and pertaining to a society.

When speaking of rights we take into account that every one person's right implies a duty for someone else. It could mostly be simple forbearance, i.e., not interfering with that person's exercise of their right, or it could be a little more demanding, i.e., being responsible for the actual provision of the right to be exercised by the subject of the right. It appeared to the authors of the American Declaration that government had been, according to their Modern view, originally

established among men through a kind of social contract to the end of being able to exercise their natural rights without interference. It made sense then that the government would be: a) a forbearer of those rights (along with the rest of the citizens), but also b) the securer of those rights (for which government was instituted in the first place).

If any given government should fail as a duty bearer, in its double aspect, men would in Modernity still retain the natural right to "alter or abolish" that fraudulent government. Thus understood, the Declaration of Independence's defense and explanation of the "right of revolution" fits perfectly within the historical context of the time and would give them a coherent basis on which to build a new civil government and a new theory of government altogether. The liberal-Lockean approach politics is born from a peculiar form of revolution though. Ironically, it is a revolution whose prime objective is not so much to dismantle the existing political order, but to set up an order that is, according to the Modern view, more faithful to its *origins*.

What the Americans did with their revolution was not aimed at overthrowing an *illegitimate* government; it was aimed at overthrowing a *corrupt* government. By the liberal-Lockean approach politics' standard, the British government was not forbearing and was not securing the Americans' rights. It is the corruption in the use of its power that rendered the British government illegitimate to rule in the colonies. Had Britain exercised their power otherwise, had the government acquiesced to those constituting principles devised by the liberal-Lockean approach politics, the Americans would have been left without an argument. Or, in any case, without the star argument that appears in the Declaration. According to the British *non*-liberal-Lockean-approach-politics standards, they were exercising their right as government.

As for the actual content of these rights, we mentioned before that most of the legal American documents of the time of the American Revolution (Declaration of Independence, States' Declarations of Rights, Sates' Constitutions…) contained a rather unitary list of the Modern natural rights of men. "Among" the "unalienable rights" of all men, although by no means the only ones, there were: life, liberty, and property. The three basic rights together amount to the affirmation of a kind of personal sovereignty, a rightful control over one's person, actions, and possessions in the service on one's intents and purposes. When seen as an integrated system of immunities and controls, the specific rights add up to a comprehensive right to the pursuit of happiness, i.e., the right to pursue a shape and way of life self-chosen. (Zuckert 2002)

Despite the British not being so specific and not having in mind the individual Modern natural rights the Americans did, the Declaration of Rights nevertheless did serve as a very valuable starting point. The step from constitutional rights to natural rights is not such a big one if we allow for some heavy interpretation -or re-interpretation, if you will. The British political practice and the British legal system were quite compatible with the natural standards of right pursued by the Revolutionists. That allowed for a certain continuity that offered the American Revolution at some levels a much needed stability and most likely contributed to its viability altogether (the lack of which probably condemned -among other factors- the contemporary French Revolution).

Notwithstanding, the United States did undergo vast changes and make deep variations in its legal and political system so as to better adjust it to their frame of mind.[17] Despite the possibility of a comfortable transition from the British

[17] Thomas Jefferson's sponsorship of a revisal of the Virginia Constitution is one of the most notorious examples of this.

institutions and legal system to the natural rights philosophy, this step did require major changes in the states' laws and political organization. It was not by chance that they chose *novus ordo saeclorum* as their new nation's motto.

The changes produced in their executive, legislative and legal systems, the liberal-Lockean approach politics, was rooted primarily in their philosophy of natural rights applied to the social order, and had crystalized in the Declaration of Independence. The British assertion of rights on the other hand was aiming at reestablishing in a single document and in writing, those rights that according to the traditional constitutional order already belonged to those affected by the declaration. It was aiming at maintaining the established order and to secure it from present or future violations. They were not establishing a "new order for the ages"; they were trying to consolidate the pieces of the existing one.

The commitment of the American Revolutionists to "the rights of man" was a costly one in the sense that it was not a simple job: it had deep rooted implications, we have seen. Revealing the principles that entered in contradiction with their new philosophy caused, even if only for the sake of coherence, an uprooting of many (if not most of the) political practices and structures that had existed since the first British settlements in North America. The solidness and congruence of their mainly Locke-inspired philosophy allowed for the *novo ordo* to successfully create a political practice based on a distinct amalgam of classical and innovative political theory. The principal political innovation of the United States was a result of this theoretical-practical process: the commitment to republicanism.

"Republicanism" (which we would nowadays refer to simply as "democracy") was understood and applied accordingly as, above all, a government constituted from the body of people, that runs based on the principle of majority rule.

> *"If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least*

> *may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." (Hamilton, Madison and Jay 2003, 237)*

The innovative feature of this government basically resided in the legitimation process. By supporting the institution of government by popular design and consent, they were rejecting the underlying legitimations of political power that sustained the English Declaration of Rights: royalty, nobility and the politically active clergy. The basis for ruling necessarily stemmed, according to the Americans, from the consent of the governed. As Locke had taught them, the "rights of man" were an endowment of each person at birth equally. No one could claim the right to rule were it not for the empowerment given to him or her by the consent of those governed. No birthright or natural condition could ever become a claim to power any more.

> *"It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; (…). It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people." (Hamilton, Madison and Jay 2003, 237)*

Men's freedom in a state of equality makes it so that they wish to have a government that will secure their rights in hopes that by consenting to an authority, the authority will minimize their risk of jeopardizing their rights given an ill use of some man's freedom.

From the Revolutionists' point of view, modern natural rights require a republic (or as we would say, a democracy) as the only way of government. A government that is set up for the sole purpose of securing those rights and keeping the public good.

Furthermore, even if a radical equality of the nature of all men does not entail a radical uniformity of society, it does require an equality of all men to access or choose the government. All power must be traceable to the people, with no exception being made for the Church or its members. There can be no legitimation for the clergy to hold positions of political power in the same way there was none for monarchs or nobility. The universal human qualities on which political society rests is independent of religious commitment.

A government whose primary focus is the people's natural rights, and that is formed by the people and for the people according to these natural rights, is actually a government at the service of the people and their rights. Having the government no real separate entity and no other right or duty a part from serving the people, it stands to reason that it will be a dependent government. The need of the people on the part of the government is seen by the Americans as a stronghold for its very nature. If the government is responsible to and dependent on the people it will necessarily have to comply with them in order to survive.

This new way of understanding government and its duties set a new standard for political life altogether that cannot be understood if not as an expression of the commitment to republicanism (democracy) motivated by the defense of modern natural rights. It may very well be considered the key that opens the door to the liberal-Lockean approach politics.

Nevertheless, the relation between a republican government and the securing of natural rights implies an even bigger step from medieval politics. It requires making a conceptual distinction -and a clear-cut one, too- between government and sovereignty. The Americans followed Locke when they interpreted the key principles of constitutional Rule of Law as: 1) political powers are to be (a) separated and (b) limited; and 2) the natural rights are to be reserved.

As we have seen, Locke parts from Hobbes in many aspects, and the cession of rights of the people to the government is one notorious aspect in which he differs. Locke concedes men must surrender some natural rights from their state of nature to the government when entering, or in order to enter, society. At the same time, though, they retain other rights that still belong to them by nature and they are not in a position to give up (such as the right to life itself).

Americans, when building the new social order, made sure it included this distinction between government, as the active receptacle of certain yielded rights of the people, and the people, as individuals who voluntarily consent to submit themselves to a government while at the same time they retain another lot of their rights. This preservation of certain rights is what will allow Americans to justify the right to revolution: for the rights that have not been surrendered but that are retained by the people, conform the foundation for the limits of governmental power and at the same time justify the commitment to the constitutional Rule of Law.

The sovereignty resides in the people who are the masters of their own persons and they are the ones who freely set up government (the Rule of Law) for their own benefit and protection. Therefore, sovereignty and government can never be confused, since one clearly antecedes the other and is the reason for it to begin with. Also, sovereignty is always going to reside in the people because people are the ones who devise constitutions and political institutions, which they themselves empower separately and with limits. Yet the yielding of power to the government will never be so much as to loose their autonomy since men retain the essential rights that were the legitimation for their sovereignty in the first place.

On How the Modern Rights of Man Were Articulated into the Politics of America as a Free Nation

Before Americans contemplated the need to secede from Great Britain, some, such as Dickinson and Otis, tried to stretch British law and institutions as far as they would go without being subverted in order to justify demanding a political action that would be more just for the American population.[18] Even in the instances in which, being familiar with Locke, they tried to use his frame of mind to attain their goals, they found themselves being limited by the British establishment. As Ward puts it:

> *"Lockean principles, at least as they were applied by Otis and Dickinson, had serious limits for the colonial position. (…) Otis and Dickinson fell back on the inherited moderate Whig notions of constitutional supremacy and sovereignty, which elevated Parliament above the colonial legislatures. Thus, despite the radical foundation of the early colonial position in Lockean natural rights theory, Otis and Dickinson displayed an abiding moderation in their view of the empire, seeing parliamentary supremacy in the empire as the cost of maintaining the colonial links with Britain. They did so even as they sought to defend a considerable degree of colonial autonomy."* (Ward 2010, 349)

James Otis and John Dickinson defended the Americans' rights to limited self-government based on ideas of natural rights, property, and political representation that were distinctively Lockean. Yet Thomas Jefferson emerged a more radical defendant of the right of the colonists against the parliamentary authority of Great Britain. He parted from Otis and Dickinson in that his interpretation of Locke was quite different from -more radical than – the Whig

[18] In Lee Ward's *The Politics of Liberty in England and Revolutionary America* chapter 12 "British Constitutionalism and the Challenge of Empire" there is an extensive account of the moderate Whig ideology in America during de Revolutionary Era.

natural rights interpretation of the first colonial spokesmen. They, albeit reluctantly, accepted a notion of constitutional sovereignty according to which Parliament was the legally constituted body that concentrated the sovereignty of the empire. Jefferson adopted a more extreme approach to the subject of popular sovereignty. He ended up endorsing the Lockean distinction between sovereignty and government that was, as we have seen, the starting point for the right to revolution (which the Whigs lacked) and led to a justification for independence.

In 1774, Jefferson's *Summary View of the Rights of British America* parted from the moderate Whigs' efforts to seek redress for the British Government's wrongs and addressed the underlying philosophical issues that those abuses raised, according to him.

The key to his departure from Otis and Dickinson, although both they and Jefferson alike turned to radical Whig natural rights theory to support their allegations, is the fact that they understood this foundation differently. Jefferson did not conclude that the relation between Great Britain and the colonies should be that one accepted by Otis and Dickinson. Jefferson did not consider the Parliament's government over the colonies legitimate since the colonial governments were under no legal or constitutional bind with Parliament. He expressed it as follows in his Autobiography:

> *"In this I took the ground which, from the beginning I had thought the only one orthodox or tenable, which was that the relation between Gr. Br. And these colonies was exactly the same as that of England & Scotland after the accession of James & until the Union, and the same as her present relations with Hanover, having the same Executive chief but no other necessary political connection; and that our emigration from England to this country gave her no more rights over us, than the emigrations of the Danes and Saxons gave to the present authorities of the mother country over England.*

> *In this doctrine however I had never been able to get anyone to agree with me but Mr. Wythe. He concurred in it from the first drawn of the question What was the political relation between us & England? Our other patriots Randolph, the Lees, Nicholas, Pendleton stopped at the half-way house of John Dickinson who admitted that England had a right to regulate our commerce, and to lay duties in it for the purposes of regulation, but not of raising revenue. But for this ground there was no foundation in compact, in any acknowledged principles of colonization, nor in reason: expatriation being a natural right, and acted on as such, by all nations, in all ages." (Jefferson 1984, 9)*

Jefferson considered the King as the head of an empire comprised of several commonwealths that were each sovereign and equal. He could not, and did not, accept the Parliament as sovereign over the American population; in his radical (Lockean) view, there already existed state legislatures to exercise that function. Jefferson argued his position both constitutionally and in terms of human rights. Locke's mark in this aspect is plain to see.

The whole *Summary View of the Rights of British America* pamphlet is sustained on Lockean principles of modern natural rights. At the foundation of Jefferson's theory of government and the relationship between the government and the governed, there is the Lockean idea of popular sovereignty understood as the natural right of the people to decide who shall govern them and in what way. He expressed it so to the British king:

> *" And this (a "respectful acceptance") his majesty will think we have reason to expect when he reflects that he is no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendence." (Jefferson 1984, 105)*

During the length of the document Jefferson stated the different rights of the American population and asserted them (to prove they had been violated by the English) on the basis that government is a convention created by the ever-sovereign people of one nation. He began with the natural rights derived from the State of Nature -as Locke had it- when he explained the right to emigration:

> *"To remind him [his majesty] that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature has given to all men, of departing from the country which chance, not choice, has placed [him]"* (Jefferson 1984, 105)

Jefferson here deals with various lockean topics by implying them and using them interconnectedly. He stresses the lack of causality in a man's place of birth ("chance") and applies this randomness to his duty towards his nation's government.

Following Locke, Jefferson recognizes true government to take place only by consent ("choice"), thus allowing an escape ("a right which nature has given") for those who do not wish to accept the government under which they have been born. Jefferson perhaps helps us to better comprehend the Lockean principle of constitution of government through the right of consensus, by showing us the other right logically paired with this one, i.e., the right not to consent. Jefferson considers the first American Settlers to be doing exactly that: exercising their nature's right not to consent to a government. In Jefferson's practical thinking, by not consenting to their fate-assigned government and moving towards a "new world", they were exercising their right to return to the State of Nature –in Locke's terms -and begin a new form of government they did agree to. By returning to the State of Nature, Jefferson understands, they were renouncing to British jurisdiction, not fleeing from it.

This right to emigrate, following Jefferson's Lockean understanding of it, also exemplifies quite graphically the way in which free and equal men can viably originate a new social order out of a state of nature by "*establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness*" (Jefferson 1984, 105-106)

Jefferson explains how, regardless or their having this right, settlers decided it was best if "*they adopt that system of laws under which they had hitherto lived in the mother country*" (Jefferson 1984, 107) Yet when establishing their colonial legislatures, they followed the lockean principles of delegation of sovereignty. Jefferson considered- as might have Locke, for that matter- that those colonial assemblies had had delegated in them the supreme legislative power of the people of their territory. That satisfied Jefferson's criteria for the legitimate constitution of government. This was the strongest argument to date for considering the American legislative powers in the colonies as free and equal as the British ones were over the British territory. This argument was evidently a modern argument. It implied that the English and the Americans both shared one same right to possess the land (whether it be British, American or otherwise -the right to possession remained the same) and that both governments could be equally compelled to satisfy the same modern-standards test of government legitimacy.

Jefferson did not consider the American colonial territories to pertain to Britain since, following the Lockean approach to the right to possession[19], the British had never possessed the colonial territories to begin with. Jefferson sees the

[19] See section 4.1 of this work "The theoretic foundation for the Liberal Approach Politics" for an account of Thomas Jefferson's view regarding the issue of lockean possession and political land owning. Also see Locke, *John Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003. Numbs. 26, 27, 30, 138-140

main fault of this "confusion" in the fact that while the European British contemplated the acquisition of (American) lands by virtue of a feudal system of ownership, the American settlers saw themselves, according to the liberal-Lockean approach politics, as the allodial owners of their own land:

> *"Our Saxon ancestors held their lands, as they did their personal property, in absolute dominion, disencumbered with any superior, answering nearly to the nature of those possessions which the feudalists term allodial" (Jefferson 1984, 118)*

Jefferson here is assuming Locke's logic of possession in order to second the American perspective according to which they had full right to possess their land. He is appealing very intently to the legitimacy of their appropriation of the American soil because of the consequences that possessing the land will allow for them according to the modern theoretical basis for self-government.

We find a necessary correlation between possession and freedom also in Locke[20]. Jefferson is trying to fulfill the sine qua non prerequisites that the modern frame of mind had established with Locke. The right to self-government, to civil freedom (that Jefferson was radical about) necessarily implied property and vice-versa.

The first of Jefferson's challenges, if he was to defend America's political autonomy from England in terms of the liberal-Lockean approach politics, was to rid the King of England of his alleged right to American soil:

[20] See section 4.1 of this work "The theoretic foundation for the Liberal Approach Politics" for an account of the relationship between freedom and possession in Thomas Jefferson and Locke. Also see Locke, *John Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003. Numbs. 25-28, 30.

> *"The fictitious principle that all lands belong originally to the King, they [the colonists] were early persuaded to believe real; and accordingly took grants of their own lands from the crown. (…) It is time, therefore, for us to lay this matter before his majesty, and to declare he has no right to grant lands of himself." (Jefferson 1984, 119)*

And on the same grounds -Locke's principal of possession, purpose of civil society and government by consent- Jefferson enabled himself then to determine who the legitimate owners were:

> *"From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only. This may be done by themselves, assembled collectively, or by their legislature, to whom they may have delegated sovereign authority; and if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title." (Jefferson 1984, 119-120)*

Once Jefferson had established, according to a Lockean/Modern political theory, that the first American settlers were and had been from the first, the legitimate owners of the American grounds, he could then continue to apply the rest of the political theory to the American case.

The role of property in civil society is such that its security comprises the *"nature and purpose of civil institutions",* says Jefferson paralleling Locke[21]. It would make no sense, according to their logic, for an agent extrinsic to that

[21] See section 4.1 of this work "The theoretic foundation for the Liberal Approach Politics" for an account of the relationship between freedom and possession in Thomas Jefferson and Locke. Also see Locke, *John Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003. Numbs. 123, 124, 127, 130, 131.

society, to exercise any form of control over the society's property. The exploitation of this principle was at the core of the Stamp Act upheaval[22].

It did not escape the Revolutionists, Jefferson among them, that the Lockean conception of property contained in it the idea of consent. It cannot be said that one possesses something –anything- if another is able to retrieve it from one according to their will, regardless of one's will, i.e., without one's consent[23].

Applied to the Stamp Act, this meant that the British King could not legitimately tax the Americans for their possessions since the American population had no representation in Parliament; in other words, they could not express their consent to the tax. So if the property was indeed theirs as Jefferson went of his way to prove, according to the liberal-Lockean approach politics, they should have had a say in whether or not they could be taxed and to what extent. Yet, they had not allowed to.

It is not the historical perspective but that one of political theory that makes this aspect so relevant to us here. The Stamp Act constituted from a distinctly modern political perspective, an assault on liberty and property. According to the new understanding, it altered the necessary relationship between taxation and consent. We have no record prior to that date of the intent of effectively applying this understanding. Dworetz explains it in the following terms:

> *"Basically, the political equation looked like this: Liberty and property are inseparable; one cannot endure without the other. Consent, moreover, is the*

[22] In 1765 an act of the British Parliament imposed a tax on the American colonies of Great Britain and required that certain printed materials in the colonies be produced on stamped paper from London, carrying an embossed revenue stamp, allegedly to help maintain the British troops stationed in North America. The opposition it encountered –mainly in the colonies but also in England-was such and at so many levels, that it was in the end repealed. The harm was already done though: it had significantly contributed to ignite the cause for American independence.

[23] See Locke, *John Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003. Numbs. 139, 193

> *sine qua non or property; if you do not control the disposal of an object by granting or withholding consent, it is not your property in the first place. In a large political community, however, where the population is dispersed over extensive territory, representation becomes the necessary institutional mechanism for registering consent. Without representation, then, there is no consent and, therefore, no liberty and no property." (Dworetz 1994, 71)*

Whether it be abusing the American's right to property (by usurpation via "illegitimate" taxation) or whether it be abusing the American's right to representation, i.e. self-government, (via abolishing their "legitimate" colonial legislatures), the British were meddling with what was the fundamental basis of a modern liberal society, which America was struggling to become. In Jefferson's conception of a legitimate political system in accordance to the law of nature, the ties between property and consent are defining of that system because those ties are the ones that are expected to produce, yet at the same time require, freedom. Only from this lockean-liberal perspective can we understand Jefferson's bold, if you will, assertion that the entire British voting population had the pretense of enslaving America through the much-criticized British Acts:

> *"(…)instead of being a free people, as we have hitherto supposed, and mean to continue ourselves, we should suddenly be found the slaves, not of one, but of 160,000 tyrants(…)" (Jefferson 1984, 112)*

Jefferson applies the same underlying liberal-Lockean logic to other alleged abuses of the colonist's natural rights by the British Parliament. Speaking of their right to free trade he states:

> *"That the exercise of a free trade with all parts of the world, possessed by the American colonists, as of natural right, and which no law of their own had*

> *taken away or abridged, was next the object of unjust encroachment" (Jefferson 1984, 108)*

The point that Jefferson wanted to reach with this discussion had less to do with economics and trade and more to do with the fact that, according to his point of view, only laws made by the colonists could regulate or restrict the rights of the colonies, in this case, the natural right to fair trade.

The American Revolutionists, as we are verifying in their writings, appear to be less concerned with economics and more with political theory. Continuing on the issue of the colonist's natural right to free trade, Jefferson alerts:

> *"Their rights of free commerce fell once more a victim to arbitrary power; and by several acts of his reign, as well as of some of his successors, the trade of the colonies was laid under such restrictions, as shew [sic] what hopes they might form from the justice of a British parliament, where its uncontrouled [sic] power admitted over these states. History informs us that bodies of men, as well a individuals, are susceptible of the spirit of tranny. A view of these acts of Parliament for regulation, as it has been affectedly called, of the American trade, if all other evidence were removed out of the case, would undeniably evince the truth of this observation." (Jefferson 1984, 108)*

In this paragraph we see how Jefferson had his mind set on detecting and preventing tyranny. He speaks of: arbitrary power, uncontrolled power, spirit of tyranny… He was not defending an increment or even a certain degree of autonomy for the Americans' regulations of their trade; the center of the paragraph is about how he was stating the fact that American trade was, according to nature (not to political or economic principles, but to nature), a free right of the colonies an therefore not to be submitted to any other (tyrannical, arbitrary, uncontrolled)

power but that of the Americans. Any political or economic consequences derived from that fact were just that: consequences.

What is remarkable is how the underlying aim of the American Revolutionists' writings, and Thomas Jefferson's in particular, was perhaps not so much to directly improve their political-socio-economic conditions but to argue and put forth a set of tightly knitted modern liberal principles that would, as a consequence, eventually bring about the change they sought.

In his defense of liberty and property as interconnected in the Lockean-liberal sense, it is noteworthy that Jefferson drew his arguments mainly from the 11th chapter of the *Two Treatises on Government* and to a lesser degree from the 5th. His source for rational support of his political practice would have to do mainly with "On the Extent of Legislative Power" and in a second place with "On Property". Dworetz asserts:

> *"The formal Lockean connection, then, was not an ideological rationalization for unlimited capital accumulation; it was, instead, a demand for constitutional politics and limited government; and when England failed to honor that demand, it became a justification for armed resistance and revolution" (Dworetz 1994, 71)*

Jefferson here departs significantly from the *"half-way house of Otis and Dickinson"* (Jefferson 1984, 9) -perhaps in part because of the nature of the historic events that took place in the 1760's and 1770's. By 1774 Jefferson had enough evidence to make him believe that the British were consciously and effectively trying to remove from the Americans the very rights that according to Jefferson supported the colonies as a legitimate, sovereign, equal autonomous civil society. What, to Jefferson, had begun as abusive colonial taxation and illegitimate trade regulations, had ended up in the dissolution of colonial legislatures and institutions. Whereas Otis and Dickinson were concerned with having Britain redress the

grievances they had caused by having violated certain American rights, Jefferson was concerned with pointing out how those rights had not only initially been violated, but had, of lately, been out and out cancelled[24].

Otis and Dickinson found in the imperial custom and in British constitutional practice the necessary material to try and defend their position as American colonists against the alleged abuses of the mother country. But where was Jefferson to turn to when, according to his perspective, those resources –legal, customary- were at the very core of the justification for those abuses? Jefferson then appealed to a modern understanding of nature according to Locke:

> *"One free and independent legislature hereby takes upon itself to suspend the powers of another, free and independent as itself, exhibiting a phenomenon [sic] unknown to nature, the creator and creature of its own power. No only the principles of common sense, but the common feelings of human nature, must be surrendered up before his majesty's subjects here can be persuaded to believe that they hold their political existence at the will of a British parliament" (Jefferson 1984, 111)*

In his argument he stressed the outlandish ("*the principles of common sense (…) must be surrendered up"*) character of the British parliament and the King's political system insofar as they, in Jefferson's mind, bestowed upon themselves the power to abolish the colonists legislatures. According to Locke's teachings, it is the natural executive power of the people who create a given legislature that is the source of that power. Having the New Yorkers never delegated such a power unto the British parliament, following Locke's reasoning, they would have had retained

[24] While in the 1760's Otis and Dickinson were mainly concerned with the Stamp Act and Townshend duties, in the 1770's Jefferson was dealing with the suspension of the New York legislature and the Coercive Acts.

that executive power enjoying the same free and independent condition as the British parliament enjoyed.

Jefferson continues to defend his case clearly on the basis of the support he finds in the Lockean principles as applied to civil society, the state of nature and government:

> *"Shall these governments be dissolved, their property annihilated, and their people reduced to a state of nature, at the imperious breath of a body of men, whom they never saw, in whom they never confided, and over whom they have no powers of punishment or removal, let their crimes against the American public be ever so great?" (Jefferson 1984, 111)*

Jefferson goes even further into the depth of Lockean teaching when he elaborates on the alternatives that are, in his modern view, open to the American people in the face of Britain's "*long train of abuses and usurpations*" (Hamilton, Madison and Jay 2003, 529):

> *"From the nature of things, every society must at all times possess within itself the sovereign powers of legislation. The feeling of human nature revolt against the supposition of a state so situated as that it may not in any emergency provide against dangers which perhaps threaten immediate ruin. While those bodies are in existence to whom the people have delegated the powers of legislation, they alone possess and may exercise those powers; but when they are dissolved by the lopping off one or more of their branches, the power reverts to the people, who may exercise it to unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper." (Jefferson 1984, 118)*

Following Locke's exposition on the subject, Jefferson not only bases governmental power on the people's consent to delegate their natural executive

power, but he also considers that in accordance to nature, there must always be a door left open to the people to escape the possible situation of an abuse of power.

Always following Locke[25], the procedure Jefferson suggests in such cases as the legitimate path to follow is to revert all the power back to the people once again that they may institute a new form of government, if and how they think fit. He implicitly states that the people of New York are a free and independent people who may alter or abolish their present form of government, be it which it may, and establish a new one of their own accord. He states in the Declaration of Independence that *"It is their right, it is their duty, to throw off such Government and to provide new Guards for their future security"* (Hamilton, Madison and Jay 2003, 529)

While explaining this procedure, Jefferson was also establishing an implicit parallel between the original constitution of legislatures in the colonies and the scenario he was now hypothetically re-opening for them. By suggesting the legitimate political actions that the American colonies could ensue in terms of nature and natural rights, he was at the same time asserting the legitimacy of the already existing American legislatures; for it could be considered that they complied with those terms and had been constituted according to the principles he was now defending as the only legitimate ones. The same could not be said for the British king or parliament, and this is exactly the revolutionary idea he was putting forth.

Jefferson drew arguments from the Lockean limits on governmental power according to which the legislative power "*is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people*" (Locke [1689] 2003, 135) This was precisely what the Revolutionists contended the British king was doing in America: "*The history of the present King of Great Britain is a history of repeated*

[25] See Locke, *John Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003. Numbs. 212, 220, 225, 243.

injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states" (Hamilton, Madison and Jay 2003, 529)

Jefferson took on the liberal-Lockean approach politics to endorse America being a free nation while at the same time -like killing two birds with one stone- he was undermining the foundations for the European sovereign powers. In order to support the Revolutionary position, he would lay bare the reasons for arriving to that position as the most convincing, almost self-evident, argument for it. Since at the core of the contention there was the nature and limits of civil government over a people, and the two contenders were precisely the civil government and the governed people, Jefferson turned it into a theoretical win-loose game in which by laying the foundations for one (the people's rights) he was destroying the foundations for the other (the British government's Acts in America). Jefferson's responsibility is substantial in this point for turning a socio-political-economic situation into a matter of political philosophy rather than just a circumstantial clash of interests between a state and its colonies. His ultimate goal when discussing the Intolerable Acts is to abstract from the particular situation involving British parliamentary encroachments on the colonies and to reflect on the limits of civil government. The way he does this is by articulating such discussions in the terms on Lockean teachings on the subject. Dr. Lee Ward states the following:

> *"By this means Jefferson assimilates the concepts and universalist reasoning of Lockean philosophy into an examination of specific issues of right (…) In effect Jefferson employs historical analysis in order to demonstrate the natural, as opposed to the simply constitutional or contingent, character of the violation of those rights. Through his detailed treatment of Parliament's historic abuses of the rights of American self-government (…) Jefferson tries to prove that Parliament has undermined both the formal legal basis of the*

> *colonies' limited relations with Britain and the subtantive principles of Lockean natural rights philosophy informing these relations" (Ward 2010, 365-366)*

We now turn to seek -and to find- the liberal-Lockean approach politics principles' as they appear in the Declaration of Independence.

4.2.2 The Declaration of Independence.

The aim of this study is to expose the specific instances of the Declaration of Independence in which the liberal-lockean approach politics appears conspicuously. Our belief here is that a meticulous elucidation of those instances, together with the highlighting effect of extrapolating them, will give us valuable keys for understanding our contemporary democracies in the terms in which their Modern historical predecessors were conceived, i.e., in the adequate terms- the original ones. Our concern is with the political implications, for then and for now, of a liberal-Lockean political theory.

We shall begin by dissecting the "self-evident truths" that are proclaimed in the Declaration of Independence. Not only because they appear at the very beginning of the document but because they also serve as basis to the rest of it. The "self-evident truths" are the pillar on which the rest of the document's proclamations are founded on, even –most significantly- the independence proclamation itself.

According to our interest here we can break down the Declaration of Independence as follows:

Ref.	Declaration of Independence[26]	Liberal-Lockean Approach Politics
A1	*"When in the Course of human events it becomes necessary"*	Politics as the result of human interactions and at the service of modern natural rights (not expression of divine order).
B1	*"for one people"*	Recognition of a pre-political society. People's sovereignty in relation to civil power. (Locke)
C	*" to dissolve the political bands which have connected them with another,"*	Right to resistance. (Locke)
B2	*"and to assume among the powers of the earth, the separate and equal station"*	State of nature. (Locke)
D	*"(to) which the Laws of Nature and of Nature's God entitle them,"*	Natural theology; liberal-lockean theistic-rational secularization of politics. God as "Nature's God".
A2	*"a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."*	Liberal-lockean justification for political actions; appeal to universality of political principles.
D	*"We hold these truths to be self-evident,"*	Natural theology; liberal-lockean theistic-rational secularization of politics. Reason as basis for theological principles.
	"that all men are created	Liberal-Lockean concept of lack of

[26] All quotes from the Declaration of Independence are from Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers.* Edited by Clinton Rossiter. New York, NY: Signet Classic, 2003, 528-532.

E	*equal,"*	civil authority in nature.
D	*"that they are endowed by their Creator"*	Natural theology; liberal-Lockean theistic-rational secularization of politics.
F	*"with certain unalienable rights,"*	Based on Locke's principle of "God's ownership" of men.
G	*"that among these [rights] there are Life, Liberty and the pursuit of happiness."*	Liberal-lockean approach to "objective" and "subjective" rights as well as to "positive" and "negative" rights. Lockean priority and understanding of rights.
H1	*"-That to secure these rights, Governments are instituted among men,"*	Liberal-lockean understanding of the nature and origin of government.
H2	*deriving their just powers from the consent of the governed.-*	Liberal-lockean understanding of the origin of political power. Social contract.
B-C	*"That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it;"*	Liberal-lockean defense of the right to resistance.
H3	*"and to institute new government,"*	Liberal-lockean understanding of the origin of political power. Social contract.
H4	*"laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."*	Liberal-lockean understanding of the origin of political power. Social contract.

Property

We have already seen in the previous section of this work how the liberal-lockean notion of "property" had been extremely appealing to Thomas Jefferson and how he had used this concept to explain and try to resolve any number of controversies of his time between the United States and Great Britain in a way that was favorable to his cause. Documents such as Jefferson's *A Summary View of the rights of British America* or *The Federalist Papers* by Alexander Hamilton, James Madison and John Jay attest it. We can also find testimonials as to how the American Revolutionists had deeply assimilated Locke's understanding of property, in the documents leading up to the Revolution[27]. The main reason had to do with the fact that Locke's understanding of property offered very highly significant political implications that were aligned with the American Revolutionists' interests.

We have seen[28] how Jefferson resorted to the liberal-lockean property right in order to: prove that Great Britain had no legitimate claim over the American Colonies; to explain in which way the American Settlers had become legitimate owners of the American soil; how along with property came the necessary right of the property owners to have a say in the Government's disposition of said property (leading to the vindication of political consent); to establish a necessary correlation between property and freedom; and justify the implications that this point of view offered when applied to the political situation of the time. Seeing as Locke's theory of property was deeply embedded into the Revolutionists' theory, it is only slightly

[27] See Lee Ward's *The politics of Liberty in England and Revolutionary America* for a specific account on how Locke's theory of property worked its way through pamphlets, sermons, political reflection and propaganda and eventually originated the American appeal to liberal constitutionalism.

[28] See section 4.2.1 of this work "On how the modern rights on man were articulated into the politics" for an account of how Thomas Jefferson resorted to Lockean theory to sustain his political views and articulate the defense of an independent America.

odd that we do not find any explicit mention to the "right of property" in the Declaration of Independence. For, implicitly, it was everywhere.

It remains peculiar only because property plays such a significant role in the background philosophy of the text, that we expect it should at some point be mentioned by name. Nevertheless we easily overcome our initial surprise when we realize that the concept is spread throughout the document in the form of its political implications. We shall see how.

We are first puzzled when the Declaration states examples of man's "unalianable rights" and we automatically expect to read Locke's *literal* listing, i.e., "life, liberty and *estate*". On the contrary though we read Jefferson's own account of highlighted rights: "life, liberty and the pursuit of happiness" (ref. G). It is convenient to keep in mind here that "life, liberty and estate"[29] is the very definition of property according to Locke. Does this signify that Jefferson in his choice of substitution, was renouncing to property either as a right worthy of special mention or as an unalienable right altogether? We do not believe so. We have evidence that suggests Jefferson and the Revolutionists held the notion of property just as Locke had it, in rank as well as in content. Liberal-lockean property was at the very core of the fundamental notions the Declaration was putting forth. We have mentioned before the deep correlation between property, consent and liberty, which were the bulwark of the theses for the Revolution. The right to pursue happiness, on the contrary, could benefit from being recognized as having the highest rank, deserving of governmental protection. There was, we assume in this work, no intention of diminishing the right to property and there was all the intention of fostering the right to pursue happiness, whatever form this might take.

[29] *"life, liberty and estates, which I call by the general name, property"* (Locke [1689] 2003, 123)

In the Declaration of Independence we find one accusation against the British King especially significant when following this line of interpretation of the American usage of liberal-lockean property. The aggravation had been stated thus: "For imposing Taxes on us without our Consent". Despite not using the word "property" explicitly (as has already been established), there is a definitely unmistakable mention of the concept of Lockean property in this accusation. As has been thoroughly analyzed in the section preceding this one, the logic behind the Revolutionary slogan "No taxation without representation" is a liberal-lockean one:

> *"The British denied the charge, in part on the grounds that Parliament, a representative body, had imposed the taxes and that was sufficient representation or consent to make the taxes legitimate under the British constitution. The Americans strongly rejected such an interpretation of the British constitution via an appeal to the doctrine of the natural right of property: it is not sufficient that just anybody at all consent to taxation but that only the property owners who are being taxed, themselves or through their representatives, give their consent." (Zuckert 2002, 221)*

The American political theorists adopted the liberal-lockean inalienable right to property and they integrated it into the whole of their body of thought as a crucial part of it; they ensured it by establishing it as the basis for government. The government's recognition of this right, its protecting the owner's property from others' interference and refraining itself from damaging or seizing it, marks a new understanding of the role of government but, most importantly, it marks a new way of understanding the owners themselves. The United States was creating a country not of subjects but of citizens.

The Declaration of Independence is based on the assumption that the American settlers were in fact, and therefore should be recognized as, American citizens. The document aims at expressing the reasons that support this

assumption; reasons that all have their roots in the liberal-lockean views. Especially the views on equality, God, rights, inalienability, and government.

Equality

To begin with, we must assume the artificers of the Declaration accepted the theory of Locke's state of nature (ref. B1, B2). When they spoke of the people of America -of themselves- they spoke of "one people" that had an "equal and separate station" to other another one, "among the powers on earth". This premise of the Declaration is actually the conclusion in the Lockean theory of the state of nature. If, as Locke tells us, the state men are in naturally is

> *"a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending on the will of any other man" (Locke [1689] 2003, II, 4)*

then it logically derives from this notion, that men, or in their case "a people", are naturally, in an "equal" and "separate" station from any other people. (This depth of analysis will suffice for now, as we will repeatedly encounter in this section the state of nature premise in the Declaration of Independence and expand it further and further.)

Another concept Locke immediately associates to the state of nature is equality. He tells us next that the state of men in nature is "*a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another*" (Locke [1689] 2003, II, 4). And we are persuaded to believe that the understanding of "equality" in the Declaration runs parallel to this one in Locke. When the Declaration stated "that all men are created equal" (ref. E) we claim it did not refer to the conspicuously erroneous belief that all human beings are

created with equality when it comes to human qualities or conditions. We know men are not equal when it comes to family, environment, skills, socio-economic position, opportunities, physical attributes, etc. All these inequalities are plain to see. We have then open before us different options for continuing our dissertation at this point: was the Declaration oblivious to the existence of the inequalities in the human condition, did it attempt to override it, or did it refer to another notion of equality?

We are of course inclined towards the latter. For starters, as we have previously noted, the Declaration was following quite closely the theory of the state of nature. Since the Declaration specifically indicates that there is equality produced when the people "dissolve the political bonds which have connected them with another" (ref. C) we are led to believe that equality takes place in a non-political state; a state of nature, a Lockean state of nature in which "the laws of Nature and Nature's God entitle them" (ref. D) to equality.

Speaking as we are of a people and not individuals, we can explain how the Declaration recognizes there being in a state of nature as a people if we resort to Locke's explaining to us how some remain in the state of nature and are in a political state as well. So long as they have no *higher* authority to be submitted to, and individual, or a people, may remain in the state of nature: "*all princes and rulers of independent governments all through the world, are in a state of nature*" (Locke [1689] 2003, II, 14) What the Declaration is doing again is using the conclusions reached from Locke's state of nature reasoning as premises for its afterword statement. That is why the American people, according to the liberal-lockean theory, are in a position to dissolve political bonds, be guided by the needs of the course of events, assume equal and separate stations to Great Britain, and ultimately, declare themselves free. Had they not been equal in this liberal-lockean sense, they would have lacked the freedom to declare themselves Independent.

Whereas Great Britain fought a war to protect what they thought belonged under their authority, the Americans fought a war to gain the freedom they believed was due to them because of their equal station.

Bearing in mind that the final goal of the Declaration was the political purpose of self-assertion it became essential for it to establish the American people's legitimacy and authority in declaring their independence. Failing to do so would be either a lack of consideration towards "*a decent respect to the opinions of mankind*" (ref. A2) or it would result in delegitimizing the process they were attempting to put forth. Locke's state of nature equality, as we have shown, apparently worked well with the philosophy of equality of the American Revolutionists.

The key as to why they so intently followed Locke at this specific point can be seen, we contend, in the fact that Locke's equality began in each and every man by way of nature while at the same time, he provided no means for nature to alter that sate of equality. Moreover, if anything "*the Laws of Nature and Nature's God entitle[d] them*" (ref. D) to that very state of equality.

So if all men, we are to assume, are born free, and not God nor Nature provide any reason for one man, or a group thereof, to rule the rest, that means men never actually cease to be free -at least not completely. Men can choose to place their allegiance in some ruler, but that choice, being as it comes from the will of a free individual, can only be considered to be binding insofar as his will remains unchanged. In other words, those who find themselves being rulers are only so out of the will of freely obeying people. The ruler therefore cannot truly subject, in the true sense of the word, the people of his own accord.

For the Americans, and for Locke, all men were equal, and having agreed to obey certain rules of a certain institution (the British King and Parliament) for a certain period of time, did not forfeit that equality. Locke's theory lacked a divine

authority or a natural source that would ever justify the fact that some men had a divine-natural right to rule and others had the divine-natural duty to obey him. From the British perspective, that was exactly the case, hence the Americans' keenness on Lockean equality.

God

Another instance of the Declaration in which we can see the footprint of Locke is that one in which it refers to God/ Creator (ref. D1 & D3). We find the American Founders refer to a God, yet we find they do in an atypical way. Their God is not a God as Robert Filmer would have it, not a classical Christian God as might have most plausibly been expected of them. Instead when referring to God and to moral law they turn to Locke's theology, as we will endeavor to show. Theirs, we hope to clarify, was a modern God; more of a *natural* one than a *supernatural* one.

> *"Nature's God and supernature's God, the laws of "nature's God" and the laws of "supernature's God" seem to differ along three dimensions. Nature's God is the God of nature, the God visible in and knowable from nature. Nature's God is the source of the order and beauty and goodness in nature. Nature's God is the creator, whose intelligent plan is visible in the natural order and in natural law, the observable natural regularities, both physical and moral. Supernature's God is visible not so much in the ordinary course of nature but in what goes beyond or against the ordinary course of nature. Supernature's God is visible in miracles. This God, or this aspect of God is most visible when nature's ordinary course is waived or broken" (Zuckert 2002, 214, Ackerman 1991)*

Thus the Americans found God in "Nature", as had Locke. In the words of Leo Strauss Locke's theology had taught us that:

> *"the law of nature is a declaration of the will of God. It is "the voice of God" in man. It can therefore be called the "law of God" or "divine law" or even the "eternal law"; it is "the highest law". It is the law of God not only in fact. It must be known to be the law of God in order to be law. Without such knowledge man cannot act morally. For "the true ground of morality (…) can only be the will and law of a God". The law of nature can be demonstrated because the existence and the attributes of God can be demonstrated. This divine law is promulgated, not only in or by reason, but by revelation as well. In fact, it first became known to man in its entirety by revelation, but reason confirms this divine law thus revealed. This does not mean that God did not reveal to man some laws which are purely positive: the distinction between the law of reason, which obliges man as man, and the law revealed in the gospel, which obliges Christians, is preserved by Locke"* (Strauss 1958, 203)

It is also preserved by the Americans, who find in this distinction a solid basis on which to separate State and Church while at the same time maintaining a certain morality in society; the law of Nature, which obliges man as man.

The advantage they found in Locke's theological approach to natural law as opposed to the classical one was that they had God and Nature, almost as one, become intelligible to all men through reason: *"what several rules and canons of natural reason hath drawn, for directions of life, no man is ignorant"* (Locke [1689] 2003, II, 5)

This was a groundbreaking argument for them as it allowed for a reason-based political order to be traced back to a somewhat traditional[30] notion of a divinity via the divine disposition of Nature and human reason. According to the American model, following the Lockean theology, there coexists at the same time in

[30] We must remember that the references Locke used in order to support his theology were actually biblical. He stood by the Bible and the Christian God as such; the novelty lies only in the interpretation and use he made of them.

society a double set of laws one of which acts like the bones (divine law) and one of which acts like the flesh (political laws). Although these laws are evidently not about to come into contradiction with each other given their common nature, and it is clear in any case that the divine law has supremacy over the political law, there is an abyss between the way the American model establishes this and the way the British model does. The liberal-lockean approach mediates the imprint of God in politics not through revelation, faith and ministers, but through the senses, reason and the understanding of natural law. Hence the introduction in the Modern Era of a clear-cut gap between divine law and political law.

In this way, by the Declaration speaking in Lockean theological terms such as "*the Laws of Nature and of Nature's God*" (ref. D1) the American Revolutionists were making a declaration of intentions when it came to the relationship between religion and state, or God and politics. Their theology was going to be a natural theology which they would rely on to establish their political order but that would override it in the way classical theology had done before with politics.

The political implications of this theology are vast, as we have seen earlier in this work, and have an important component of modernity in them that appealed to the American Founders very much for it aligned their anthropology within a theological framework that conferred to their political process more legitimacy and credibility that it would otherwise have had. The British were coerced by the circumstances into defending their tradition from the Americans' attacks, not agreeing with what conception of theology the Americans had and its moral and political implications. By doing so, they had entered into a dialogue that honored their interlocutors far more than the British would have willingly desired. The result was an even more elaborate and consistent development of the articulation of natural law into politics. Natural rights in particular played a main role in the new politics.

Rights

The Declaration speaks of "rights" sometimes openly (ref. F, G, H1) and sometimes it refers to them indirectly (ref. B2, C) but at any rate those who wrote the Declaration and those who signed it all agreed on two things: the first, men *had* rights, the second, *all* men had rights. We are led to believe this was not consensual at the time in the British Commonwealth since it had been necessary to include this bit of information in the document that declared the independence. One reason for the lack of general consensus on the subject had to do with the issue that has been discussed in the previous section of this paper[31], the issue regarding the notion of rights that the modern Americans had and that differed from the notion of rights that the non-modern British had. They disagreed not so much over *which* were the rights of man or which men *had* the rights but the question was more about what *was* a right. The key difference between their rights was a conceptual one.

We take Burke, for instance, to exemplify a defendant of a more classical notion of right in the Modern scenario. Strauss says about him:

> *"he did not hesitate to use the language of modern natural right whenever that could assist him in persuading his modern audience of the soundness of a policy which he recommended. He spoke of the state of nature, of the rights of nature or of the rights of man, and of the social compact or of the artificial character of the commonwealth. But he may be said to integrate these notions into a classical or Thomistic framework." (Strauss 1958, 296)*

[31] See section 4.2.1 of this work "On the revolutionary aspect of the modern rights on man" for an account of the differences in the concept of rights between the British and the American during the American Revolutionary Era.

This integration made it so that he could not accept other modern notions, perhaps the most significant ones, such as the founding of government on the rights of man, considering all duties to arise from consent or from contract, conferring supreme authority to the people (over tradition), the new moral teachings… And this was a wall that erected itself in front of any partisan of the classical notion of rights in the Modern Era. Their difficulties when meddling with the modern concept of natural rights were of a conceptual nature and stemmed from the different approaches to the subject of rights: one classical and the other modern. *"The quarrel between ancients and moderns concerns eventually, and perhaps even from the beginning, the status of "individuality". Burke himself was still too deeply imbued with the spirit of "sound antiquity" to allow the concern with individuality to overpower the concern with virtue."* (Strauss 1958, 323)

As a result of this difference of approach, there arose a difference of conception of what the rights of man were. We have already seen in the previous section[32] what was the modern Americans' understanding of man's rights and its implications in the liberal-lockean approach politics. We shall follow Zuckert in seeing how the Declaration of Independence follows a strikingly specific modern understanding and distinction of the rights of man, one that is inherited from the Lockean perspective.

Americans steered away from the classical notion of "objective rights" and resorted to "subjective rights" instead. This choice is perfectly coherent with the disparity of views that Strauss pointed at. Moderns would be of course oriented towards the individual empowering faculty that subjective rights had whereas the

[32] See section 4.2.1 of this work "On how the modern rights on man were articulated into the politics" for an account of the effect the theory of modern right had on the construing of the new American political order.

British were oriented towards the fortressing-of-virtue effect that objective rights could have. For instance:

OBJECTIVE RIGHT: "It is *right* for citizens to vote"

SUBJECTIVE RIGHT: "It is *a right* of citizens to vote"

The Declaration speaks of certain "unalienable rights" and specifies they are "Life, Liberty and the pursuit of happiness" and "the Right of the People to alter or abolish" Government, among other rights. These are all examples of subjective rights. They are in Zuckert's[33] words "moral powers". As such, the agent, the possessor of the right, has discretion over the exercise of that right; one may decide to vote or not to vote, yet the subjective "moral" power of voting remains in them.

There is yet another distinction to be made within the realm of rights that is also most interesting to us here. It is very useful to us because it allows us to dissect the exact nature of the rights that appear in the Declaration and therefore to identify it more clearly and pin down its lockean character. It is the distinction between positive rights and negative rights in the context of subjective rights. If we consider positive rights to be the ones that require something from another in order to be fulfilled and negative rights the ones that require only forbearance on the part of others in order to potentially be, then we can categorize the Declaration rights as negative rights, or as liberties.

[33] Zuckert, Michael. *Launching liberalism: on Lockean political philosophy*. Lawrence, Kansas: University Press of Kansas, 2002. P. 216-218

POSITIVE SUBJECTIVE RIGHT: "All citizens have a right to free access to a public healthcare system provided by the Government"

NEGATIVE SUBJECTIVE RIGHT: "All citizens have the right to be healthy"

The first requires for the government to assist the citizens by setting up a public healthcare system. The second one requires only that the Government not affect its citizens' health and prevent others from doing so.

The Founders include in the Declaration as most important -albeit not the only ones- a brief catalogue not of rights that require active governmental assistance (such as right to a pension, to a fair trial or to a free public health system) but of rights whose potential exercise needs to be protected from other citizens and even from the very government, i.e., negative rights. Every man, it is declared, possesses those rights (to life, liberty, pursuit of happiness, abolishment of government) and requires self-restraint from interfering on the part of the government and its restraining other citizens from interfering as well.

If we seek for the source of these specific rights we find the Declaration states they are an endowment of the Creator, yet nowhere in the Bible do we find these rights to be mentioned, let alone endowed upon anyone. We are not led to assume it is an incongruity though, since the Declaration's God, we know, is a natural theology God, not so much a revealed God[34]. Thus we must search for the source of these rights in "Nature's God". We encounter yet another difficulty, which

[34] See section 4.1 of this work "The theoretic foundation for the liberal approach politics: John Locke" for an account of natural theology of the Founders.

is that the Declaration does not state in which way Nature's God is the source of the rights.

We can clarify this link somewhat if we rely on Locke's position to explain it. Locke tells us that divine law is a law that any man can discover through reason. Reason may extrapolate a divine law via the observation of nature. The laws of nature will allow for the discovery of the laws of men. Those laws contain duties as well as rights, natural rights. In doing so, man discovers God as a creator not only of oneself, but of all mankind too. Through the ownership principle[35], Locke explains why all men should have equal respect for each other's dignity insofar as they are all God's creatures. This way, one os led to believe those rights (and duties) belong to all men. So we can believe to have found the answers that the Founders gave to two questions: first, as the Creator of men, God created them with rights which man's reason can universally decipher; second, as the owner of all mankind, it is not for one man to encroach upon another, in any aspect, unless it is with the other man's consent (in which case it would not be an encroachment at all).

Inalienability

The Declaration is explicit on the subject of the "unalienable"[36] character of man's rights (ref. F). They had plenty of reasons for doing that. The implications of accepting that all men had rights, which were untouchable by any person or even

[35] See section 4.1 of this work "The theoretic foundation for the liberal approach politics: John Locke" for an extended explanation of the lockean principle of divine ownership.

[36] Although the word is known as "inalienable" we will consider, together with most all other scholars, that the meaning of the word "inalienable" is identical to the meaning the Founders intended to convey when using, for whatever reason (a typo, evolution of the language, etc.), the word "unalienable" instead.

political authority, extended far enough to allow for the Founders to be able to justify some of their boldest arguments based on this principle.

If, as we here contend, the Americans founded their rights theory on lockean philosophy, then we should be able to assert, as we have just intended to show, that the divine ownership principle, according to them, justified the existence of negative rights. These negative rights, whose source is the natural theology God, are thus an inseparable part of man's nature. Having the rights belong to a part of man's very own nature means implicitly that those rights are inalienable, inseparable from man in his essence, for one cannot dispose of another man's nature without jeopardizing him altogether, without altering their being as such. The lockean principal of divine ownership of men (plus human reason's capacity to reach that conclusion), account not only for the existence of negative subjective rights but also for their inalienability.

The status of inalienability of men's natural subjective negative rights was a crucial one for the American Founders to put forth since they were able to use it to support some of the arguments that came into clear contradiction with inherited British tradition. For instance, they were able to rid themselves readily from any hypothetical contract the British wanted to tie the American Revolutionists down with by argumenting that any instance of American ancestors forfaiting their own rights had no effect on those people's descendant's rights, being as they believed, an inalienable part of them, whom had *not* given them up at any point.

We find these words from Locke making a similar statement by following his own principles, which we have shown inspired the Founders' as well:

> *"for those, who would persuade us, that by being born under any government, we are naturally subjects to it, and have no more any title or pretence to the freedom of the state of nature, have no other reason (…) to produce for it, but only, because our fathers or progenitors passed away their*

> *natural liberty, and thereby bound up themselves submitted to. It is true, that whatever engagements or promises any one has made for himself, he is under the obligation of them, but cannot by any compact whatsoever, bind his children or posterity"* (Locke [1689] 2003, II, 116)

Another one of the implications of the inalienability of man's rights that was very valuable to the American Revolutionists was the one that sustained their argument against the right of the king to take any of the Americans' possessions without their consent. Americans did not have representation in the British Parliament and so, from the Americans' point of view, by not having a voice in that body politic they were not able to consent, not even indirectly, to being taxed. If their right to property were to be respected, the way for them to be taxed would be by allowing them to consent to it. Therefore, having been forced to pay taxes anyhow by the British government, they considered they were being all but robbed of their possessions, they were being unjustly alienated not just of the object of their right (their property) but most importantly, of the right itself. The Government was actively acting against their natural subjective negative right to have (retain) property and thus encroaching upon their right to property.

It was a tricky argument to allow since once it was admitted it left the door open for men to discover any number of unlisted natural rights and at the same time, it gave whatever right *was* recognized as such, the status of part of human nature, an inalienable part of it. The effects of this notion of rights, of man's natural subjective negative inalienable rights, on the conception and practice of American government were decisive.

Government

We have yet again to assume that the Declaration is following Locke's ideas when it states "*in the course of human events it becomes necessary*" for the "*one*

people" to "*dissolve the political bonds*" (ref. A, B1, C). The Declaration speaks of the American people (the "*one people*") as an entity subject of political rights ("*to alter or abolish* [governments]" ref. B2). These "people", says the Declaration, may assume a "separate and equal station among the powers of earth" (ref. B2). The Founders could quite adequately justify the necessity and ability of one people to do this, at a time when government was generally understood to be the result of direct divine ordination, if they leaned on Locke's genesis of government.

We have seen earlier[37] how from the British perspective society generated the rights for its subjects whereas for the Americans, taught by Locke, we believe, those rights were inherent to mankind and anteceded the society for the protection of which it was created:

> *"it is not without reason, that he [man] seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property" (Locke [1689] 2003, II,123)*

That is how in lockean theory, modern rights laid the foundation for the creation of societies in the first place, by needing to be protected by them. In the Declaration of Independence it is succinctly expressed also: "*to secure these rights, Government is instituted among men*" (ref. H).

They key concept is that for the moderns, for Locke as well as for the American Founders, government is instituted *by* men, they put *themselves* into a commonwealth. They are not designed to pertain to one or another, and the randomness of the commonwealth they belong to by birth only goes to support the

[37] See section 4.2.1 of this work "On the revolutionary aspect of the modern rights on man" for an account of the nature of man's rights according to the British during the American independence period.

idea that they can make, and it is their *right* to do so, a rational choice out of what chance has produced. Such was the shared belief of Locke and the American Founders. We believe the Declaration is following Locke in considering there could be no authority over men but that one imposed on them by their own consent. The way by which individual natural rights get channeled into a political authority is through consent: "*governments are instituted among men, deriving their just powers from the consent of the governed*" (ref. H2). This notion appears also in Locke in the Two Treatises:

> *"Man being, as has been said, by nature, all free, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community. (…) When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest." (Locke [1689] 2003, II, 95)*

Having only the consent of their governed as a limit to their community's authority had great relevance, for it gave the American Revolutionists virtually no limits to practice whatever political revolution they deemed fit -insofar as the American public supported them. Basing government on the people's consent implicitly allowed for the government's authority to dissolve, if and when the consensus was broken. Thus when in the Founders' opinion, the British government had become "destructive" (ref. B-C) of the ends of legitimate political power, it was the colonists' right to "alter or to abolish it" (ref. B-C). The following texts should serve to prove the striking parallel between Locke's position on the matter and the American one.

In Locke's words:

> *"Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make de design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered that they should the rouze themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected (…)" (Locke [1689] 2003, II 225)*

and

> *"The end of government is the good of mankind; and which is best for mankind, that people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed, when they grow exorbitant in the use of their power, and employ it for the destruction, and not the preservation of the properties of the people?" (Locke [1689] 2003, II 228)*

The Declaration of Independence's practically paraphrasing is articulated as follows:

> *"All experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, tan to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such government, and to provide new Guards for their future security.(…) The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tranny over these States [American colonies]" (Hamilton, Madison and Jay 2003, 259)*

Submitting the two texts to an analytic-interpretative scrutiny allows for the perception of the American authors to be practically justifying their rebellion against the King directly to Locke and only indirectly to the British King and British Parliament, whom were perhaps not much concerned with the American liberal-lockean approach politics justifications to begin with.

On another note, if we take from Locke's teachings on human equality the lack of any existing pre-political authority among men we will understand humanity as a group of free people who can freely choose according to "*the course of human events*" what political authority they deem best to suit their interests (for Locke, as for the Founders, that would be to protect their natural rights). The Declaration appears to be following this lockean approximation to the way governments were – and are to be- instituted:

> *"In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law: for everyone in that state (…) [is] both judge and executor of the law of nature (…)" (Locke [1689] 2003, II 124)*

and

> *"(…) lives, liberties and estates, which I call by the general name, property. The great and chief end, therefore, of men uniting into commonwealths, and putting themselves into government, is the preservation of their property. To which in the state of nature there are many things wanting". (Locke [1689] 2003, II, 124)*

If they were not to see it this lockean perspective and to follow the British tradition, what role would "*the course of human events*" play in establishing a political authority? Unless they believed the people had the power to "*dissolve the political bonds which have connected them*" and to search for other political bonds

that better satisfied them, there was no reason to believe, in that time, that circumstances played any part in the institution of government-let alone if one believed government to derive from divine –that is immutable, eternal- origin.

John Locke gave an extensive account of this dynamic. He both explained how it worked while at the same time rendering clear why it was the only possible dynamic that could offer a legitimate political order compatible with the modern natural rights understanding. This is consistent with the position we hold the American Founders had regarding the requirements of politics. The defense of majority rule by Locke went as follows:

> *"For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority: for that which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary for the body should move that way wither the greater force carries it, which is the consent of the majority: or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it, agreed that it should; and so everyone is bound by that consent to be concluded by the majority. And therefore we see, that in assemblies, empowered by positive laws where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole.*
>
> *And thus every man by consenting with others to make one body politic under one government, puts himself under an obligation, to everyone of that society, to submit to the determination of the majority and to be concluded by it; or else this original compact, whereby he with others incorporates into one society would signify nothing, and be no compact, if he be left free, and under no other ties than he was in before in the state of nature. For what*

> *appearance would there be of any compact? What new engagement if he were no farther tied by any decrees of the society, than he himself thought fit and did actually consent to? This would be still as great a liberty, as he himself had before his compact, or anyone else in the state of nature hath, who may submit himself and consent to any acts of it if he thinks fit." (Locke [1689] 2003, II 96, 97)*

The Declaration did not contain an exhaustive account of the new political order the country was to be ruled by, yet we now through the United States Constitution of 1787 that the method of election chosen to channel the people's desires was indeed a representative democracy. Although Locke never points at there being only one exclusive way of articulating his political views in a society (he only vividly criticizes monarchy), we know, roughly 300 years later, there seems to be an international consensus on representative democracy as being the most adequate way to do so.

5 CONTEMPORARY DEMOCRACY: THE SPANISH CONSTITUTION OF 1978.

Up until this point, in the present work we have tried to give a plausible version of the political thinking that eventually became the origin of our object of study, namely, modern democracies. We have traced the original configuration of Modern political thought through absolutist extremes of the medieval ideological spectrum and briefed through relatively innovative medieval hints at a new appreciation of some key elements of political thought in general. We have then tried to understand in which specific way did that reasoning contribute to help form John Locke's theory on government. We moved on to conclude that there existed in the seventeenth century a new form of politics clearly distinct from the Medieval one: a Modern one. We have focused on what we have named the liberal-Lockean approach politics. We hold that the United States of America serves as an eighteenth century paradigm of that new political thinking's praxis and we have strived to use the political material of its foundational era to elucidate our contention.

We now turn to check on the current state of political thought in modern democracies over two hundred years after they began their journey into nations all over the world. The question of this chapter may be stated thus: Can we call our democracies in the twenty-first century modern in a liberal-Lockean approach to politics sense? We shall answer no. The following pages will scrutinize an average, stable and successful twenty-first century European democracy for proof of the existence of contemporary democracies as separate from modern ones.

Both democracies, modern and contemporary, have deep-rooted similarities and the contemporary one can with no shadow of a doubt be called the offspring of

the modern one. Yet in order to better serve our purpose in this work it will be mostly the differences we will be focusing on, the differences in the point of view of the political theory of democracies.

The object of our present chapter is the constitution of the Kingdom of Spain of 1978. We have found it to be in many relevant aspects a true reflection of now-a-days democracies in the Western developed world (much as the US was of modern democracy in the eighteenth century). Spain's constitution was debated, decided, written, submitted to a vote, and approved by the citizenry all near the end of the twentieth century and so its precepts cannot be considered in and of themselves a product of historical development -they are not the result of an evolution of philosophies of the past. It is safe to say the Spanish constitution contains contemporarily chosen commands for the contemporary political practice; it is from there from where we will attempt to extrapolate its underlying contemporary political thought.

In order to not get derailed and keep the focus strictly on the elements that will afterwards allows us to better establish connections between the liberal-Lockean approach politics and now-a-days politics, we will analyze Spain according to the way the state defines itself. Much in the same way as we interpreted the US according to how we found its Founding Fathers defined it themselves in certain constituent documents, we will interpret Spain's political thinking as we draw conclusions from its legal self-definition. The Constitution of 1978 begins by stating:

> *"Art. 1.a- España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo político."*

We will take this synthesis, which contains the most defining aspects of the regime that the 1978 Constitution establishes, and try to elucidate how its core principles (equality, justice, liberty, political pluralism) are articulated into the political structure of the state (being democratic, under a rule of law and a ocial state) and understood legally.

Equality, Justice, and Liberty

Spain's defense of equality originally stems from the French Revolution's liberal claim that all men should receive the same treatment from the State, regardless of their position in society (noblemen, clergy, bourgeoisie or peasant) (García Morillo 1996, 36). Nevertheless the content of that equality, what is now a days considered equality by the Spanish Constitution, goes far beyond merely being treated equally by the State. It sounds ironic but the social State that the Constitution establishes requires citizens to *not* be treated equal. The social State requires the public institutions to treat each individual differently according to their needs in order to ensure *de facto* equality among them. Having secured the basic frame for the rule of law -individual civil rights guaranteed- the Constitution pushes the need for equality further.

The French revolutionists did not actually claim that all citizens *were* equal or even that all citizens were entitled to equal property (García Morillo 1996, 36); the Spanish Constitution does, out and out. We will see throughout this chapter how the conception of the State as social, democratic and under the rule of law is devised to support and foster the core principles of the Spanish Constitution: equality, but also, justice, liberty and political pluralism.

The evolution that the notion of social equality has undergone in Spain has pushed the role of the state in the late twentieth century to make a step from having quite a passive role to having an extraordinarily active one. As always, the

tricky aspect of equality has to do with the difficult harmony it must keep with plurality and with liberty. We shall attempt to see how the Spanish Constitution tries to maintain the delicate equilibrium between its extremely demanding principle of equality and its other not at all disdainful principles of liberty, justice and political pluralism.

On the subject of justice, in general terms as far as being a core value, we read in the Carperi notes[38] that:

> *"La justicia no es un valor claramente identificable en abstracto. Cuando se dice que la justicia es dar a cada uno lo suyo, no se nos dice qué es lo suyo de cada cual; cuando se identifica la justicia con la acoplamiento social nos e nos dice como debe hacerse este acoplamiento; cuando se identifica la justicia con el Derecho Natural tampoco se responde cuál es el contenido de ese Derecho Natural.*
>
> *(…)*
>
> *En efecto, en algunas ocasiones el Tribunal Constitucional identifica justicia con equidad, con justicia del caso concreto. En tal sentido es claro que no estamos ante un valor superior sino ante el instrumento de los jueces para incorporar a las resoluciones criterios de moralidad existentes en el ámbito cultural en que se produce la sentencia. En otras resoluciones el Tribunal Constitucional identifica justicia con igualdad.*

[38] Carperi is a Spanish publishing house that specializes in the compiling of highly regarded academic notes that offer a comprehensive understanding of the Spanish legal system for the purpose of studying for the official exams to access the various offices in the Spanish judicial system (judge, district attorney, solicitor, judicial secretary among others). Judges, Public Prosecutors, Property Registrars and State Solicitors write the notes.

> *Por ello, la inclusión de la justicia entre los valores superiores tiene un carácter superfluo (…)" (Carperi 2015, I, 4)*

We understand then that justice has a peculiar rank within the Spanish legal system. It is recognized as one of the four core values that sustains the legal system, while at the same time there appears to be controversy regarding what it is exactly and how it is -if it is at all- to be applied in sentencing. In this chapter we shall focus on justice not as Constitutional theory understands it or as we can find it applied in jurisprudential precedents, but we will try to detect those instances of the Constitutional stipulations that we believe were motivated by a certain understanding of what justice is. We will by the end conclude that Spain's Constitution has a social understanding of justice.

Freedom also appears in the first article of the Constitution. It is given the status of core value together with equality, justice and political pluralism. We find Spain is in a constant tug of war trying to conceal two notions that have been traditionally opposed: individual liberty and state interventionism. Carperi explains the Iberian solving of this dichotomy by dissecting its various aspects (Carperi 2015, I, 3-4). Spain feeds each one of these aspects in a delicate balance so as to not alter the difficult harmony between the social system of positive rights and the free development of negative civil rights.

The first distinction the 1978 Spanish Constitution offers –according to Carperi- is between liberty in its organizational sphere from liberty as the status of the people. From the organizational point of view of liberty, it explains, the Constitution makes certain requirements regarding freedom that must be met. Those are: 1) Popular sovereignty; 2) Tolerance; 3) Election of officials by universal suffrage; 4) Separation of powers; and 5) Recognition and protection of the fundamental rights.

From the point of view of the people's status, liberty as a value appears from various perspectives: 1) Liberty-autonomy. In other words, the creation of the necessary legal conditions to enable the persons sphere of social activity without exterior intervention from other person's, social groups or even the State. We find this aspect of liberty is developed in the "*Título Primero. De los derechos y deberes fundamentales*"; 2) Liberty-participation. In this aspect of liberty, the intervention of the people in the organization of power is endorsed, as well as in the establishment of general criteria for the State's government and for the public services that affects each person's quality of life. Through the participation in the organization of power, the citizens are the subjects of the norms as well as their creators; 3) Freedom-benefits. This understanding of freedom is a sign of the tightly knit link between the core values liberty and equality, which cannot be separated and that mutually condition each other. From this standard, the State is compelled to carry out positive actions in order to foster liberty.

Social State

SOCIAL STATE-EQUALITY

From the standpoint of the imperatives of a social state, we find the Constitution enforces equality in various aspects: interpersonal, familiar, public-social, and public-political. Equality, being one of the self-imposed core principles of the state, should be one of the main principles to guide policies. Also we find it is the motivation behind many of them in the first place.

Within its endorsing of social equality within society, the state regulates the family, aiming at establishing equality between spouses in matrimony and at equality in childcare responsibility and law protection between all types of mothers and fathers. Articles 32.1 and 39.2 read as follows:

> *"Art. 32.1- El hombre y la mujer tienen derecho a contraer matrimonio con plena igualdad jurídica."*[39]

and

> *"Art. 39.2- Los poderes públicos aseguran, asimismo, la protección integral de los hijos, iguales éstos ante la ley con independencia de su filiación, y de las madres, cualquiera que sea su estado civil. La ley posibilitará la investigación de la paternidad."*

Article 14 we find is also aimed at fighting discrimination at a more generic level, establishing equality as a fundamental right[40]:

> *"Art. 14.- Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo, religión, opinión o cualquier otra condición o circunstancia personal o social.*

We can distinguish between two spheres that the law wants to make clear are specifically covered by the equality protection: a "natural sphere", since human nature is a fountain of inequalities, such as race or sex; and a "personal sphere", since personal diversity is endorsed, e.g. in the case of diversity of opinion or condition. Included in this diversity is of course religion, whose free choice and exercise thereof the law protects under the umbrella of fostering equality and

[39] Even though very uncharacteristic of Spain, this article was judicially reviewed in 2005 to be interpreted from then on as meaning that men and women were to be free to marry a partner of their same sex or of the opposite sex and to do so, as the article originally attempted to emphasize, under equal conditions. Despite this fact, the very need to pass such a sentence already indicates that originally, the article intended to only convey an equality of status to both spouses (then assumed to be a man and a woman). Regardless of the nature of the equality that was being addressed in each moment, what is clear is that in both cases, Spain was striving to overcome historical discriminations of one nature or another.

[40] By including article 14 under the First Title it automatically gives equality the status of fundamental right, since the First Title (and therefore the contents of all its 5 chapters) refer exclusively to fundamental rights.

avoiding discrimination. Nevertheless we see how the Constitution struggles to keep a balance between certain rights and in this case choses to explicitly state the priority of public order over free exercise of religion:

> *"Art. 16.1- Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley."*
> *"16.2- Nadie podrá ser obligado a declarar sobre su ideología, religión o creencias."*
> *"16.3- Ninguna confesión tendrá carácter estatal. Los poderes públicos tendrán en cuenta las creencias religiosas de la sociedad española y mantendrán las consiguientes relaciones de cooperación con la Iglesia Católica y las demás confesiones."*

Equality is then not an absolute value in and of itself. It is there to infuse other rights, to produce a foundation for otherwise discriminatory governmental actions, to pressure for the passing of laws which contain equality at its core, yet the law does not forget it is there for the whole for society and that its main focus is the wellbeing of society as a whole, over the individual circumstances of one citizen.[41]

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[41] It is noteworthy here to mention the essential difference between equality as generally understood in the Spanish Constitution, from that notion of equality that has been discussed in the previous chapters, both on American political practice and on Lockean political thinking. John Rawls advises us how "*It is important, for example, to distinguish that sense of equality which is an aspect of the concept of justice from that sense of equality which belongs to a more comprehensive ideal*" (Rawls 1958) Following the distinction Rawls makes in his article, we see that the Spanish approach to equality is that of equality being one more aspect within the larger notion of justice. In other words, the notion of justice is larger than that of equality and it includes equality in so far as equality is going to provide us with a specific aspect of justice that may not be covered by other aspects of the same idea of justice. As we already mentioned in the introduction to this chapter, experts in Spanish law such as Peces-Barba, felt that the inclusion of justice as a core value was "superfluous". It might seem staggering at first glance to consider justice to be superfluous as a value of a democratic XXth century legal system but if we take into consideration the twofold interpretation that the concept of justice can lend itself to, then

In the line of separating the individual subjective right from the governmental requirement to provide it, we can interpret a difference -and the will to cover them both- between negative and positive measures to enforce equality in articles 9.2 and 9.3:

> *"Art. 9.2- Corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas; remover los obstáculos que impidan o dificulten su plenitud y facilitar la participación de todos los ciudadanos en la vida política, económica, cultural y social."*

> *"Art. 9.3- La Constitución garantiza el principio de legalidad, la jerarquía normativa, la publicidad de las normas, la irretroactividad de las disposiciones sancionadoras no favorables o restrictivas de derechos individuales, la seguridad jurídica, la responsabilidad y la interdicción de la arbitrariedad de los poderes públicos."*

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we realize that the Spanish legal system has chosen the first path in which justice encompasses a series of values that the system tends to separately (liberty, equality, political pluralism) rendering justice an abstract notion that needs not further legal endorsement or protection, while still being valid and present. This use of equality as an aspect of justice voids justice of its power to act as a direct basis for dictating sentences, for it must be abstract by definition; equality (and other values specified in the Constitution) are the concrete expressions of the abstract and generic justice notion that in its turn, sustains them all.

Parallel to this understanding of justice, Rawls points at another one; one in which equality has its own status independent from justice. He ascribes to equality in this sense a "more comprehensive social ideal". Equality here refers perhaps not so much to the specific instances in which the legal systems may want to redress cases of injustice that can be articulated through violations of equality (unequal opportunities, unequal education, unequal resources, unequal employment…) and refers more so to the nature of the relations that guide the social/political realm. Equality as a comprehensive social ideal understood by the liberal-Lockean approach politics is mostly concerned with the equal empowerment of all citizens regarding their state and each other. Equality and justice are -as always due to their very nature- deeply related, but in this case, it is not because equality is identified with social justice, as was the case before, in this case they are related because it is considered that only through ascribing to all citizens the equal power that they share, can there be a real foundation for justice (social, or otherwise). Perhaps this radically democratic social ideal was targeted in the Spanish Constitution by establishing political pluralism as one of its four core values.

To bring back the terms we used in chapter 4.2.2 of the present work, art 9.2 calls for "affirmative action" and can be considered more of a pro-social norm. Art 9.3, the one we could identify with a call for "negative" action on the part of the government, perhaps responds more to the democratic imperative of non-discrimination. Following the first imperative, the call for positive action from the government, article 31.1 establishes equality associated to social policies such as the income tax:

> *"Art. 31.1- Todos contribuirán al sostenimiento de los gastos públicos de acuerdo con su capacidad económica mediante un sistema tributario justo inspirado en los principios de igualdad y progresividad que, en ningún caso, tendrá alcance confiscatorio."*

The aim of this rule is clearly a redistributive one, i.e., to foster a tendency towards equality by retrieving the amount of tax due in a way that is proportional to the income of the taxpayer. The effect to be expected is that those who are unequal on the higher end of the income scale will lose more acquisitive power in absolute terms but also in relative terms, while those on the lower part of the income scale will lose less acquisitive power both absolutely and relatively as well. The revenue will then be reinvested in services to a society in which the one who less contributed will be likelier to receive services they might not have been able to afford while those who contributed the most will probably invest more private income on other services (perhaps private ones) thus tending to an equality in the access to services between both groups, and tending to an equality in the amount of factual acquisitive power.

We take the very notion of social State (Estado social) to represent the hallmark of the socio-economic sense in which the Spanish Constitution understands justice. The theoretic premise underlying the justification for a social state is a responds to a development of a specific notion of applied justice. The jurists' appeal to a common human nature justifies the need for government to attempt at securing each individual's full development of said nature insofar as it is the people's just right and therefore the government's duty is to produce that justice which does not spring naturally given the inequality of the human condition.[42]

The Constitution's 10th article reads thus:

> *"Art 10.1.- La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a la ley y a los derechos de los demás son fundamento del orden político y de la paz social"*

The inclusion of these liberties into the network of official institutions is articulated through the idea of justice. We find in Carperi an explanatory reference that links the common human nature of the people ("*la dignidad de la persona*" and

[42] As has been indicated in the previous footnote, the American understanding of equality is identified primarily with the equal share of power among all citizens. In Spain equality is more readily equated to measures of social justice. Thus seen, it appears logical that the first democratic government would not consider implementing a welfare state in all its territory as a primary goal inherent to its nature as a democracy, in turn, for Spain it is an essential part of its regime. According to the American position, all citizens need to be empowered equally, so that they may develop themselves freely. The Liberal-Lockean approach, followed by the United States, pursues that which it considers ought to pertain to each man because it is just; all men should share equal power because nature has given it to them. It seeks justice in the name of human nature. From the Spanish perspective, perhaps the founding of a new democratic regime for the country already covered the "minimal" liberal principal of equality. The State found it was its duty to make another step in another direction when it comes to equality. In order for all to be able to effectively develop themselves freely, state intervention was necessary.

its "*derechos inviolable que le son inherentes*") to the need for legal regulations to enforce and protect the rights of the individuals:

> *"Por otra parte, la dignidad de la persona permite una lectura en clave no individualista de la herencia liberal: los derechos inviolables son contemplados no solo como libre desarrollo de la personalidad, sino también y sobre todo como derechos de los demás que hay que respetar." (Carperi 2015, V,3)*

We believe that it is in this overcoming of the pure liberal state in which the Spanish Constitution shifts from an abstract defense of the person's dignity, and from the use of that dignity as a fountain of freedoms, towards an active recognition of the state's role in securing that that dignity not only not be violated but that it be fostered in the various aspects it may need being fostered. (We have already mentioned article 9.2 of the Constitution, which states*: "Corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas; remover los obstáculos que impidan o dificulten su plenitud y facilitar la participación de todos los ciudadanos en la vida política, económica, cultural y social."*)

Also, as the mentioned article explicitly states, the dignity of the individual requires not only the recognition of civil rights but also requires for the individuals to respect the law and to respect the rights of others as well. We will take up this subject again later on in this chapter.

So, we can say that by establishing the social state, the Constitution is defining justice not only in terms of recognizing the individual civil rights (liberal state) but also necessarily, in the active terms we extrapolate from article 9.2, "*también de las iniciativas de intervención pública para la corrección de los desequilibrios del sistema social, a los que se alude cuando se habla del Estado social"* (Carperi 2015, V, 4) (VVAA, Constitución Española 2010)

We have seen how article 31.1 endorses equality through the redistribution of acquisitive power. In our present context we can also understand this article and the principle that it puts forth in a more complete way by interpreting it from the point of view of justice. Equality of acquisitive power makes sense in the context of the Spanish Constitution because it is fair; because, through equality, it is serving social justice. Redistributive taxation is in the sphere of the public intervention initiatives that aim at correcting the social system's inequalities, and therefore is under the safety net of the 9th article.

Although justice is not specifically defined in the Constitution, we can only assume it is moral justice that brings upon the overcoming of liberal economic principles, such as the individual's free disposal of his/her own property to give way to social ones, such as redistribution of wealth within the members of a society. Perhaps it is because of justice that the social element has value at all. It is justice understood in the social sense that pushes liberalism a step forward. Private property is not frowned upon, yet it is valued in its social dimension. For instance, the public good that said property might offer limits the liberal principle of private property. In such cases in which the social good of the property is superior to the private good, the social principal shall prevail- so says the Constitution.

> *"Art. 33.3- Nadie podrá ser privado de sus bienes y derechos sino por causa justificada de utilidad pública o interés social, mediante la correspondiente indemnización y de conformidad con lo dispuesto por las leyes."*

By prioritizing the social State, the Constitution is guaranteeing a fair and justified restitution of the good that has been justly taken from the individual yet that has left that individual unaccountably missing it.[43]

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[43] Private property has an ambiguous status in the Spanish legal system. It is recognized but it is highly subjected to the general interest. It is significant to realize how in the Spanish legal system, the clause that allows private property is at the same time the one that establishes its limits (its social function):

"Art 33. 1.- Se reconoce el derecho a la propiedad privada y a la herencia.

2.- La función social de estos derechos delimitará su contenido, de acuerdo con las leyes.

3.-Nadie podrá ser privado de sus bienes y derechos sino por causa justificada de utilidad pública o interés social, mediante la correspondiente indemnización y de conformidad con lo dispuesto por las leyes."

The right to private property is recognized under the Second Chapter of the First Title, the one on rights and liberties, but it is significantly *not* listed under the "fundamental rights and public liberties" in the 1st Section, but under the "rights and *duties* of the citizens" in the 2nd Section. Therefore, under this law, property cannot be considered an individual right as it is under a liberal-Lockean State. (Ruiz-Navarro and Sara Sieira 2004 [2011])

To say private property is limited by the public interest is to say that private property is relative, not an absolute value. From the Lockean perspective, it might not be considered strictly private property at all. The Social State requires a generous amount of private income donation towards the state and the law of eminent domain is viewed primarily from the perspective of the public good, not of the private property right. Under these circumstances Locke might have acknowledged that citizens have a right to a sort of private usufruct perhaps, but that we cannot call it private property in the strict sense since the general good has the ultimate *de facto* ownership of the citizen's so-called property.

From the perspective of the liberal-Lockean approach, in the US, private property is not a relative right subject to the general good; the protection of every citizen's natural right to private property constitutes the very basis for society. The private property right *is* the general good. Justice is viewed as the public *defense* of every citizen's private property against its seizure (by the state or any other individual or group). The law of eminent domain *is* nevertheless contained in the Constitution's Fifth Amendment, under the "Takings clause": "*nor shall private property be taken for public use, without just compensation*." It acknowledges that it might sometimes be necessary for society to make public use of a private property, making it justifiable for the state to compromise a citizens' right to private property. Yet, although the formulation is similar to the one chose by the Spanish Constitution, the Spanish Constitution gives not only a specific instance of when private property seizure will be legitimate, i.e. "*utilidad pública*" as in the American "public use", but also includes a more general and ambiguous legitimate cause: "*interés social*".

Whereas the Spanish legal system is most concerned with establishing just compensations, the American system takes those for granted and includes these naturally as part of the clause, but it is mostly concerned with the first part: establishing great limits as to when private property can be seized in the name of society. The Spanish Constitution focuses on strengthening the legitimacy of these more lax limits.

Social State-Liberty

Spain's legal system establishes a distinction between "public liberty rights" and those that are considered "fundamental rights" (Carperi 2015, V, 6). The public liberties are those realms of action in which the Constitution gives to their holder full liberty, i.e. a liberty that is immune to any exterior intromission. These liberties require from the state only a negative role:

> *"Cuando la Constitución establece que "se garantiza el derecho de…" o que "nadie podrá ser obligado a…" está reconociendo una esfera de libre actuación que solo necesita una actividad negativa o de omisión por parte del Estado para su respeto." (Carperi 2015, V, 6)*

In contrast, the fundamental rights contribute positively to the individual insofar as they grant a certain power to their holder. Whereas the public liberty rights (called "rights of liberty") force open room for their defense, the fundamental rights are mostly identified with rights to benefits or rights to participation, i.e., positive actions from the government.

We have already seen how article 10.1 of the Constitution addresses the issue of liberty. In a pedagogic manner this article establishes the foundation for positive individual liberty, namely, (1) the dignity of the individual, (2) the individual's unalienable inviolable rights, (3) the free development of the individual's personality. It includes in the same sentence the negative aspect of liberty by establishing, together with the liberties, the *limits* of those liberties: (4) respect for the law and (5) respect for others' rights. Together these five elements

constitute, according to the Constitution, the foundation for political order and social peace.

The citizens' liberties play such a central role in the origin and end of government (for they are "*fundamento del orden político y de la paz social*", Constitución Española 1978 Art 10.1) that it makes sense that in this framework the liberties should be protected and endorsed by the Sate. It is only from the point of view of a social conscience of the State that we can grasp the depth and complexity of the legal coverage granted to all aspects of liberty. Spain's legal system does not conceive an effective protection of the citizens' rights without an active state intervention; the reason being that as a social State it broadens its horizons when it comes to an understanding of the content of the liberties it recognizes. Because of the nature of these evolved liberties it becomes necessary to demand from the State a more active role, which would have not been expected in an original liberal society. We here interpret this extensive liberty-protecting step in the Spanish legal order as a logical one within the said context, i.e. a social state.

To a certain degree it might have been easily comprehensible -especially given the liberal influence in Europe- that negative liberties ("liberty- autonomy") should have been so protected. It is the array of positive liberties ("liberty-benefits" and even "liberty- participation") that are also pro-actively secured by the Spanish State that could appear to come into contradiction with a liberal view of the role of government. Notwithstanding, Spain maintains the liberalism of the State as well.

Spain retains the liberal devotion to *individual liberty* as a fundamental element that justifies the need for the government is protection while at the same time it is also equally devoted to *individual welfare,* which justifies the need for government action; the political order becomes social, without becoming social-*ist*.

The ends of the fundamentally liberal government, namely to secure people's individual liberties and to allow for full personal development, now become a means for justifying a government intervention. Spain considers its State interventionism, its emphasis on fostering positive rights, does not harm citizens' negative liberties and yet it is necessary in order to effectively guarantee them.

The liberal limits to such a state (the social state) are set insofar as there are a series of recognized "fundamental rights" the citizens have had legally recognized and yet no "fundamental duties" to cancel them out[44]. In broad strokes we may assert Spain envisions its citizens as right-bearers and not as duty-bearers. Therefore it is safe to say that the individual freedom traditionally associated with liberalism is still existent and it is, if anything, enhanced by the State's support so that any liberty can be effectively exercised, albeit with social considerations, such as equality and justice.

Democratic State

DEMOCRATIC STATE-EQUALITY

Manuel Delgado-Iribarren García-Campero, a Spanish Congressional Attorney, writes thus in a comment to the Spanish Constitution (copyrighted by the Congress):

> *"El principio democrático (…) en su incidencia sobre el Estado liberal ha significado la extensión del principio de igualdad a la participación política, el reconocimiento de los derechos políticos a todos los ciudadanos, cualesquiera*

[44] Technically there are: every citizen's duty is to respect the law, to sustain the State by paying taxes and to defend their country, but these are better thought of as premises for establishing any community, rather than duties specific to one type of regime or another.

> *que sea su riqueza, sexo, ideología, religión o creencias."* (Delgado-Iribarren García-Campero 2005)

He expresses the indissoluble link between the democratic structure of the State established by the Constitution and the equality principle the State is ruled by. By consolidating the democratic aspect of the State, the Constitution intertwines into its formal structure the material need for a specific type of political participation (universal suffrage) that in turn requires a specific type of citizen and of citizen-state relations.

> *"Art 23.1 Los ciudadanos tienen el derecho a participar en los asuntos públicos, directamente o por medio de representantes, libremente elegidos en elecciones periódicas por sufragio universal"*

> *"Art 68.1 El Congreso se compone de un mínimo de 300 y un máximo de 400 Diputados, elegidos por sufragio universal, libre, igual, directo y secreto, en los términos que establezca la ley."*

> *"Art 69.1 En cada provincial se elegirán cuatro Senadores por sufragio universal, libre, igual, directo y secreto por los votantes de cada una de ellas, en los términos que señale una ley orgánica".*

There is no room for any discrimination whatsoever, for democracy needs general citizen implication in order to effectively be a democracy. Regardless of the differences among the citizens, individually or as a group, the democratic government cannot be representative of those minorities and channel their plurality satisfactorily unless they have a role in the political game. Delgado-Iribarren explains it thus:

> *"Es también gobierno de la mayoría pero con respeto de las minorías, que tienen que mantener la posibilidad de llegar a ser mayoría- lo que exige que los cauces de acceso al poder de las minorías permanezcan abiertos y no sean obstruidos por quienes temporalmente detenten la mayoría, y que los mandatos políticos sean temporales" (Delgado-Iribarren García-Campero 2005)*

We find that principle in the Constitution:

> *"Art 23.2 Asimismo, tienen derecho a accede en condiciones de igualdad a las funciones y cargos públicos, con los requisitos que señalen las leyes."*

Therefore, in establishing the democratic structure of the access to power, the Constitution is at the same time also necessarily establishing the equality right in the political sphere. Equality is essential to democracy in a conceptual way but it also entails functional obligations such as the care for the potential access to government by minorities and all other individuals alike. Equality is understood in Spain not only to mean equal treatment of all by the law or equal opportunities of all citizens, but also the equal right to political participation and protection by all political groups, majorities *and* minorities.

> *"Y la regla de la mayoría absoluta también tiene limitaciones, que responden al deseo de asegurar que, por muy mayoritaria que sea, la voluntad popular no sea arbitraria ni inicua. (…) En España (…) el soberano no es el Parlamento, sino el pueblo, que expresó su voluntad suprema en la Constitución. Hay, pues, un ámbito acotado en el que ninguna mayoría puede actuar. Este ámbito está determinado por la propia Constitución y, especialmente, por los derechos fundamentales. Ninguna mayoría, por abrumadora que sea, puede adoptar decisiones contrarias a la Constitución o las leyes" (García Morillo 1996, 33)*

In this way, as can be drawn from García Morillo's exposition of the facts, it is actually the Spanish fundamental rights ("*derechos fundamentales*") the ones that limit political actions, there being Courts and judges specifically aimed at ensuring no political group or party ever contravenes them, as they have been established in the law by the whole of the citizenry and only the whole of the citizenry can change what they have agreed on. In this way the Spanish Constitution tries to make sure that the core of the Spanish citizens' rights are not subject, no matter what the rules of democracy may be, to majorities or minorities. We can draw the conclusion that equality, having its origin in the fundamental rights, is a priority over democracy, which we are to understand as a means to securing those rights. Therefore there must obviously be a check on democracy, lest it should subvert the equality principle it contains.[45]

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[45] Bruce Ackerman distinguishes between different strands of constitutional thought according to where the system locates its supreme authority. There are, for Ackerman, three of these strands: primacy of popular sovereignty, primacy of foundational rights and primacy of law precedents. According to what we have just seen, we would have to locate Spain in the strand that gives primacy to the foundational rights. Conversely, the US gives primacy to popular sovereignty in an, as Ackerman calls it, "dualist" way; that is, in recognizing Congress as a legitimate source of expression of popular sovereignty, as does Great Britain with its Parliament (a "monist" interpretation of sovereign power), yet without considering this power to be exclusive, but to be shared with the citizens directly during "higher law-making" periods (Ackerman 1991). This notion dates from the very origins of the United States. We find James Madison writing in the 49th of the Federalist Papers: "*There is great force in this reasoning* [for the ultimate authority of popular sovereignty] *and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions." (Becker 1958, 311)*

This being said, Spain considers itself to be "monist" in the sense that there is one and only one source of legitimate power of the State and it is the people: "*Ese precepto establece un verdadero monismo del poder; el poder tiene una fuente única en España, que es el pueblo español. Es el pueblo es que construye, juridifica y financia el Estado social de derecho." (Carperi 2015, I,2)* The will of the "pueblo" is elucidated in the Parliament, and the expression of the Parliament is the law. Therefore, in the Spanish legal system, the law is going to be held as the maximum expression of popular sovereignty. The American logic when it comes to locating popular sovereignty follows a path conceptually paved by the liberal-Lockean precept of equality. All citizens participate equally of the sovereign power. This power, in order to be effectively exercised and to not subvert the principles it was established for is, according the US drafters, best divided into three equally authoritative and legitimate powers: the legislative, the executive and the judicial. Since the decision to separate them is not natural

Other democratic principles, such as tolerance, are channeled from the point of view of equality. For instance, we have seen that individual choice of religion or the exercise thereof, is not to be a motive for discrimination. But the primacy of equality makes it so that religious tolerance becomes a subject of special protection for all religions, lest one might be discriminated against. The state is then an officially lay state, and it even establishes cooperation protocols between the state and the confessions within it.

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or given by any higher law other than the people's very will, in virtue of their sovereign power, it is consistent for them to believe that there is no real priority of any one power over the others. All three powers are equally legitimate expressions of popular sovereignty and all three powers have equal representative powers. From our point of view, as we have tried to show, the Spanish legislators tried to entrench citizen equality into a system of legal guarantees-not for the legal guarantees to come *equally* from all *three* popular sovereign powers.

A clear example of this difference of approach between the two systems is how in Spain there is no judicial review principle, given that a judge is not allowed to attempt at single-handedly manipulating the original meaning of the most legitimate expression of popular sovereignty, i.e. the law. In the US, the Congress' expression of the people's will -the law- is considered to be just as valid as the judicial power's expressions of it, therefore it is not contrary to the popular sovereignty but a more complete version of it if the judges contribute to its primitive lawful expression with their sentences.

Another visible consequence of this difference of approach is seen in the paths that each legal system sets for law making and reform. The Spanish legal system distinguishes between two formally different procedures for altering the law: "procedimiento ordinario" and "procedimiento agravado". When to use one or the other will depend on the content of the law that is to be dealt with. In both cases the procedure is similar; it is always done by the Parliament, only the "procedimiento agravado" follows strengthened requirements with respect to the "procedimiento ordinario". Even in those cases in which the people follow the popular legal initiative open to them ("*Iniciativa legislativa popular*"), their popularly proposed law is only guaranteed to *enter the law making process* if it fulfills all formal demands, to go to the Parliament to be discussed, that is, not to be necessarily approved.

The US also makes distinctions for the ways in which popular will may be expressed or changed, but the difference is not merely formal; it has to do with two different decision-making paths that may be made in democracy. The first, Ackerman explains, is a decision made by the American people; the second, by their government. The Spanish monist system of locating the primacy in the Parliament rules out the possibility of there ever being a "higher law-making path". Even if this law-making path is ultimately founded on the same democratic principles as the monist understanding of power is (the sovereignty of the people), those same democratic principles, being contained and regulated exclusively by the law, cannot consistently allow for a democratic expression out of the law. From this point of view it is doubtful whether the Spanish authority is really in the sovereign people's expression (the laws of Parliament) or in the specific interpretation of the fundamental rights that entrench these very rights only and exclusively into the laws that are supposed to guarantee them-ironically- in any given form or context.

Also a basic premise in democracy, the equality right has effects for private citizens but also for the Administration as well. In both cases the legal nature of the right, despite being the same right, is different. Private citizens find in the legal protection of equality a source for a subjective right to receive equal treatment whereas for the Spanish Administration, it means a form of establishing a criterion for its governmental acts. Because the Administration is subject to the equality principle, from this point of view we may assert that the right to equality poses limits to the government[46].

DEMOCRATIC STATE-JUSTICE

[46] This is yet another instance in which we can graphically see how much the Spanish legal order emphasizes the social aspect of equality. The Spanish Constitution makes sure the principle of equality guides the government actions, therefore limiting them. In the US legal order we find a somewhat different phenomenon in which the government is not so much constrained by the absolute respect for the fundamental right to equality of all citizens but it is the legal order that has been construed according to this principle, in hopes that it will in turn produce a set of norms consistent with its own founding guides (equality) but without the explicit restrictions that constrain the Spanish system. The American liberal-Lockean idea is that it is the *system* that has to respect the democratic principles for the enjoyment of the citizens, not that the system should impose the democratic principles on the citizens.

Ackerman comments on an aspect of the American managing of a social conflict that can be seen as an example of the American approach to democratic equality and liberty in this context. He writes: "*The only sure way to suppress faction is to force everybody to think alike. Such a destruction of liberty is inconsistent with everything for which the American Revolution stands. (…) Here is where constitutional law comes in: By a clever manipulation of legal forms, we play different factions off against one another so that they do relatively little damage to the rights of citizens and the permanent interests of the community." (Ackerman 1991, 172)* In other words, the American way is not to force the government to apply the democratic principle of equality of thought and perhaps to illegalize certain factions, but to embody the democratic principles of liberty and equality to the extent that their effects will rub off on the citizens and that freedom will naturally produce the necessary equality without the need for direct imposition of the government (which could violate citizen rights).

A father of the Spanish Constitution, Gregorio Peces-Barba considered the notion of justice as an element of judgment within the Spanish legal order to be more confusing than helpful[47]. We read in Carperi:

> *"Kelsen identifica justicia con los contenidos de libertad del sistema democrático. En el mismo sentido, la justicia como valor superior no añade nada a la libertad a la igualdad, como lo prueba el uso escaso y confuso que hace el Tribunal Constitucional de este valor." (Carperi 2015, I, 4)*

Despite being part of the core values of the Constitution[48] it has proven to be difficult to apply a vague doctrine of justice to specific cases; the reason being mainly that it is ambiguously referred to in the Constitution itself as well as in the jurisprudence it has produced. Sometimes it has been used as a synonym for liberty or equality[49] yet it stands on its own when being enumerated along with these two other core values as well as with political pluralism. So the question is just how *is* justice to be interpreted then? And most importantly, does it have enough conceptual autonomy to be appealed to on its own?

Though justice is enumerated by the Constitution as one of the four core values of the legal order, perhaps it is better understood as an ethic criterion. Perhaps it is more of a criterion for laying down, interpreting and applying the law than it is the actual content of the law. We find various specific articles of the Constitution aimed exclusively at construing and protecting equality, liberty and political pluralism (as is being shown in this chapter) yet there are no articles

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[47] *"(…) o es sinónimo de libertad o igualdad o su utilización por los tribunales puede producir más problemas de los que resuelve (Peces Barba)"* (Carperi 2015, I,4)

[48] "España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo político." Constitución Española de 1978 Art. 1.1.

[49] *"(…) es sinónimo de libertad o igualdad (…) (Peces Barba)"* (Carperi 2015, I,4)

specifically aimed at endorsing justice per se. Perhaps it is helpful to keep in mind the undefined role of the core values within the legal order- justice among them.

Therefore, if we are to analyze the Spanish use and understanding of justice, we must turn to the traces of justice that we may find scattered throughout the Spanish legal system and see when they intervene and in what character.

To begin with, we find the ultimate source of justice for the whole of the legal order, lies in the Spanish people through their governing of themselves. The first article of the Constitution says:

> *"Art 1.2- La soberanía nacional reside en el pueblo español, del que emanan los poderes del Estado."*

The powers of the State are, as the Constitution establishes[50], the Executive, the Legislative and the judicial powers. Although the judicial branch exercises the power of the State, the source of justice is the democratic will of the people. The Constitution reiterates:

> *"Art. 117.1- La justicia emana del pueblo y se administra en nombre del Rey por Jueces y Magistrados integrantes del poder judicial, independientes, inamovibles, responsables y sometidos únicamente al imperio de la ley."*

The 23rd article of the Constitution establishes that democracy constitutes a *derecho fundamental* of the people; democracy is therefore the just political organization, the one that recognizes for the people the power that is due to them. It is in this way that an originary notion of justice lays the foundation for the democratic regime of the Spanish legal order. The link between the fundamental rights (what is just for each individual) and the democratic nature of the Constitution's legal order (democracy) are inextricable. The tie is so close that it is

[50] Constitución Española of 1978 Título III, Título IV and Título VI.

considered that citizens give their consent to the law and even condition their submission to it based on its being a democratic legal order:

> *"Los derechos fundamentales son normas constitucionales que representan los valores esenciales del ordenamiento constitucional. Constituyen un elemento objetivo de la Constitución cuya función es la de sistematizar el contenido axiológico del ordenamiento democrático al que la mayoría de los ciudadanos prestan su consentimiento y condicionan su deber de obediencia al Derecho."* (Carperi 2015, V, 6)

The reason for it has to do with democracy complying with certain prerequisites that allow for it to guarantee basic justice. If we understand justice at its most superficial level (Merriam-Webster's Dictionary would describe it simply as "fair treatment") then we see many instances within the dynamic of democracy that can give us an idea as to what aspects of justice are most valued in the Spanish legal system. To begin with, the sole fact that the chosen political order is one that allows for every single citizen without exclusion to advocate in public affairs for its own interests (directly or through representation) is already a huge indicator of the importance the State attaches to "fair treatment", for it is assumed that who will be fearer to oneself than oneself?

Another instance of how justice is understood as part of the government's responsibility can be seen when it is considered that the government is responsible for the redress of inequalities of the system. Minorities might be negatively affected by the dynamics of the majority rule and so it is stipulated in the Constitution that the time in power must be limited ("*elecciones periódicas*"), thus giving new chances of the minorities to rally enough support to rule.

We should understand justice within Spain's framework, through its adoption and enforcing of democracy. Justice might be too vague a concept within the

Spanish legal system to be brandished as an argument in legal cases, but it is without doubt the backbone of its very system.

DEMOCRATIC STATE-LIBERTY

Article 17 of the Spanish Constitution bluntly states:

> *"Art 17 Toda persona tiene derecho a la libertad y a la seguridad. Nadie puede ser privado de su libertad, sino con la observancia de lo establecido en este artículo y en los casos y en la forma previstos en la ley."*

Yet this article does not -nor does any other article in the Constitution for that matter- give an account of what liberty is exactly. Despite there not being any specific definition for liberty in the Spanish legal system, García Morillo gives somewhat of an explanation by saying that the Constitution regulates liberty "in general" and only specifically in those cases in which it considers a given liberty needs special protection for certain reasons. According to García Morillo's interpretation of liberty in the Spanish legal system:

> *"Todo lo que no está prohibido, está permitido.*
>
> *El objeto fundamental de las constituciones es asegurar la libertad de los ciudadanos. Por eso, la Constitución garantiza el derecho a la libertad personal. También reconoce y protege algunas libertades o derechos concretos, aquellos que considera conveniente consagrar expresamente, bien porque han sido frecuentemente vulnerados a lo largo de la historia, bien porque presentan una problemática particular. Todos ellos son, sin embargo, emanaciones o concreciones de la libertad, que es reconocida con carácter general.*
>
> *(…) Gozamos, en general, de la libertad para actuar, salvo que ello esté lícitamente prohibido; y, en particular, somos titulares de los derechos expresamente recogidos en la Constitución, pero sin que esta mención*

> *expresa de algunos derechos concretos impida que nos corresponda una libertad general en el marco de la Constitución y las leyes." (García Morillo 1996, 323-324)*

Without undermining or contradicting this interpretation, a more in depth analysis of the role of liberty in the Spanish legal system allows us to distinguish two dimensions of liberty within it. One attends to an "organizational" aspect; the other is in regard to the "status" of the people within that organization.[51] The organizational liberties imply: popular sovereignty, tolerance, electing of governors by universal suffrage, separation of powers and recognition and protection of fundamental rights. In other words, all of these "organizational liberties" are necessary and correlative to a democratic regime. After all, democracy is about channeling liberty, and the Constitution explicitly recognizes this liberty's protection:

> *"Art 16.1 Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley."*

One of the four core values of the Spanish legal system, political pluralism, is deeply embedded in democracy. Its link to liberty is easily understood if we dig up its roots, i.e., freedom of thought. As García Morillo explains:

> *"la Constitución reconoce lo que ella llama libertad ideológica y religiosa, que nosotros podríamos muy bien llamar libertad de pensamiento, puesto que ampara cualquier manifestación de éste: al mencionar no sólo la libertad religiosa sino también la ideológica (…)" (García Morillo 1996, 294)*

[51] We will follow the classification established by Carperi for the dissecting of the liberty value in the Spanish legal system.

García Morillo helps us to see how the Constitution of Spain not only protects religious freedom but also any set of ideas that are susceptible of constituting an ideology. The Constitutions goes on to guarantee the same legal protection and status for both –religion as well as ideologies- with no further limitation that the need to maintain the public order. This protection of ideological liberty is an implicit recognition of the plurality of ideologies that exist, and may come into existence, in a given society. To recognize the freedom of ideology is to recognize there is a variety of ideologies to choose from and the right of every citizen to make a personal choice. The demand of channeling them through necessarily democratic ways becomes explicit here:

> *"Art 6.- Los partidos políticos expresan el pluralismo político, concurren a la formación y manifestación de la voluntad popular y son instrumento fundamental para la participación política. Su creación y el ejercicio de su actividad son libres dentro del respeto a la Constitución y a la ley. Su estructura interna y funcionamiento deberán ser democráticos."*

On the other hand, from the point of view of the "status" of the people, liberty is achieved through different paths. One is (a) autonomy-liberty. That is, the creation of the legal conditions so that the individuals have a social action arena protected from the interference of other persons, of social groups or even –especially- of the State. (This dimension of liberty is the one developed in the 1st Title of the Spanish Constitution.)

Another dimension of this aspect of liberty is (b) participation-liberty. The Spanish Constitution puts forth[52] mechanisms to endorse the intervention of the citizens in power. This allows for the citizens to be both the addressees of the norms as well as their creators all at once. They are able to influence over the

[52] Constitución Española de 1978 Art. 23.1 and 23.2.

organization of power, over the general criterion of the State governance and over the public services that affect the citizens' quality of life.

These services are related to yet another dimension to liberty, that of the (c) benefit-liberty. It is understood that the Spanish legal system has the obligation to follow positive conducts that will enable and endorse liberty (as has been seen in the previously commented article 9.2 of the Constitution). This dimension clearly evokes the intimate link between the liberty and equality values that may not be separated and that condition each other. Again we see in the Spanish legal order both liberty and equality construed together to build the backbone of democratic rights.[53]

Rule of Law

RULE OF LAW-EQUALITY

The specific understanding of the Rule of Law embedded in the Spanish Constitution in 1978 is validly described thus by Delgado-Iribarren:

> *"La cláusula del Estado de Derecho como señala Santamaría Pastor (Fundamentos de Derecho Administrativo, I, p. 192-194) fue desarrollada por la doctrina alemana de Derecho Público en el primer tercio del siglo XX en torno a criterios formales- principios de legalidad de la Administración, división de poderes, supremacía y reserve de ley, protección de los*

[53] Viewing liberty as autonomy in this sense is recognizing freedom as a negative subjective right. Perhaps this dimension of liberty is the essence of the Liberal-Lockean approach to liberty. From the Liberal-Lockean approach, "liberty-participation" would be a direct, albeit minor, sine qua non consequence of liberty as a subjective negative right. "Liberty-benefit" on the contrary would not necessarily be a part of the concept at all (thought it is probably not incompatible with it per se). Understanding liberty as benefit is the same as implicitly assuming that the role of the state in endorsing fundamental rights should go further than only regulating them (which would be the original Liberal-Lockean approach), and believing that only by being actively involved in them can the state be considered really committed to them; which is the principle behind the Social state.

> *ciudadanos mediante tribunales independientes y responsabilidad del Estado por actos ilícitos (Thoma)-, complementados en la posguerra, vista su utilización por el nacional socialismo, con otros de tipo material- toda la actuación de poderes públicos debe dirigirse a la consecución de valores, entre los que el más importante es la garantía y protección de la libertad personal y política (Stern)-."* (Delgado-Iribarren García-Campero 2005)

Through the application of the rule of law imperatives we also can detect Spain's channeling of the principle of equality. For starters, article 9.1 of the Constitution establishes that both the citizens and the power of the State are under the Constitution's authority as well as that of the rest of the legal system. We find it significant how it is so blunt about the issue and how there is no distinction whatsoever between one and the other's submission the law:

> *Art 9.1 Los ciudadanos y los poderes públicos está sujetos a la Constitución y al resto del ordenamiento jurídico.*

We interpret this norm as in and of itself establishing equality of a sort when it treats the citizenry at the same level with the public powers. The article is implicitly clearing all possible distinction between the position of the citizens in front of the law and the position of political powers in front of the law. Also (if we are to infer there is only one legal body), the article is indirectly establishing that both have not only the same status when it comes to following the law, but they have also the very same law to follow. In article 106.2 we find for example one of the effects that citizen-power equality in front of the law has:

> *"Art 106.2 Los particulares, en los términos establecidos por la ley, tendrán derecho a ser indemnizados por toda lesión que sufran en cualquiera de sus bienes y derechos, salvo en los casos de fuerza mayor, siempre que la lesión sea consecuencia del funcionamiento de los servicios públicos."*

In other words, to establish the equal status among citizens and the public power in front of the law, eradicates any prerogative the Administration could have been assumed to have in the use of its power. Not only should the power to take special care not to interfere with the citizens' properties and rights, but also, if within the legitimate use of power the government happens to do so, the law forces it to restitute whatever harm it may have caused to the citizens (exceptional cases aside). It in this way establishes the equal status of citizens and the power not only when in comes to following the law, but it also is establishing the citizens' right to be respected insofar as they have equal status in front of the law. The individual citizens' property and rights are, when it comes to the law and to Administration acts, as important as the general good and are legally protected as such.

The law gives the following means to ensure the exercise of theses rights from possible violations:

> *"Art. 24.1 Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión."*

Once again when the law establishes the effective means for justice it is indirectly endorsing equality. Not only is the Constitution giving the citizens the power to resort to the courts of justice to have their case heard, it is also establishing it shall be open to "all people" and there may never be any "in any case" any defenselessness. Defenselessness implies inequality of one in front of another. It is the responsibility of the State to prevent and to solve potential inequalities, and the Constitution expresses it thus:

> *"Art 149.1.1 El estado tiene competencia exclusive sobre las siguientes materias: (…) La regulación de las condiciones básicas que garanticen la*

> *igualdad de todos los españoles en el ejercicio de los derechos y en el cumplimiento de los deberes constitucionales."*

RULE OF LAW- JUSTICE

Delgado-Iribarren reflects on the relationship between rule of law and justice in modern nation-states as follows:

> *" El Estado contemporáneo, lejos de limitarse a fijar las reglas conforme a las cuales deben desenvolverse los individuos en sus relaciones sociales y económicas, adopta una posición activa, más intervencionista, pues considera como un nuevo fin que le compete el garantizar "la procura existencial" (Fornnsthoff), el mínimo vital para poder desenvolverse en la sociedad. (…) Se trata de no renunciar al Estado de Derecho sino de dar a éste un contenido económico y social" (Delgado-Iribarren García-Campero 2005)*

We interpret the Spanish legal system's concern for the social and economic contents of the Rule of Law as proof of the decisive responsibility towards justice that the system takes upon itself. One significant instance that can be found in the Constitution regarding this self-imposed duty towards justice is in its article 106.2:

> *"Art 106.2- Los particulares, en los términos establecidos por la ley, tendrán derecho a ser indemnizados por toda lesión que sufran en cualquiera de sus bienes y derechos, salvo en los casos de fuerza mayor, siempre que la lesión sea consecuencia del funcionamiento de los servicios públicos."*

As we have just finished discussing a few pages earlier in this work, article 106.2 finds in social justice its reason to be. This time around we will not focus so much on the equality of the individuals that it puts forth, instead we will take a look at how this rule affects our understanding of justice in the Spanish legal system.

Insofar as Spain declares itself a social state, it is for the common good that public services are instituted. If the functioning of these services collide with a private good (rights or property of an individual) there arises a conflict of priorities to be resolved: which of the two goods is more important, and therefore to be protected, the private one or the public one? Is it the public one? What the Spanish legal system ends up answering is "Yes, but…". In other words, it gives the public good a priority that is visible in that (a) it supports offering the service, and (b) the awareness of its offering the service harming private goods does not prevent it from doing so. At the same time though there is a "but"; it still maintains the recognition of the right to private property. Following the liberal premise that one has in fact no property if another can dispose of it, the legal system must respect the citizens' possession of the private property that the State recognizes him or her to have. To that end it goes on to promise a restitution of the grievances the State might incur in. This way, despite openly violating the citizens' right to property at first, by restituting it there is no harm done in the end- at least not technically.

This will to restitute of the State springs naturally from the "principle of responsibility" that is among the constitutional principles that bound the supreme law. The rule of law obliges the constitution to regulate the principles that inform it and for these principles to be completely compatible with the principles of the rule of law. The Spanish Constitution guarantees the following principles in an attempt to offer citizens Rule of Law guarantees:

> *"Art 9.3- La Constitución garantiza el principio de legalidad, la jerarquía normativa, la publicidad de las normas, la irretroactividad de las disposiciones sancionadoras no favorables o restrictivas de derechos individuales, la seguridad jurídica, la responsabilidad y la interdicción de la arbitrariedad de los poderes públicos."*

Following the same principles, we also see the government committing itself to repair any harm caused by judicial errors or a malfunctioning of the administration:

> *"Art 121- Los daños causados por error judicial, así como los que sean consecuencia del funcionamiento anormal de la Administración de Justicia, darán derecho a una indemnización a cargo del Estado, conforme a la ley."*

Consistency is actually the root of the State's legal guarantee of the exercise of justice. We learn through the Constitution that:

> *"Art 117- La justicia emana del pueblo y se administra en nombre del Rey por Jueces y Magistrados integrantes del poder judicial, independientes, inamovibles, responsables y sometidos únicamente al imperio de la ley."*

If the power of the judiciary resides in the people, it only makes sense that the Constitution will protect that power from becoming harmful to those very people in whom the power resides. Therefore in an exercise that we can interpret as legal responsibility towards justice, the Constitution establishes compensations for grievances that are the product of the exercise of legitimate power. Legitimate use of power can never go against the private interest of those in whom the power lies.

This kind of disposition is compatible with justice being a core value of the Constitution; it constitutes a material principle of the rule of law. As we saw when opening this section how, after World War II, together with the formal principles of the rules of law, there was felt the need of securing material principles of the rule of law as well. We find both types explicitly accounted for in the Spanish

Constitution[54]. We can only assume a sense of justice is at the bottom of it, but also a reverence for liberty-which we now turn to.

RULE OF LAW- LIBERTY

Although in the Spanish legal system "*Todo lo que no está prohibido está permitido*" (García Morillo 1996, 323), it is also true that there is a very lot that is, if not forbidden, at least highly regulated. How does Spain make compatible its high level of regulation with the respect for citizen liberty? For starters the feeling seems to be that only a highly dense legality will guarantee liberty:

> *"Siglos de desprecio por el Derecho y por los derechos de las personas han hecho del nuestro un pueblo altamente desconfiado para con las intenciones y las actuaciones de los gobernantes. Por eso, todo se quiere regular, prever jurídicamente, porque se alimenta la sospecha de que lo no previsto dejará un resquicio por donde penetrará la arbitrariedad" (García Morillo 1996, 35)*

This is definitely one approach to the relationship between the law and liberty. Yet the Spanish system does not confuse the law for the *Rule* of law. Not only is it considered that a heavy regulation is a better guarantee for the liberties of the citizens, it is also considered it is necessary that there be other mechanisms as well aimed at protecting those laws. This understanding motivated the Constitution of 1978 to include not only the formal principles of the rule of law (principle of legality of the Administration, separation of powers, citizen protection through independent courts, State responsibility for illicit actions) but also the material ones

[54] See (Delgado-Iribarren García-Campero 2005) for a succinct account of the articles of the Constitution that conform to one or other set of principles.

as well (all actions of the State must be carried out for the consecution of its values), in hopes that the following would be effectively carried out[55]:

> *"Cuando la Constitución dice que España es un Estado de Derecho está señalando que es un Estado en el que los derechos y obligaciones están fijados por leyes elaboradas por quienes han sido libremente elegidos para ello, y que en todo caso respetan unos derechos que se consideran fundamentales. Además, está consagrada la separación de poderes y asegurado el control de los actos de los gobiernos por órganos independientes, los órganos judiciales."* (García Morillo 1996, 35)

The following quote tries to justify a dense legal set-up as the only way for securing fundamental rights, as opposed to a particular understanding of the liberal state:

> *"Frente a las tesis del liberalismo más clásico que, tributario del pensamiento iusnaturalista, entendía los derechos y libertades como límites absolutos al poder del Estado y anteriores a la existencia del mismo, nuestra Constitución, alineándose con las Constituciones de la segunda postguerra, ha contemplado un complejo sistema de garantías de los derechos*

[55] There is in America the liberal-Lockean approach to limited government which believes it will better respect people's liberty than a strong government, one with more laws to oblige its citizens, regardless of if those laws are theoretically laid down to protect liberties. The American position, as has been noted previously, is that the power of the state is located in the laws -expression of the people's ultimate representatives-, but also in the executive and the judicial powers. This in and of itself is already viewed as a very effective method to prevent the violation of the citizens' fundamental rights because the state's power is spread equally among various powers and there is less chance of any single power encroaching upon the people's rights. Also, there is the checks and balances mechanism that does not require dense legal guarantees, only the establishment of a specific dynamic of relations among the three powers in order to prevent the encroachment.

> *reconocidos en su texto. Porque lejos ya los tiempos en que el reconocimiento constitucional de un derecho bastaba, hoy es comúnmente aceptado que un derecho vale jurídicamente lo que valen sus garantías. De ahí la necesidad de que se establezcan al más alto nivel mecanismos jurídicos que aseguren la efectividad de los derechos fundamentales." (Abellán Matesanz and Sieira 2011 [2003])*

The laying out of the options of the states when faced with the dilemma on how to carry out their duties when it comes to protecting citizen rights, helps us to better understand why Spain has such a legal density and is interventionist - "paternalist" in the libertarian dictionary according to Zuckert. Spain is a firm believer in the rights infrastructure and that required of the Constitution the double responsibility of securing rights (Título Primero) and providing services (Estado Social):

> *"Just what the rights infrastructure requires has turned out to be a very controversial matter within liberal political communities. Some, like John Stuart Mill and contemporary libertarians, limit legitimate governing action to more or less direct rights-securing behavior. All else would be rejected as unjustifiable paternalism. Others say that society must legitimately foreclose such options to individuals as the right to use drugs or to view pornography, because widespread practices such as those derogate from the rights infrastructure, for instance, by eroding the necessary personal responsibility of citizens or by diminishing the necessary respect for others as full-blown and autonomous right bearers. Concern for the rights infrastructure may also require that governments provide services beyond direct protection to rights; for example, Thomas Jefferson was of the view that public education was a requisite to the rights infrastructure. Some level of social support may also be necessary" (Zuckert 2002, 284)*

6 TWENTY-FIRST CENTURY LIBERALISM: THE POLITICS OR THE DOCTRINE.

Based on our analysis of pre-modern, modern and contemporary political understandings we have reached the realization that there has occurred within the liberal ideology a phenomenon that has had a substantive effect on its outcome over the centuries and deserves some attention. There have been two striking waves of secularization of the political philosophy since the domain of Christian natural right in the middle Ages. In modernity, in order for liberalism to put forth its contractualist theory successfully, Locke needed to present a political philosophy that was complexly both theistic and rationalist at once[56]. This first wave of secularization produced the placement of nature -and its natural law- at the vertex of political philosophy, instead of God. It was rationalist in that human reason was the protagonist of the political discoveries (as well as all others for that matter), yet it was theistic in that the very human reason was believed to be rooted in God and reason's discoveries had been laid there by God to be discovered by man's reason.

Now we turn to the second wave of political secularization. This one took place in that indescribable moment when modernity commixes into the contemporary era. The notion of divinity gets severed from that of nature and is disposed of altogether; from now on, nature (natural right) stands on its own to justify the political order. The pressure is too high and eventually the roll of philosophers undermining both human reason and the reasonableness of natural right, takes a toll on Locke's original foundation for political order. Agnosticism and atheism appear to have subverted the bases for all liberal democracy. The

[56] This issue has been thoroughly reviewed in section 4.1 of the present work.

individual, as opposed to a natural right common to *all* individuals, is now at the top and at the center of the political system.

Thus, our contemporary liberal democracies are struggling because the demise of the concept of nature in favor of the centrality of the individual, the demise of theism in favor of atheism and the demise of rationalism in favor of agnosticism, is apparently pocking holes into its already iffy foundation. But is it? We must first analyze these two consecutive processes of the secularization of politics that have affected human understanding and practice of politics in modernity and the contemporary eras.

As we have just recently noted, in modernity Locke brought about a very peculiar form of rational-theistic liberalism. As Dworetz points out:

> " *(…) in Locke's political theory, God essentially informs the secular political order even though -and precisely insofar as- He is absent from it. For modern interpreters, this may seem like a paradox. But it is a paradox "of the interpreters' rather than of the philosopher's making" (Dworetz 1994, 132)*

For the philosopher, as has been previously discussed in this work, elaborately justifies his position which when contextualized is not paradoxical at all. His political thinking is founded on natural rights, and his natural rights are founded on God's creation. Nevertheless, God's precepts are channeled, are discovered, in nature through reason. Law of reason becomes a synonym for law of nature. The secularization of political thinking is thus a *rational-theistic* one.

Regardless of how convincing or not Locke's attaining of this goal is, his liberalization of politics through opening a breach between natural law and the political order, and filling in the gap with reason leaved plenty of room for another type of political thinking, another secular political thinking. The second wave of secularization undermines not only natural law but reason as well. Dworetz is

puzzled as to why this would emerge from Lockean theory and believes, at any rate, that it was not Locke's intention:

> *"The duties which arise from each individual's relationship to a common creator no longer carry much weight in Western political theory. Twentieth-century observers may applaud or regret this development; but in either case they should stop trying to attribute it to Locke. Lockean liberalism may have become "bourgeois" as it lost its grounding in a theistic worldview, but it did not start out that way. Nor was it perceived in such a light by the American Revolutionists who proclaimed it their "unvarnished doctrine". (Dworetz 1994, 133)*

Despite whether or not it was Locke who laid the foundation for the loss of a theistic worldview, Leo Strauss focuses on the consequences of contemporary "*generous liberals view[*ing*] the abandonment of natural right not only with placidity but with relief*" (Strauss 1958, 5):

> *"It would seem, then, that the rejection of natural right is bound to lead to disastrous consequences. And it is obvious that consequences which are regarded as disastrous by many men and even by some of the most vocal opponents of natural right, do follow from the contemporary rejection of natural right. (…) If our principles have no other support than our blind preferences, everything a man is willing to dare will be permissible. The contemporary rejection of natural right leads to nihilism -nay, it is identical with nihilism" (Strauss 1958, 2-5)*

MacIntyre considers "*morality has to some large degree disappeared –and that this marks a degeneration, a grave cultural loss."* (MacIntyre 1984, 22) Our contention here is that despite the strong hold that nihilism can legitimately be said to have over our contemporary political thought, it has not successfully overturned every other worldview. This small note is essential to the healthy survival of a

viable liberal democracy. Strauss points out that the rejection of natural right in our times is an embracing of nihilism and that "*the inescapable practical consequence of nihilism is fanatical obscurantism" (Strauss 1958, 6).* Nihilism obviously is a direct rejection of rational-theistic liberalism, and as such it can be considered a firm promoter of the second wave of secularization in politics, in ridding political philosophy from the leash of nature and reason at once.

And yet we contend here that nihilism does not necessarily have to signify a rejection of liberalism altogether. The problem is with the focus of the dispute, not with the nature of the doctrines. Nihilism does not necessarily have to be at odds with liberalism *per se*. Nihilism is undoubtedly at odds with most -if not all- other worldviews, "comprehensive doctrines" to use Rawls' terminology. But a second-wave-secularized liberal democracy does not constitute a comprehensive doctrine. Thus, we cannot, if we are going to be technically consistent, confront as equal opponents the nihilistic comprehensive doctrine and the contemporary liberal political order. The liberal political order is, in Rawls words, a "political conception of justice":

> *"The distinguishing features of a political conception of justice are, first, that it is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose accepting any particular comprehensive religious, philosophical, or moral doctrine; rather the political conception presents itself as a reasonable conception for the basic structure alone; and third, that it is formulated not in terms of any comprehensive doctrine but in terms of certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society." (Rawls 1988, 252)*

Following Rawls' categories, we can distinguish liberalism as a political conception from nihilism as a comprehensive doctrine as follows:

> *"Thus the difference between political conceptions of justice and other moral conceptions in a matter of scope- that is, the range of subjects to which a conception applies, and the wider content a wider range requires. A conception is said to be general when it applies to a wide range of subjects (in the limit to all subjects); it is comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our nonpolitical conduct (in the limit our life as a whole)." (Rawls 1988, 252)*

Our contemporary liberal democracies, insofar as they are a political conception of justice, require a certain type liberalism that *is* compatible with nihilism but that neutralizes its effects, obviously. But this is no secret; it is an essential part of the game. Paradoxically, contemporary liberalism needs both: a channel for nihilistic (and any other) expression and a limit to that channel. Contemporary liberal democracy, Rawlsian if you will, requires pluralism.

It requires it for being faithful to its principles; it needs for a nihilistic worldview to have room for expression, as any other. At the same time it needs to guarantee that nihilism (or any other absolutist comprehensive doctrine) will not take over the system. Rawls suggests the "overlapping consensus" for which we shall need a plurality of comprehensive doctrines (philosophical, religious, moral) that may include but by no means is to be restricted to, nihilism. The various comprehensive doctrines will play off each other in order to reach the consensus that is necessary:

> *"In a phrase: justice draws the limit, the good shows the point. Thus, the right and the good are complementary, and the priority of right does not deny this. Its general meaning is that although to be acceptable a political conception of justice must leave adequate room for forms of life citizens can*

> *affirm, the ideas of the good it draws upon must fit within the limits drawn - the space allowed- by that political conception itself" (Rawls 1988, 252)*

Strauss would regard this understanding of tolerance as a danger[57]. According to him, tolerance and intolerance are both regarded in Contemporary relativist liberalism as equally valid attitudes due to the lack of a natural law to judge which of the two principles is in fact the good one. Contemporary liberals have had to choose between natural right (implying a certain degree of intolerance) and uninhibited cultivation of individuality (apparently implying complete tolerance), to be consistent. They have chosen, says Strauss, the latter. Its consequence being that:

> *"Liberal relativism has its roots in the natural right tradition of tolerance or in the notion that everyone has a natural right to pursue happiness as he understands happiness; but it itself is a seminary of intolerance.*
> *Once we realize that the principle of our actions have no other support than our blind choice, we really do not believe in them anymore. We cannot wholeheartedly act upon them anymore. We cannot live any more as responsible beings. " (Strauss 1958, 6)*

But when one collates Strauss diagnosis of our societies with its symptoms, we realize they are distorted from the malady that is supposedly ailing it. Still, Strauss has a strong case. Again we believe this crossroad requires a change in focus to offer us a useful insight. If, as it seems to him, "*the issue of natural right is a matter of party allegiance*" (Strauss 1958, 7) this could be because the parties are not well defined. We suggest that Strauss' diagnosis may be correct for

[57] For the complete reasoning of this argument go to Strauss, Leo. *Natural Right and History.* Chicago: Univeristy of Chicago Press, 1958.

liberalism as an atheist-agnostic comprehensive doctrine, but perhaps not so much for a democratic liberal political conception of justice.

We find in Habermas a contemporary approach to the issue of tolerance in our societies that does not quite fit into Strauss' all-or-nothing analysis:

> *"As Habermas states, the best way of countering intolerance is by making an apt criticism of prejudice and to fight against discrimination, that is, to struggle for equality of rights and not for mere tolerance. This principle of equality must be a norm that includes those who think in a different way from us, and who are discriminated against as a result of prejudice. This rule of inclusive equality for all citizens must be recognized universally by the political community in order to make tolerance possible. According to the principle of equality, we should not tolerate actions that violate human rights" (Monserrat Molas and Abad Ninet 2009)*

The problem with the cultivation of individualism in liberal democracies might not be its neutrality after all. Kymlicka elaborates on the subject:

> *"The real issue concerning neutrality is not individualism: nothing in Rawls's insistence on state neutrality is inconsistent with recognizing the importance of the social world to the development, deliberation, and pursuit of individual's values" (Kymlicka 1989, 904)*

The trouble, Strauss warns us, lies in the *uninhibited cultivation of individualism*, but Kymlicka reminds us that Rawls' political liberalism would only endorse such a concept of unlimited individualism if and when the political conception of justice called for it, that is, only if and when the overlapping consensus of political conceptions of justice gave that result. Besides, there is nothing in Rawls that says that the state cannot favor some ideas of the good over others. The neutrality of the contemporary liberal state should have limits, in Rawls'

version of it, at least. The state, understood in its liberal sense as those delegates who have the keys to the social contract, must, in order to be consistent, favor to a certain extent those comprehensive doctrines that contribute to the political conception of those who subscribe to the social contract or, negatively expressed, the state's neutrality does not prevent the state from protecting its political conception of justice and thus acting against other views of the good that are a menace to its political order.

Liberalism as a comprehensive doctrine may, no doubt, end up dramatically for its proponents.[58] But contemporary liberalism as a political conception, in order to be effective must apply the priority of right; those views of the good that will form the political conception of justice must adhere to two principles: they must be political ideas that can be sustained by all free and equal citizens and they must not presuppose any comprehensive doctrine. The liberalism that Strauss fears and warns us against is, in rawlsian categories, a comprehensive doctrine. As such, its contribution to the political conception cannot be founded on those ultimately nihilist precepts if it is to be valid in the strictly political realm.

It could be argued whether Locke's rational-theistic liberalism would constitute a comprehensive doctrine, more than a political concept of justice, which is how Rawls describes our contemporary liberalism. Indeed Locke's state would by no means be an all-tolerant, completely neutral state. As Zuckert points out:

> *"The notion of a rights infrastructure speaks in a yet deeper way to the recent debate over the relation between "the right" and "the good" in liberal*

[58] "*We cannot live any more as responsible beings. In order to live, we have to silence the easily silenced voice of reason, which tells us that our principles are in themselves as good or as bad as any other principles. The more we cultivate reason, the more we cultivate nihilism: the less are we able to be loyal members of society. The inescapable practical consequence of nihilism is fanatical obscurantism."* (Strauss 1958, 6)

> *theory. It is widely held today that under liberalism 'public institutions and more especially the institutions of government should be systematically neutral as between rival conceptions of what the human good is.' Even if true for contemporary liberal theorists such as John Rawls and Ronald Dworkin it is not true for Locke." (Zuckert 2002, 361)*

Locke's commitment to a theist natural right and to reason could not be ascribed to Rawls' liberal priority of right principle; it must be ascribed to Locke's personal comprehensive doctrine, which he necessarily associates to political liberalism. Again in Zuckert:

> *"he [Locke] sees that the achievement of a right-securing society is incompatible with strict neutrality. For Locke, both family life and religion, for example, are institutions that rational liberal societies should foster and encourage" (Zuckert 2002, 361)*

What contemporary liberal theorists are getting at is that it is not written in stone anywhere that all liberal political conceptions of justice should forcefully subscribe such a rational-theistic perspective. Locke might very well have been in favor of state neutrality in the sense of the contemporary theorists. He might have been putting forth his personal comprehensive doctrine to support the political conception of justice he defended. In order to assert this we must add complementary notions that have to be settled first. One is the notion of a political community as a comprehensive doctrine. Contemporary liberals have been heavily criticized for the lack of justification for political community as an end. Rawls paraphrases his critics:

> *"[in] a 'private society' [a]s such, political society itself is not a good at all, but at best a means to individual or associational good" (Rawls 1988, 269)*

Then he goes on to explain though, how the ideal of a political society united on one comprehensive doctrine (philosophical, religious, moral) is indeed abandoned by his liberal proposition. It is inevitably so because of the pluralism inherent to the liberalism that offers the levels of "*liberty and toleration embodied in democratic institutions." (Rawls 1988, 269)* Yet, Rawls justifies how a well-ordered society (that is, according to justice as fairness[59]) is not a "private society" either, for in a political liberal society, its members do have ends in common. It so happens that:

> *"As we have seen, political liberalism conceives of social unity in a different way-namely, as deriving from an overlapping consensus on a political conception of justice. In such a consensus this political conception is affirmed by citizens holding different and conflicting comprehensives doctrines. This they do from within their own distinctive views." (Rawls 1988, 269)*

While they do not share in the same comprehensive doctrine, they do share the same political conception of justice, they share the very basic political end: supporting just institutions and giving one another justice accordingly (besides any other ends that they might share through their political arrangements). It appears that agreeing to disagree, and agreeing on which terms they are going to do so, is the essence of the liberal political community. We will not attempt to speak for Locke on this one.

It turns out then that the agnostic-atheist secularization might not have affected necessarily the core of political liberalism, despite its destructive vortex. Nihilism is only one of very many comprehensive doctrines that end up composing

[59] For a full account of this view see Rawls, John. *A Theory of Justice.* Cambridge, MA: Bellknap Press, [1971] 1999.

the political conception of justice in liberal societies. The same way that Locke's rational-theistic views could perfectly well contribute to this conception, nihilism could as well. They would play each other off in order to reach the overlapping consensus.

It might be easier to hold on to the desire of returning to a state of political liberalism that was dominated, as in the liberal-Lockean approach times, by rational-theism. But people cannot travel back in time, and neither can their ideas. Strauss gives us the keys as to why it might not be such a sound idea. He contends:

> *"Present-day social science rejects natural right on two different, although mostly combined, grounds; it rejects it in the name of History and in the name of the distinction between Facts and Values"* (Strauss 1958, 8)

Both appreciations have already had their effect on philosophy and the social sciences, and humanity cannot make it simply go away. Besides, even if we could, we have no guarantee (only Strauss' bad omens) that we cannot, as a humanity, find a better, or at least another valid, political system. The common *belief* of the political order in natural right has never put a stop to its violation and has never offered any guarantee of its protection either.

Nevertheless if we focus on what is really important, which is on people having *some* kind of comprehensive view of the good to guide their lives, political and private, Rawls shows us they actually do:

> *"members of a democratic society have, at least in an intuitive way, a rational plan of life in the light of which they schedule their more important endeavors and allocate their various resources (including those of mind and body) so as to pursue their conceptions of the good over a complete life, if*

> *not in the most rational, then at least in a sensible (or satisfactory) way." (Rawls 1988, 254)*

The contemporary break with natural right is an irreversible fact, and it makes it so that it may be impossible to recuperate natural right as a generally shared comprehensive doctrine (at least for now and while that breakage persists). But this is not to say that we have all become relativists-nihilists. Not at all. It only goes to show how natural right and legal positivism have reached a point of complementarity instead of necessary frontal opposition. Of course as concepts, by definition they continue to be confronted. But by political liberalism allowing us the duality of adhering to a comprehensive doctrine (natural right), and at the same time allowing us to share in a political conception of justice (legal positivist) together with the rest of society, we have found a way to channel plurality in a pretty satisfactorily way.[60]

It is nevertheless important to highlight how:

> *"The harsh experience of this consequence* [fanatical nihilistic obscurantism] *has led to a renewed general interest in natural right. But this fact must make us particularly cautious. Indignation is a bad counselor. Our indignation proves at best that we are well meaning. It does not prove that we are right. (…) Certainly, the seriousness of the need of natural right does not prove that the need can be satisfied" (Strauss 1958, 6)*

What is left to do? Our assumption is twofold. Firstly, we must endorse the political liberal democracies that allow us this satisfactory dualism by strengthening the political conceptions that sustains it. Secondly, in order to strengthen those

[60] Referring to the rules of social unity that allow for and spring from such a dichotomy, Rawls affirms: "I believe that social unity so understood is the most desirable conception of unity available to us; it is the limit of the practical best" (Rawls, 1988, 269)

political conceptions we must advocate for those comprehensive doctrines whose view of the good is most favorable to it. A rational-theist doctrine will naturally be most consistent with and will most coherently endorse a political liberalism that has been born as an ersatz of its own liberal comprehensive doctrine. As of the political systems that we have right now, only through this endorsement can we aspire to neutralize the pernicious element in nihilism and obtain the necessary allegiances:

> *"This leads to the idea of a political conception of justice that presupposes no such particular view, and encourages the hope that this conception can be supported, given good fortune and enough time to win allegiance to itself, by an enduring overlapping consensus" (Rawls 1988, 276)*

The reality of our liberal democracy plurality forces us to acknowledge the multiplicity of views of the good, but also the fact that they are not nearly all agnostic/atheist. Also that "*The problem posed by the conflicting needs of society cannot be solved if we do not possess knowledge of natural right."* (Strauss 1958, 2) Liberal democracy does not have to be obsolete; we just need to correct our focus on it. We must pass from a natural-theistic political view not to an agnostic-atheist one, but to an overlapping consensus one.

The challenge in front of us is to make political liberal democracy as much of a self-evident truth to all contemporary political conceptions of justice as the theistic natural right was a self-evident truth to the comprehensive doctrines of the first modern democrats.

To end, we could draw the conclusion that the main difference between Modern democracies and Contemporary democracies is in fact, not the difference in the nature of the secularization they put forth, but rather the effect those different kinds of secularization had on the overall view of the political order: as a comprehensive doctrine or as a political concept of justice.

7 CONCLUSIONS

In the seventeenth century two contemporary political thinkers, Robert Filmer and Thomas Hobbes, despite standing on different philosophical grounds, erected a similar building. The edifice of an absolute, unitary sovereign power was erected upon two strikingly opposed pillars: a very particular understanding of Christian theology on one hand and a revolutionary proposition involving a new concept of natural right on the other. We tried to show how one of them, Filmer, exploited some specific traits of the divine power political philosophy tradition while the other, Hobbes, had quite an original approach based on a renewed understanding of natural right. Despite this difference both authors had doubtless a strong impact on Locke's mode of thought, for one reason or another, as was attempted to be expressed in the third section of this work.

Hobbes and Filmer managed to strip of their meaning the claims of ancient constitutionalism and popular consent by common practice, thus denying any moral authority for representative institutions that these arguments suggest. Hobbes and later Filmer, denied the logic of constitutionalism, and the conception of sovereign power they articulated resisted constitutional limits.

Much at the same era when Hobbes and Filmer were trying to consolidate the notion of an absolute political power that would at the same time absorb the maximum religious authority on earth, cardinal Robert Bellarmine was establishing a conceptual separation between religious and political power. Out of all of his contributions to the philosophy of politics, there are some specific ones we believed to be relevant to our study; those concerning the origins of political power and the extent of the political power's authority regarding spiritual affairs. The main controversy that arose at the time from his works had to do with the fact that he

was postulating for a lack of political inference in religious matters as well as for an actual, albeit indirect, papal power in temporal matters.

In direct opposition to Hobbes's theory of the origin of human relations, Bellarmine would sustain that humans are social by nature and, thus, political. The very basic need for means for living drew men together in collaboration to share their wisdom and efforts. In this specific intellectual context the social tendency of the human race was envisioned not as accidental-utilitarian as Hobbes would have it, but as a trait of the human nature as designed and thus willed by God. An idea that would sit very well in Locke's theory.

Nevertheless, Hobbes eventually transformed the original strictly moral sense of the "state of nature" into a revolutionary political understanding of humanity: Hobbes' understanding of the state of nature was to be the basis for an unprecedented doctrine of natural rights, the social compact, and sovereignty. John Locke picked up on those and used the new doctrines as a plank from which to develop his own ameliorations. These variations stemmed in great measure from a revised understanding of the modern-Hobbesian sense of "state of nature" and they produced as a result a new comprehension of man as a social creature along with all the consequences this new comprehension entailed: the political ones but also moral ones. These consequences, we contended, have proven historically to be most crucial to the modern Western understanding of political theory and exercise of political practice.

What Hobbes called "state of nature" is according to himself, de facto undistinguishable from a state of war. However Locke managed to redirect the "state of nature" concept towards a reflection that had to do with the natural freedom and equality of men. According to Locke's understanding of what "natural law" is, it made sense that all men should coincide to feel the impulse to unite into society.

Man by birth was, for Locke, entitled to his own life, to the means for preserving it (estate) and to the liberty that is necessary to ensure the other two. To these three necessary –thus we assumed, legitimate- possessions humans were entitled to, in what common and generically, Locke referred to as "property". From this standpoint it was likely to sense the radical consequences this peculiar and complex notion of property might have on a theory of civil government. Locke asserted that the freedom from absolute arbitrary power was so intrinsically united to man's preservation, that one could not give up one's freedom without forfeiting one's own life as well. If man gave up his freedom, he was giving up with it the necessary capacity to manage his estate and his life as he deemed fit. Locke believed that man's liberty awarded him an authority and a self-determination that could not be subtracted without incurring in a violation of human nature. Locke's justified how in Civil Society liberty was being taken up a notch, for the end of the law was to enlarge freedom, he said. On these grounds we built the assumption that what Locke considered to happen when men united into society was that they better secured human liberty through better securing self-preservation.

It became necessary, Locke observed, for the supreme power of the people to be delegated and divided. There was a need for power to be delegated since not all the people could administer all the government all of the time. The factions of government suggested by Locke into which the power of the commonwealth should be divided were: legislative, executive and judicial. What constituted them as a novelty was their being subjected to the will of the people and to the people's judgment of whether the political powers were pursuing legitimate ends or not.

When reflecting upon the establishment of civil society, Locke appeared not to be precise about the specific motivation for it; the reason alleged was for the securing of certain human superior goods, but these varied in order, appearance and priority with no apparent established criteria. They could be summarized in

general terms as: preservation/ self-preservation, life, liberty/ liberties, property, estate, etc. When referred to in these lists, some of them acquire different connotations and even different meanings.

The next step in our work consisted precisely in analyzing one specific instance of the establishment of a Liberal-Lockean civil society. In section 4 we tried to show how the colonists' analyses of the political establishment of their time, and Thomas Jefferson's in particular, were understood, posed and answered in Lockean terms. The theoretical question of the American Revolution can be considered to be the one of the extent of civil power; a central question in Locke's political philosophy. The answer is a Lockean answer as well: as a civil government, there are limits to Parliament. When confronted with the British government's assertion of abolishment of liberty and property in America, the American answer was a political development of the Liberal-Lockean theories of refutation of absolute power.

We tried to demonstrate how Locke's ideas supported the Revolutionist cause and how the American Revolutionists used his ideas and his language, upon occasion even textually, in order to express and argument their view of the situation. Our aim here was to illustrate the connection between the Lockean system of thought and the American Revolutionary one in order to put forth a specific view of the character of the American political ideology and the philosophy on which it is founded.

Thomas Jefferson's stated explicitly what the Founders were attempting to do in the Declaration of Independence: to open the eyes of all to the *rights of man*; and on that basis, to establish themselves as a new nation-state. The whole purpose of the American Revolution was primarily concerned with natural rights. It was from the modern take on what natural rights were that they would reach their political claims. We went on, in the same chapter, to focusing on which were those

rights, and more specifically, in determining their parting points from those traditional natural rights held by the British.

The aim of the study of the Declaration of Independence was to expose the specific instances of the Declaration of Independence in which the liberal-lockean approach politics appears conspicuously. Our belief was, throughout the work, that a meticulous elucidation of those instances, together with the highlighting effect of extrapolating them, might give us valuable keys for understanding our contemporary democracies in the terms in which their Modern historical predecessors were conceived, i.e., in the original terms. Our concern was with the political implications, for then and for now, of a liberal-Lockean political theory. Thus, we turned to study the now.

We turned to check on the current state of political thought in Modern democracies over 200 years after they began their journey into nations all over the world. The question of the 5th chapter was stated thus: Could we call our democracies in the XXIst century Modern in a Liberal-Lockean approach to politics sense? We answered no. We scrutinized an average, stable and successful XXIst century European democracy, Spain, for proof of the existence of Contemporary democracies as separate from Modern ones. Both democracies, Modern and Contemporary, had deep-rooted similarities and the Contemporary one could with no shadow of a doubt be called the offspring of the Modern one. Yet in order to better serve our purpose in this work we mostly worked on the differences in the point of view of the political theory of democracies.

In order to not get derailed and keep the focus strictly on the elements that would allows us to better establish connections between the Liberal-Lockean approach politics and nowadays politics, we will analyzed Spain according to the way the state defined itself. Much in the same way as we interpreted the US according to how we found its Founding Fathers defined it themselves in certain

constituent documents, we interpreted Spain's political thinking as we drew conclusions from its legal self-definition. We toke its constitutional 1st article synthesis, which contains the most defining aspects of the regime that the 1978 Constitution established, and tried to elucidate how its core principles (equality, justice, liberty, political pluralism) were articulated into the political structure of the state (being democratic, under a Rule of Law and a social state) and understood legally. The overall structure of the state, the popular sovereignty, the primacy of rights and the protection of freedom all (notwithstanding some substantial ideological differences which were duly noted in the inserted footnotes) seemed to fit within the Lockean-liberal framework, yet it did not.

In the 6th section, based on our analysis of pre-modern, modern and contemporary political understandings, we reached the realization that there had occurred within the liberal ideology a phenomenon that had a substantive effect on its outcome over the centuries, from Modernity to nowadays. There have been two striking waves of secularization of the political philosophy since the domain of Christian natural right in the Middle Ages. In Modernity, in order for liberalism to put forth its contractualist theory successfully, Locke needed to present a political philosophy that was complexly both theistic and rationalist at once. This first wave of secularization produced the placement of nature -and its natural law- at the vertex of political philosophy, instead of God. It was rationalist in that human reason was the protagonist of the political discoveries, yet it was theistic in that the very human reason was believed to be rooted in God and reason's discoveries had been laid there by God to be discovered by man's reason. As for the second wave of political secularization, it took place in that indescribable moment when Modernity commixes into the Contemporary era. The notion of divinity got severed from that of nature and was disposed of altogether; from then on, nature (natural right) stood on its own to justify the political order. The pressure was too high and

eventually the roll of philosophers undermining both human reason and the reasonableness of natural right, toke a toll on Locke's original foundation for political order. Agnosticism and atheism appeared to have subverted the bases for all liberal democracy. The individual, as opposed to a natural right common to *all* individuals, was then at the top and at the center of the political system.

Thus, our contemporary liberal democracies would have been left struggling because the demise of the concept of nature in favor of the centrality of the individual, the demise of theism in favor of atheism and the demise of rationalism in favor of agnosticism, was apparently pocking holes into its already iffy foundation. But was it? We went on to analyze these two consecutive processes that have affected human understanding and practice of politics in Modernity and the Contemporary Eras: the secularization of politics.

Our contention was that despite the strong hold that nihilism can legitimately be said to have over our contemporary political thought, it had not successfully overturned every other worldview. Nihilism did not necessarily have to signify a rejection of liberalism altogether. The problem was with the focus of the dispute, not with the nature of the doctrines. Nihilism was undoubtedly at odds with most -if not all- other worldviews, "comprehensive doctrines" to use Rawls' terminology. But a second-wave-secularized liberal democracy did not constitute a comprehensive doctrine. Thus, we could not, if we were going to be technically consistent, confront as equal opponents the nihilistic comprehensive doctrine and the contemporary liberal political order.

The reality of our liberal democracy's plurality forced us to acknowledge the multiplicity of views of the good, but also the fact that they were not nearly all agnostic/atheist. Also we had to admit, that without knowledge of natural right, the problems of society would be impossible to solve. It turned out liberal democracy did not have to be obsolete; we just needed to correct our focus on it. We needed

to pass from a natural-theistic political view not to an agnostic-atheist one, but to an overlapping consensus one.

The challenge in front of us was to make political liberal democracy as much of a self-evident truth to all contemporary political conceptions of justice as the theistic natural right was a self-evident truth to the comprehensive doctrines of the first modern democrats.

To end, we drew the conclusion that the main difference between Modern democracies and Contemporary democracies was in fact, not the difference in the nature of the secularization they put forth, but rather the effect those different kinds of secularization had on the overall view of the political order: as a comprehensive doctrine or as a political concept of justice.

Final Conclusion

> *"Someone holding a comprehensive liberal view can say that their society would be a better place if everyone held such a view. They might be wrong in this judgment as, given the larger background of belief and conviction, other doctrines may play a moderating and balancing role and give society's culture a certain depth and richness. The point is that to affirm the superiority of a particular comprehensive view is fully compatible with affirming a political conception of justice that does not impose it, and so with political liberalism itself."* *(Rawls 1993, 68)*

If we take this initial reflection by John Rawls as a lighthouse and try to travel through the mist that is our contemporary political situation, we might realize that what appears -admittedly, if we follow his political thinking- to be almost commonsensical is indeed hard to identify in reality. That holding a comprehensive view should not become difficult -let alone incompatible- with joining in political

liberalism seems sound. In any case, the comprehensive view would need to reach a compromise with other worldviews in an effort to conform a joint liberal political conception. However, as we noted in section 6 of this work, the principles of a rational-theistic liberalism have been dissolved when it comes to founding the political conception of justice in nowadays liberal democracies and, in the very least, watered down when it comes to the contemporary worldviews.

This evolution developed very smoothly[61] but contains a strong paradox we need to elucidate it we want to move forward in our analysis of contemporary liberal democracies, and reap its benefits.

Lockean liberalism was designed as a means for politically channeling plurality in a society, including diverse views of the good, in order to offer an environment for individual coexistence while at the same time providing space for private development, personal and of group (family, Parrish, business…). [62] Notwithstanding, nowadays, liberalism as a comprehensive doctrine has been diluted into a democratic political liberalism that has erected itself as the standard for the good. The political conception of justice has taken upon itself the role of a comprehensive philosophical doctrine, and a dominant one at that. According to Rawls' reasoning, this is impossible. Yet, how it *has* happened, we must say it is not impossible*,* it is simply incoherent.

The democratic political conception of the good imposes itself on other diverse views of the good, which are tolerated but kept under a strict rule of thumb, since they are not taken to be the legitimate grounds for the very political conception. Instead of actively supporting and endorsing the growth and

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[61] For an accurate description of the process see Strauss, Leo. *Natural Right and History.* Chicago: Univeristy of Chicago Press, 1958, pages 1-80.

[62] This idea is thoroughly developed in section 4 of this work.

development of the diversity of comprehensive doctrines in order to strengthen them and promote the best options for the citizens to adhere to so that from the interaction among them, culture and society will develop, the democratic liberal conception struggles to maintain uniformity of thought so as to perpetuate itself. It has ended up resting on itself, and not so much on the comprehensive doctrines that should support it (liberal comprehensive views or otherwise).

Logically, the result of this dynamic is a confrontation between the various comprehensive doctrines on one hand, and the democratic political conception on the other. They are presented as opponents when, in fact they are not; the democratic political conception is *not* a comprehensive doctrine and has no business competing with them. Democracy appears to society as an end, as a superior form of the good, instead of being a means; instead of offering itself as an arena for the comprehensive doctrines to meet, reconcile themselves and reach a consensus.

This might be the great paradox; the consequence of stepping from a rational-theistic secularization of politics towards an agnostic-atheist one. In the first process of secularization there was a relaying of God for nature, which still allowed for a certain theistic presence; in the second process of secularization there was an ousting of God altogether. Has the divine good been substituted for the democratic good?

As we have discussed in the 6th section of the work, the stress should be put on distinguishing liberal democracy as a political conception of justice from liberalism as a rational-theist comprehensive doctrine. Political conceptions should be returned to the positions they need take in society (but not more than that) and comprehensive doctrines should be promoted as the true basis for society that they are. We might be able to improve our complex situation if we try to seek for solutions to our problems not within the very democratic principles (if that even

makes sense) or in copy-pasting two-hundred-year-old solutions (it is not feasible, -and even doubtful whether desirable- to simply re-instate a natural right order to brush away our troubles).

Perhaps it would be helpful to begin by paying serious attention to and thoroughly elucidating the various views of the good that coexist in our liberal democracies nowadays and from which we are to extrapolate a viable political amalgam with which to resolve matters such as the legitimacy or government, public morality or public policy making. If we want to ensure the best possible overlapping consensus, we must shift the focus away from the dynamics of the consensus (namely "democracy") and onto what it is we have to overlap.

When taking up this task it might be helpful for us to keep in mind that although Locke will not solve all our contemporary problems, he will, as the original –if remotely- author of it, set the basis for us to correctly understand our present political order: the natural rights approach politics.

8 BIBLIOGRAPHY

Abellán Matesanz, Isabel María, and Sara Sieira. *Congreso.es.* Diciembre 2011[2003]http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=53&tipo=2 (accessed 2015).

Ackerman, Bruce. *We the People.* Vol. 1. 3 vols. Cambridge/ London: The Bellknap Press of Harvard University Press, 1991.

Appleby, Joyce. *Capitalism and a New Social Order: The Republican Vision of the 1790's.* New York, NY: New York University Press, 1984.

Becker, Carl. *The Declaration of Independence.* New York, NY: Vintage Books, 1958.

Bellarmine, Robert. *Opera Omnia.* Vol. 2. 6 vols. Naples: Joseph Guiliano, 1856-1862.

Bourdin, Bernard. *The theleological-Political Origins of the Modern State.* Translated by Susan Pickford. Washington, D.C., Washington, D.C.: Catholic University of America Press, 2010.

Carperi. *Temario Carrera Judicial y Fiscal.* Vol. 1. 7 vols. Madrid: Carperi, 2015.

Dworetz, Steven M. *The unvarnished doctrine.* Durham: Duke University Press, 1994.

Delgado-Iribarren García-Campero, Manuel. *Sinopsis Articulo 1.* Junio 2005. http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=1&tipo=2 (accessed 2015).

Diggins, John Patrick. *The Lost Souls of American Politics.* New York, NY: Basic Books, 1984.

Filmer, Robert. *Patriarcha and other writings.* Edited by Johann Somerville. Cambridge: Cambridge University Press, [1680] 1991.

García Morillo, Joaquín. *La democracia en España.* Madrid: Alianza Editorial, 1996.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers.* Edited by Clinton Rossiter. New York, NY: Signet Classic, 2003.

Hamowy, Ronald. "Jefferson and the Scottish Enlightenment: A Criqtique of Garry Wills Inventing America: Jeffesron's declaration of Independence." *William & Mary Quarterly*, no. 36 (1979): 523.

Hartz, Louis. *Liberal Tradition in America.* New York: Mariner Books, [1955] 1991.

Hobbes, Thomas. *Leviathan.* Edited by Edwin Curley. Indianapolis: Hackett, [1651]1994.

Jefferson, Thomas. *Writings.* New York, NY: Literary Classis of the United States, Inc., 1984.

Kymlicka, Will. "Liberal Individualism and Liberal Neutrality." *Ethics* (The University of Chicago Press) 99, no. 4 (Jul 1989): 883-905.

Kramnick, Isaac. *Republicanism and Bourgeois Radicalism.* Ithaca: Cornell University Press, 1990.

Levy, Jacob T. *"Ancient and Modern Constitutionalism Revisited".* University of Montreal/ McGill University Political Theory Workshop . Unpublished manuscript, 2002.

Locke, John. *A Letter Concerning Toleration: Latin adn English Texts Revised.* Edited by M. Montuori. The Hague: Martinus Nijhoff, [1689] 1963.

Locke, John. *An Essay Concerning Human Understanding.* Edited by P. H. Nidditch. Oxford: Claredon Press, [1689]1979.

Locke, John. *Reasonableness of Christianity.* Edited by I. T. Ramsey. Stanford: Stanford University Press, [1695] 1958.

Locke, John. *Two Treatises of Government and a Letter Concerning Toleration.* Edited by Ian Shapiro. New Haven, CT: Yale University Press, [1689] 2003.

Monserrat Molas, Josep, and Antoni Abad Ninet. "Habermas and Ackerman: A Synthesis of Their Thought Applied to the Legitimation and Codifications of Legal Norms." *Ratio Juris* 22, no. 4 (12 2009): 510-531.

Pangle, Thomas L. *The spirit of modern republicanism.* Chicago: University of Chicago Press, 1990.

Pastor, Santamaría. *Fundamentos del Derecho Administrativo.* Vol. I.

Strauss, Leo. *Natural Right and History.* Chicago: Univeristy of Chicago Press, 1958.

Ruiz-Navarro, José Luis, and Sara Sieira. *Sinopsis Artículo 33.* Abril 2011 [2004].http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=33&tipo=2.

Rawls, John. *A Theory of Justice.* Cambridge, MA: Bellknap Press, [1971] 1999.

Rawls, John. "Justice as Fairness." *Philosophical Review* (Duke University Press) 67, no. 2 (April 1958): 164-194.

Rawls, John. "The Law of Peoples." *Critical Inqiry* (University of Chicago Press), no. 20 (1993).

Rawls, John. "The Priority of Right and the Ideas of the Good." *Philosophy & Public Affairs* (Blackwell Publishing) 17, no. 4 (Autumn 1988): 251-276.

Tocqueville, Alexis de. *La démocratie en Amérique.* Edited by J.-P. Mayer. 2 vols. Paris: Gallimard. , [1835;1840]1966 .

Zuckert, Michael. *Launching Liberalism: on Lockean Political Philosophy.* Lawrence, Kansas: University Press of Kansas, 2002.

Ward, Lee. *The Politics of Liberty in England and Revolutionary America.* New York, NY: Cambridge University Press, 2010.

Weber, Max. *The Protestant Ethic and the Spirit of Capitalism.* Edited by Unwin Hyman. Translated by Anthony Giddens Talcott Parsons. Boston, [1905] 1930.

Wills, Garry. *Explaining America: The Federalist.* New York, NY: Doubleday, 1984.

Wills, Garry. *Inventing America: Jefferson's Declaration of Independence.* New York, NY: Doubleday, 1978.

VVAA. *Constitución Española.* Madrid: Tecnos, 2010.

VVAA. *History of Political Philosophy.* 3rd edition. Edited by Strauss Leo and John Cropsey. 1 vols. Chicago, IL: University Of Chicago Press, 1987 [1963].