Western Graduate&PostdoctoralStudies

Western University

Scholarship@Western

Electronic Thesis and Dissertation Repository

11-21-2011 12:00 AM

A Rawlsian Idea of Deliberative Democracy

Angela D. White
The University of Western Ontario

Supervisor
Dr Michael Milde
The University of Western Ontario

Follow this and additional works at: https://ir.lib.uwo.ca/etd

Part of the Ethics and Political Philosophy Commons, Legal Theory Commons, and the Political Theory Commons

A Rawlsian Idea of Deliberative Democracy

by

Angela Dawn <u>White</u>

Faculty of Arts and Humanities
Department of Philosophy

Submitted in partial fulfillment
of the requirements for the degree of
Doctorate of Philosophy

School of Graduate and Postdoctoral Studies
The University of Western Ontario
London, Ontario, Canada

CERTIFICATE OF EXAMINATION

THE UNIVERSITY OF WESTERN ONTARIO
School of Graduate and Postdoctoral Studies

Supervisor

Examining Board

_____

_____

Dr. M. Milde

Dr. R. Vernon

Supervisory Committee

_____

Dr. D. Klimchuk

_____

_____

Dr. R. Vernon

Dr. C. Jones

_____

_____

Dr. C. Weijer

Dr. D. Weinstock

The thesis by
Angela Dawn White

entitled
A Rawlsian Idea of Deliberative Democracy

is accepted in partial fulfilment of the
requirements for the degree of
Doctorate of Philosophy

Date   _____

_____
Chair of the Thesis Examination Board

Abstract

In my thesis, I develop a framework based on John Rawls's *Political Liberalism* that addresses the question: how is it possible for democratic institutions and their decisions to be legitimate, given that (i) they are supposed to be governed by the "will of the people", but (ii) the people will disagree with each other about what political institutions ought to do about any given issue? Amy Gutmann and Dennis Thompson advance a deliberative democratic response to this question, which has served as the basis of governments' attempts to "strengthen democracy". They argue that political decisions are justified insofar as they are made in a process that allows citizens to exchange reasons that are respectful and moral. Furthermore, although a binding decision must be made at some point, it should be possible to revisit any decision after a period of time.

I argue that while respectful public discourse about political issues may be desirable in some circumstances, this is inadequate as a basis for guiding and evaluating political decisions, in light of the reasonable disagreement that persists about what political institutions ought to do. Instead, I argue that the legitimacy of political institutions, or their obligatory force over citizens, depends on the extent to which reasonable citizens are sufficiently satisfied with the institutions that govern them, over time. Furthermore, I argue that other indicators besides deliberative democratic discourse may be used to assess how well institutions are meeting the standard of political justification that I develop.

Acknowledgements

I would like to thank my parents, who have always emphasized the importance of thinking about things, and thinking for myself, and for their unwavering support and encouragement along the way.

Thank you to Jason, for his support and encouragement, and making me laugh when I needed it most throughout this process.

Thank you to Patricia and Thomas Hickey, for their love and support throughout this long journey.

Thank you to my friends who have continued to be there for me. It means more than I can say.

I am deeply indebted to the members of my thesis committee, Michael Milde, Richard Vernon, and Charles Weijer for being so generous with their time, attention, and support.

Thank you to my examination committee, for what was a thoroughly enjoyable culmination of many years of hard work.

Thank you also to all of the members of the Rotman Institute of Philosophy who have given me so much support, and made it such an enjoyable, rich and fulfilling experience to work in philosophy the way one does in the Institute.

I owe great thanks to Chad Heilig, and to the members of the cluster trials research group, who have helped me so much to develop my theory, as I try to make it useful and practicable for addressing ethical issues in conducting health research.

Thank you to the members of the Transitional Justice Colloquium, for helping me to move forward in thinking about the challenges for democracy, and ways that I might be able to contribute to work on those issues.

Finally, words cannot express my gratitude to Charles Weijer, for welcom-

ing me into what is now the Rotman Institute of Philosophy, and for his mentorship, encouragement, and confidence in my philosophical abilities, without which I would not have been able to achieve what I have (and hope to) in philosophy.

Contents

1

Chapter 1

The problem of liberal democracies

1.1 Introduction

A slogan that is often used to capture the meaning of democracy is that "government should be ruled by the will of the people". But when they have the freedom – as they do in modern liberal democracies – to adopt their own conceptions of the good, and to determine how they will pursue them, individuals often hold conflicting views about contemporary political issues. As a result, there is often widespread disagreement among the people about what governments should do about any particular political issue.

As Jeremy Waldron so eloquently puts the point:

> There are many of us, and we disagree about justice. That is, we not only disagree about the existence of God and the meaning of life; we disagree about what count as fair terms of co-operation among people who disagree about the existence of God and the meaning of life. We disagree about what we owe each other in the way of tolerance, forbearance, respect, co-operation, and mutual aid. Liberals disagree with conservatives; socialists disagree with market economists; the party of freedom disagrees with the party of community and both disagree with the party of equality; femi-

nists disagree with those who want the government to stand up for 'family values'; last-ditch defenders of the welfare state disagree with triumphant opponents of taxation; and pragmatists and utilitarians disagree with those who think the task of the law is to vindicate the claims of order, retribution, and desert.(Waldron, 1999, 1)

The question that this disagreement gives rise to and that I will address in this thesis is: given the extent of disagreement among citizens, how can governments in modern liberal democracies maintain their legitimacy in the face of such disagreement, and relatedly, how can they make justified decisions? That is, how can governments reconcile what seem to be two essential but competing commitments – to treat individuals with conflicting conceptions of the good as equals, and to base their decisions on "the will of the people"?

As I will explain further below, this thesis will assume that there are democratic governments that have at least some amount of legitimacy, and make decisions that are to some extent justified. However, it also seems as though there will always be citizens who disagree about what the government ought to do about particular political issues. As John Rawls (2005, 56–7) identifies in his discussion of the "burdens of judgement," a number of factors lead citizens to disagree with one another about how the government should respond to political issues. Obviously, they disagree because they hold different values. But it is useful to understand their disagreement as being the result of their different background beliefs, knowledge, and experiences, which inform their views about issues. Furthermore, citizens may disagree about what evidence should count in the issue at hand, and, for any given piece of evidence, they may disagree about what it implies for how the issue should be resolved. Also, they may disagree about the very meanings of the concepts that are involved.

An example that may illustrate the burdens of judgement is the controversial political issue of whether it ought to be legal to destroy human embryos, e.g., for human embryonic stem cell (hESC) research, or as a means of terminating pregnancy. Not only are conflicting values the source of disagreement, although that is of course part of it. There is also disagreement about the answers to such questions as: What is an embryo (is it a person or not)? What happens during embryonic development (at what point does the embryo have the ability to feel)? Which facts about embryonic development are morally relevant? Insofar as there is agreement about the facts of embryo development, what normative conclusions follow from this? If one believes that embryos do have some moral status, how should that be weighed against the good that may come from using them for research, or against the harm that would come to the woman as a result of not terminating the pregnancy?

One strategy for dealing with disagreement is to try to find political processes that all could agree to for resolving the issues that confront us. But, as Waldron points out in the passage cited above, citizens disagree about this as well. That is, they disagree about what processes are fair, democratic, just, etc. for making political decisions in the face of disagreement. And competing political philosophies reflect the conflicting views that citizens have about how institutions should be structured.

For example, Benjamin Barber (1984, xxxiv–xxxv) argues for political institutions that are based on his theory of strong democracy. Barber's theory emphasizes what many ordinary citizens believe is wrong with modern liberal democracies: there should be greater participation by more individuals in political decision-making. And Waldron raises the concern that many citizens

share about constitutional democracies, i.e., endowing unelected officials – *viz.*, judges – with the authority to make decisions about people's basic rights and freedoms cannot be squared with democracy.(Waldron, 1999, 212)

These disagreements, found both in theory and in everyday politics among the general citizenry, support the argument by W.B. Gallie (1955) that democracy is indeed an "essentially contested concept." That is, there is disagreement about what the term means, and it seems impossible to resolve that disagreement in any way that is justified. In contrast, in other domains of disagreement, such as physics or biology, there seem to be some settled meanings for the fundamental concepts that are at work within these disciplines.

In my thesis, I will consider two responses to the problems of what it means for democratic institutions to have legitimacy, and how they may make justified decisions, given the pluralism of modern liberal democracies. One response that I will examine is Rawls's constitutionalism; the other is Amy Gutmann and Dennis Thompson's deliberative democracy theory.[1] While some view these two theories as compatible accounts of political justification, Rawls (e.g., 1997, 770) and Gutmann and Thompson (e.g., 1996, 37–9) argue that there are important points of divergence between the two. My goals are to elucidate the differences between these two theories, identify the strengths and limitations of each, and draw out the importance of their differences for practice.

After considering the arguments for each, I wish to show that the Rawlsian framework I defend is the better foundation for contemporary, democratic, liberal societies. For, I shall argue that Rawls's theory is better equipped to

---

[1]In my thesis, unless I specify otherwise, any reference to deliberative democracy theory is meant only to refer to the theory advanced by Gutmann and Thompson (1996, 2004).

address the deep but reasonable disagreement about what the state ought to do in a way that is consistent with the tenets of liberal democracy. The core of my Rawlsian view is that the legitimacy of democratic institutions depends on the degree to which a significant proportion of reasonable citizens are satisfied with those institutions and their decisions over time.

Building on my view of legitimacy, according to my view, the justification of an institution's decision depends on the extent to which that decision is conducive to the satisfaction of reasonable citizens with the institutions involved over time. This, I shall explain later, has the implication that decision-makers should strive to meet the standard of public reason: they ought to make decisions (and to make them in a way) that is conducive to reasonable citizens' satisfaction with the institutions that govern them over time.

1.2   Deliberative democracy theory

Although deliberative democracy theories come in a variety of forms, they generally share two fundamental commitments reflected in the slogan, "government that is ruled by the will of the people." First, the democratic aspect of it: citizens should have meaningful opportunities to engage in discourse with one another and decision-makers about the political issues that significantly affect them. Generally, deliberative democracy theorists are explicitly concerned with the current trend that seems to exist in many places, of the public's diminishing participation and interest in politics.

Second, the reference to "the will" reflects that not just any input from citizens about government will do to justify state institutions' decisions. Delib-

erative democracy theorists generally emphasize that the government should take into account citizens' *thoughtful* and *informed* views about political issues. People's unreflective opinions that are formed in ignorance of relevant information, on the other hand, should have less weight in the government's decisions.

These commitments lead to the following contrast between deliberative democratic institutions, on the one hand, and representative and constitutionalist institutions, on the other. Representative institutions are flawed with respect to the deliberative aspect that deliberative democratists value, in that they accept whatever preferences the people indicate, regardless of whether they are sound judgements or not. And institutions based on constitutionalism, such as supreme courts and the constitution, are counter to democracy, since they effectively remove decisions from the hands of the people altogether.

In contrast, deliberative democracy retains the commitment that no decision should be beyond the reach of the people, and that institutions should be structured so that the people are able to make their decisions on the basis of good reasoning about the relevant information. In Chapter 2, I will examine the criticisms that Gutmann and Thompson advance against Rawls's constitutionalism, which motivate them to develop their theory in response. In addition to Gutmann and Thompson, I will also consider others' related objections to further elucidate Gutmann and Thompson's critique.

One way of differentiating between deliberative democracy theories is on the basis of the principles they advance to determine how their two main commitments ought to be fulfilled. In Chapter 3, I will present Gutmann and Thompson's account of the principles that comprise deliberative democ-

racy. Not only will I outline the principles they advance in their theory of deliberative democracy, but also, I want to focus on its structure of political justification, or how their principles are meant to strengthen political decisions.

Gutmann and Thompson recognize that even if political institutions are constructed on the basis of their theory, the outcomes or decisions they result in may fall short of being fully justified. As they say,

> Deliberative democracy does not assume that all the results of all actual deliberations are just. In fact, most of the time, democracies fall far short of meeting the conditions that deliberative democracy prescribes. But we can say that *the more nearly the the the conditions are satisfied, the more nearly justifiable the results are likely to be.*(*emph. added*, Gutmann and Thompson, 1996, 17)

Thus, here we see Gutmann and Thompson's commitment to the idea that institutions and their decisions are at least better justified to the extent that they are determined in processes that meet their principles of deliberative democracy.

I will agree with Gutmann and Thompson that their theory can be useful for strengthening the justification of political decisions in certain ways. For example, public engagement tools that are based on deliberative democracy, such as citizens' assemblies and councils, may provide the government with valuable information about (some) citizens' considered judgements about particular policy issues. This could assist the government in making better decisions, insofar as the government is more attuned to the people's views about what it ought to do and why, and their likely responses, in terms of their satisfaction with the institutions involved in the decisions. However, in Chapters 4 through 6, I will argue that their theory is not adequate as an account of political justification. Their principles do not, in themselves, provide the ideals

at which democratic institutions should aim.

1.3 A Rawlsian theory of justice

The positive argument that I will make is that Rawls's theory of justification as he advances it in *Political Liberalism* provides us with the necessary concepts for determining which decisions available to political officials may be justified in modern liberal democracies.[2] So, my account allows that fulfilling Gutmann and Thompson's principles may strengthen the justification of political decisions. However, determining whether decisions (including those about the design of institutions) are justified depends on whether they meet the standards of Rawls's *Political Liberalism*.

I use Rawls's *Political Liberalism*(2005) rather than *A Theory of Justice*(1971) because I agree with the substantive revisions to his view that are reflected in the former. For example, in *A Theory of Justice*, Rawls argues that citizens are to state their reasons in secular terms for those reasons to count in discussions in the public political forum. Later, however, in *Political Liberalism*, Rawls (2005, xlix–l) explicitly amends this commitment, and allows that in public political discourse, citizens should be permitted to state their reasons in terms of their comprehensive doctrines.[3] I believe that revisions such as these strengthen Rawls's position, in the sense that his view in political liberalism more accurately reflects the necessary conditions for a stable and well-ordered modern liberal democracy.

---

[2]Throughout the thesis, I will use the term 'political liberalism' to refer to Rawls's theory of political justification as he presents it in *Political Liberalism* unless I state otherwise.

[3]Of course, the standard of justification – public reason – remains independent of whether one accepts any particular comprehensive doctrine.

Relatedly, I focus on Rawls's theory of political liberalism because I wish to defend an account of political justification that is more widely applicable to modern liberal democracies than is Rawls's theory of justice as fairness. Although I will not defend it here, I agree with Rawls that his theory of justice as fairness is likely to best fulfill the standards of liberal democracy. However, I also agree with his view that other public political conceptions of justice may support stable and well-ordered liberal democracies.(Rawls, 2005, xlvi–xlvii) For example, I believe that different principles of justice serve to support the decisions that are made by governments in the U.K., Canada, and the United States. The principles of justice as fairness are only applicable to democracies in which the institutions therein seem to reflect its principles of welfare egalitarianism (as some believe to be true of Canada). Rawls's theory of political liberalism is meant to be a more general theory that is applicable to all of these contexts.

1.4   Justification and legitimacy

To further clarify the scope and aim of my thesis, a distinction made by A.J. Simmons may be helpful. Simmons draws a distinction between the questions of justification and legitimacy. According to Simmons, justification of the state may be best thought of as directed towards the anarchist, where the goal is "showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives."(*emph. added*, Simmons, 1999, 742) So, justifying the democratic state in this sense requires showing that there is any defensible form of the state

that coerces individuals to comply with its laws and policies. One must show that it is possible to hold a coherent conception of a democratic state at all.

As Simmons helpfully elucidates the anarchist's objection that the democratic state cannot meet this standard of justification: "anything that is sufficiently coercive (hierarchical, inegalitarian, etc.) to count as a state is also necessarily, and for that reason, morally indefensible and prudentially irrational."(Simmons, 1999, 743) On the anarchist's view, the tenet that a democratic government is to be ruled by the will of the people cannot be made consistent with the coercive power that an effective state necessarily has, to impose its decisions on citizens when they would choose not to comply. Unless the state has the power and is willing to use it to compel citizens to comply with its laws, there seems to be little sense to the claim that there is a state in place, nor does there seem to be any point in having one. Simmons proceeds to argue that justifying the democratic state in this sense is impossible.

In contrast with the justification of the state, according to Simmons, legitimacy "is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively."(Simmons, 1999, 769) The question of legitimacy then, concerns existing institutions in a particular state. It asks whether the institutions in question are justified in imposing binding obligations on particular individuals. In defending an institution's legitimacy, one might, for example, attempt to show that the individuals who were subject to it had rightly found that it was rational for them to submit to the coercive force of that state. For example, they may have reasoned that an extremely minimalist state provided important benefits, such as protection from other persons, which outweighed

the costs to individuals of submitting to the coercive authority of it.

Using Simmons' terminology, my Rawlsian theory is meant to be a response to those who question the legitimacy of states that are identifiable as stable and well-ordered modern liberal democracy. However, I am not attempting to provide what Simmons refers to above as justification for it. That is, my Rawlsian account might be thought of as taking the form: *given* that one accepts that it is possible and wishes for a state to be a modern liberal democracy, these are the conditions that must be in place (to some degree), and the ideals and principles that decision-makers in the institutions must follow, so that the coercive power of the state may be consistent with the tenets of liberal democracy.

It is important to be clear about my goal because of its implications for what assumptions can legitimately be made. A basic assumption that Rawls seems to help himself to (as will I) is that the general population consists in a significant proportion of people who are satisfied with the institutions that exist in those modern liberal democracies – e.g., a mixed system of constitutionalist and representative majoritarian institutions. If I were attempting to provide justification for why rational people *should* submit to the state, then this move would be ruled out.

But I will argue that this assumption, that the general population is somewhat satisfied[4] with politico-legal institutions traditionally associated with modern liberal democracies, is permissible, given the scope of my argument. This assumption forms part of my hypothesis about what are the necessary conditions for a stable and well-ordered liberal democracy to obtain and per-

---

[4]I will discuss how satisfied later in Chapter 4.

sist over time. The assumption of a predominantly satisfied population is permissible because I am not attempting to answer Simmons' anarchist about whether individuals should submit to the state. My view is that this must be true, if the society is a stable and well-ordered modern liberal democracy.

Although I will not attempt to justify the liberal democratic state against Simmons' anarchist challenge, I will frequently argue about the basis of political justification. However, when I use the term 'justification', I will be using it in a second sense that Simmons himself raises, to address another normative question that he identifies. When I refer to the question of political justification throughout, I will be speaking to the question of what *particular decisions* the state should make about how to use its coercive force.

Simmons describes the relationship between the justification of actions by a state, the justification of the state, and the legitimacy of a state, in the following passage:

> States may be justified on balance in enforcing certain laws even if they are not justified in existing [i.e., not justified in the first sense within Simmons' framework] or are not legitimate with respect to those against whom the laws are enforced. In my view even the government of the Third Reich was justified [in the second sense of the term] in prohibiting rape and punishing rapists, however illegitimate that government may have been with respect to its subjects and however unjustified was its existence (i.e., however much of an improvement over its rule even the state of nature would have been).(Simmons, 1999, 770)

In the example Simmons cites here, of prohibiting rape and punishing rapists, his point is that the question of whether a state is justified to take those actions is, on Simmons' view, entirely separable from any special status it has as *the state*. Questions about the legitimacy of a state, or justification of the

state, have no bearing on the question of whether it is justified to prohibit and punish individuals for committing rape. The justification for the state to prohibit someone from committing such a harm, and punishing someone for it if they do so, derives from the same morality that justifies the actions of anyone who is able to prohibit and punish such harms.

My account of political justification rejects Simmons' view that the justification of the state's particular decisions may be separated from its legitimacy. I will argue that the justification of the state's decisions are determined by its legitimacy. That is, the state should make its decisions on the basis of what is likely to strengthen its legitimacy. And I will argue that the state's legitimacy depends on how well justified are the particular decisions it makes, over time. My account assumes that there is a morally relevant difference between, on the one hand, what the state is justified in doing to others, and, on the other, what individuals – i.e., private citizens – are justified in doing to others.

1.5   A place for deliberative democracy

A final word about the aim of my thesis. The arguments that I make against Gutmann and Thompson's theory are not meant to undermine their principles. I agree with them that fulfilling the principles of deliberative democracy may strengthen the justification of political decisions in a modern liberal democracy. My point is that their theory falls short on the following aims that one may look to a political theory to fulfil. First, it does not provide a good account of what it means for a political institution to be legitimate, in spite of disagreement that exists about the form it should take, or what decisions it

ought to make. Also, it is not equipped to inform us about how well political decisions in modern liberal democracies are justified, including decisions about whether political institutions should be designed according to Gutmann and Thompson's principles as they advance them. As an example, I will use the case of the Ontario Citizens' Assembly (OCA) to argue that their theory cannot tell us whether to use a citizens' assembly to choose the electoral system, or whether another institution, such as the legislature or an expert panel, would be better justified. Instead, I will argue that my Rawlsian framework better serves as a theory that enables us to determine the legitimacy of political institutions, and whether political decisions are justified in accordance with the principles of liberal democracy.

One advantage of my theory is that it better emphasizes that a society must already have certain fundamental features, in order for the state to make justified political decisions. For instance, one of the most important features that a modern, liberal democracy must have is that a significant proportion of the population must subscribe to a principle of equality. Also, given their conceptions of justice, it must be possible to define the politico-legal institutions in a way that a significant proportion of the population (that is committed to egalitarianism) is willing to be bound by their decisions. To the extent that a society does not have these features, the strength of legitimacy with respect to their institutions will be undermined.

Furthermore, my theory better captures the structure of political justification. For example, it reflects that the ability for a modern, liberal democracy (i.e., its institutions) to make justified political decisions depends on how prevalent egalitarianism is among the general population. Also, my theory

captures how the state may make politically justified decisions even though individuals have different conceptions both of the good and of justice, e.g., by ensuring that over time, citizens are satisfied with the decisions that institutions make. So, if an institution makes decisions that are contrary to the satisfaction of someone, all is not lost, so long as it is able to make subsequent decisions that regain her satisfaction with the state. I will argue that because Gutmann and Thompson ground political decision-making in actual public discourse, their theory does not have the resources to adjudicate between persistent disagreement among citizens about particular decisions, including about the importance of actual public discourse in political decision-making.

In addition to examining the principles of each theory, in the last two chapters I use the experiences of the OCA, which was to review the Ontario electoral system, to illustrate the theoretical points that I argued in previous chapters. I present Thompson's defence of his position that citizens in a deliberative democratic institution – *viz.*, a citizens' assembly – rather than a committee of experts, legislators, or judges, ought to be given the opportunity to review and potentially recommend changes to the electoral system. Thompson argues that the electoral system designed by an assembly of ordinary citizens should then be voted on by the full electorate, in a referendum to be determined by simple majority. According to Thompson, this process better fulfils the principles of democracy than do the other aforementioned political institutions. Thus, according to Thompson, a citizens' assembly followed by a referendum provides a better political basis for decisions about the electoral system.

The OCA serves as an example of a deliberative democratic institution that was meant to strengthen democracy. To fulfil this goal, it was largely

designed and implemented in accordance with the principles that Gutmann and Thompson advance. However, I will argue that the OCA illustrates the limitations of Gutmann and Thompson's theory. That is, I use the OCA to show the problems that arise by neglecting the standard of public reason – i.e., the likely effects on the satisfaction of reasonable citizens with the institutions and decisions they are making – as the ultimate grounding for political decisions.

I conclude that while Gutmann and Thompson's theory is not equipped to be a basis of political justification in modern liberal democracies, fulfilling the principles of deliberative democracy may serve to strengthen the justification of political decisions and the legitimacy of democratic institutions. I argue that they may do so by grounding decisions about how to structure deliberative democratic institutions with Rawls's theory. Conceiving of political justification and legitimacy in this way allows us to better understand what was wrong with decisions that have been heavily criticized about the OCA, e.g., who was included in the process and how, and the length of time that was taken to engage with the public about the decision at hand. Furthermore, my alternative understanding of the theories also provides a better way of determining how similar mistakes may be avoided in the future.

Chapter 2

Rawls's critics

2.1   Introduction

As we saw in the previous chapter, perhaps the most central question that contemporary democracy theories must address is, "how can democratic institutions make justified political decisions in a modern liberal democracy?" For, as democratists generally accept, people who are given the freedom to do so will adopt conceptions of the good that lead them to have conflicting views about how to resolve political issues. Thus, this pluralism makes it difficult to give a satisfying answer to the question of how the state can make justified political decisions in the face of such widespread and persistent disagreement.

In response to this challenge, Rawls follows the tradition of social contract theories. Recognizing that actual agreement about political decisions is unlikely, social contract theories instead ask: what decisions would the people agree to, and under what conditions? One way to define the social contract is to identify who are the parties that are to be represented in the "negotiations". For instance, at a minimum, a social contract theorist might stipulate that contracting parties must be rational agents, and attempt to provide an

acceptable definition of what this means. Thus, in the political context, the social contract theorist may answer the question of how political institutions should be structured by identifying the parties who should be represented in the "negotiations" about this issue, and then attempting to work up the answers such parties would be likely to give.

The other consideration that may be raised by social contract theories is the conditions for negotiations.(Gauthier, 1990, 1) Even though the parties represented in the contract negotiations may have conflicting views about a political issue, it may be possible to reach a justified political decision by finding a process that all would agree to as fair. It may be that none have particularly positive feelings about the resulting policy, but what matters to the contractarian is simply whether the parties would agree to be bound by the outcome of negotiations, or terms of the contract.

Many hold that Rawls's theory follows in this tradition, in that it bases justification for political decision-making on what those citizens that he defines as reasonable and rational would choose under certain idealizations that he specifies in his theory of justice. However, a number of concerns have been raised for this approach in general, and for Rawls's theory in particular. In this chapter, I will outline the main objections that have been advanced in response to his theory. These criticisms motivate the development of Gutmann and Thompson's theory outlined in the next chapter, as well as the framework I present in the fourth chapter.

In the next chapter, I will outline how Gutmann and Thompson's theory is meant to address the problems they identify in Rawls's account. However, in the fourth chapter, I will defend a Rawlsian response to Gutmann and

Thompson's objections, and show that the Rawlsian account that I develop is not vulnerable to the criticisms examined here. Then, in the remaining chapters (5 and 6), I will argue that not only are the moves that Gutmann and Thompson make to address the problems they find in Rawls's theory not necessary, the theory they develop is not adequate to address the problem of deep but reasonable disagreement in modern, liberal democracies. It requires my Rawlsian framework as a foundation to assess the legitimacy of existing and proposed political institutions in modern, liberal democracies, and to assess political decisions in the face of reasonable disagreement.

2.2   Unhelpful idealizations

Gutmann and Thompson raise a number of objections to theories that base political justification on hypothetical as opposed to actual deliberation. One objection is to the implication of hypothetical reasoning, which also seems to exist in practice. For, in practice, policymakers also base their decisions on an "internal monologue," in which policymakers imagine what would be likely to garner citizens' agreement, rather than finding out what citizens actually want by engaging in discourse with them. Gutmann and Thompson argue that instead of basing decisions on an internal monologue, political decisions ought to be based on "explicit dialogue" with ordinary citizens.[1]

As I argue in the next chapter, according to Gutmann and Thompson, the central point that sets their theory apart from Rawls's is that the justi-

---

[1]I owe thanks to Richard Vernon for bringing this way of phrasing the objection to my attention, which I think brings into sharper focus this central point of disagreement between Rawls and Gutmann and Thompson.

fication for political decisions is based on *actual* discourse between citizens, in a process that fulfils the principles they hold are essential to deliberative democracy. As they state one of the advantages their theory has over others: "Deliberative democracy, in contrast, admits reasons and principles that are suitable for actual societies, which all still suffer from discrimination and other kinds of injustice."(Gutmann and Thompson, 1996, 16)[2] They argue that one of the virtues of resting political justification on actual discourse is that their theory is equipped to provide principled guidance about how to settle political controversies, while taking into account the actual circumstances of actual people.

The advantage that Gutmann and Thompson identify with their theory, that it is suitable for actual societies, brings us to one of the reasons that they object to the hypothetical reasoning in Rawls's theory. An idealization that Rawls builds his theory on is that the general population supports his egalitarian principles of justice and constitutional essentials. Gutmann and Thompson (1996, 35) object that, "Constitutional standards seem compelling when stated abstractly: few would deny that majorities should not violate the basic liberty of their fellow citizens. But abstraction comes at the price of disagreement about their interpretation."

Recall that the goal of the social contract theorist is to identify what the

---

[2]The fact that Gutmann and Thompson explicitly distinguish their theory from e.g., Rawls's becomes especially important in arguments I make elsewhere for Rawls's constitutionalism, since Rawls himself states that by constitutional democracy, he means a deliberative democracy(see Rawls, 1997, 771–2). However, he distinguishes his view from that of Gutmann and Thompson at least on the basis of the meaning of reciprocity they each have, which they all argue ought to order public discussion(Rawls, 1997, 770n19). As I'll discuss later, Rawls argues that the role of reciprocity in his concept of public reason is purely political, and so less comprehensive than Gutmann and Thompson. In the last chapter, I will argue this comes out in practice in the OCA.

parties in the contract would agree to and under what conditions. One way of achieving agreement is to define the terms of the contract so abstractly that the parties would agree to them. For example, people might agree that all persons are equal. However, Gutmann and Thompson object to this strategy on grounds that disagreement will occur as soon as one tries to further specify this general principle. For example, although people may agree that all persons are to be treated as equals, people may disagree about who is to count as a person, or what it means to treat someone as an equal. Gutmann and Thompson point out that while Rawls may be right that citizens would agree to very abstract formulations of constitutional principles, e.g., the equality of persons, their rights to certain fundamental freedoms, etc., hypothetical agreement will be lost as soon as we try to further specify what those principles imply in practice.

To return to the example I presented in Chapter 1, both a scientist engaged in hESC research and a person who believes that it is wrong to destroy human embryos may believe in the principle of equality of persons. But this agreement seems to do little good for settling their disagreement about whether the state should permit human embryonic stem cell research. For the principle of equality to be helpful for resolving their disagreement, they need to settle their differences about, e.g., whether a human embryo is a person, if that is where the source of disagreement lies. Thus, Rawls cannot justifiedly presume hypothetical agreement about constitutional principles will be an adequate basis for determining what egalitarianism amounts to in politics.

But, object Gutmann and Thompson, Rawls does exactly this. As they say, "Rawls relies on 'established political procedures [being] reasonably regarded

as fair' to resolve these substantive disagreements."(Gutmann and Thompson, 1996, 36) On the basis of accepting constitutional essentials stated in the abstract, Gutmann and Thompson charge Rawls with unjustifiedly supposing that further specifications of these in current institutions are accepted as well. Furthermore, they criticize his theory for assuming that people will accept how those institutions ultimately resolve disagreement about political issues, based on his deeper assumption that citizens accept the institutions as fair.

Gutmann and Thompson identify these theoretical assumptions in actual, existing institutions as well.(Gutmann and Thompson, 1996, 91) For example, the U.S. Constitution sets the bar for amendment so high that it seems that any initiative to do so will almost certainly fail. Another example may be found in the context of electoral systems in Canada. A reason that the Ontario government gave for holding a citizens' assembly on electoral reform was that Ontarians have never had a say in choosing their electoral system, which is true in many places.(Secretariat, 2007, 3)

Fundamental decisions about the structure of political institutions in modern liberal democracies have often been decided in ways that do not conform to Gutmann and Thompson's principles of deliberative democracy. They were made by a small group of an elite few (relative to the population to be governed according to their decisions), with little or no consultation with the general population about the acceptability of their decisions. Thus, the processes for building traditional institutions often seem to reflect Rawls's assumption that they can be constructed in ways that the people *would* accept, without the people's input about what forms they should take.

In his critical analysis of Rawls's theory, Joshua Cohen also criticizes the

weight that Rawls places on the idealization of egalitarianism and agreement about the constitutional essentials. Cohen objects that even if we suppose that Rawls's egalitarian principles of justice have the support that Rawls seems to think, they are incapable of grounding other elements that Cohen argues both he and Rawls believe are essential to a just liberal democracy. According to Cohen, those essential elements are that: "[i] *public deliberation focused on the common good*, [ii] requires some form of *manifest equality* among citizens, and [iii] *shapes the identity and interests* of citizens in ways that contribute to the formation of a public conception of common good."(Cohen, 2002, 89)

So, according to Cohen, both he and Rawls share the view that institutions in modern liberal democracies should attempt to show how they serve the common good, while still respecting the equality of individuals with their different and, in some ways, conflicting conceptions of the good. And they should also attempt to promote citizens' conceptions of themselves as members of a collective (the citizens of that state), so that citizens will identify the advancement of its good with their own interests. This strengthens the legitimacy of institutions in a liberal democracy, since institutions will thereby be better able to serve citizens' interests in virtue of their having the same interests.

While Cohen finds these goals laudable for a liberal democracy, he rejects that Rawls's theory is capable of supporting these commitments. That is, Cohen argues that even if we suppose, as he believes Rawls does, that a significant proportion of the population subscribes to principles of equality and fairness, (i)–(iii) do not necessarily follow. Something more is needed to support Rawls's view that public deliberation in a modern liberal democracy must

be focussed on the common good, make manifest the equality of citizens, and try to encourage a conception of the (singularly determinate) common good.

So, Cohen agrees with Gutmann and Thompson that Rawls's theory does not justify institutions for which Rawls argues. However, contrary to Gutmann and Thompson, Cohen believes that Rawls actually supports the view that institutions should better fulfil deliberative democratic principles. Cohen's objection then is to Rawls's attempt to fundamentally support deliberative democracy with egalitarian ideals. According to Cohen, it is the ideal of democracy itself that justifies (i)–(iii), not the principle of egalitarianism.

One important practical implication of this theoretical disagreement is that if Rawls is right, then what is most fundamentally necessary to support strong democratic institutions is a prevailing sense of egalitarianism among the people in society. Thus, (as I will argue in Chapters 5 and 6,) what should dictate how to structure and make decisions within democratic institutions are the principles of equality that are held by the people in the society. If Cohen is right however, the question of how to order our democratic institutions is fundamentally determined and justified by the ideal of democracy itself. And, according to Cohen, this is best ensured by the principles of deliberative democracy he defends and attributes to Rawls as well.[3]

The first deliberative democratic commitment that Cohen identifies in Rawls's theory is that in an ideal pluralist society,

> Public explanations and justification of laws and policies are to be cast in terms of conceptions of the common good (conceptions that, on Rawls's view, must be consistent with the two principles of justice), and public deliberation should aim to work out the details

---

[3]As I will outline in Chapter 3, Gutmann and Thompson's theory follows a similar structure, but differs in the substantive principles they argue are essential to democracy.

of such conceptions and to apply them to particular issues of public policy.(Cohen, 2002, 88)

So Cohen ascribes to Rawls the view that when citizens deliberate about political issues, their reasons must be cast in terms that are consistent with the principles of welfare egalitarianism. The goal of public discussion is to determine what that common good – i.e., the principles of egalitarianism – implies with respect to particular decisions.

Furthermore, according to Cohen, Rawls holds that people ought to couch their reasons in terms of the public good for more than merely instrumental reasons. As Cohen draws out, "So an ideal pluralist scheme, in which democratic politics consists of fair bargaining among groups each of which pursues its particular or sectional interest, is unsuited to a just society."(Cohen, 2002, 88) Citizens must move beyond the view of others as mere instruments or barriers to pursuing their own conceptions of the good. Rawls's theory demands more of citizens than that they participate in politics to advance their own individual or group-based interests. They must participate in a way that appreciates the values that others have as persons who are ends in themselves.

The second deliberative democratic requirement that Cohen finds in Rawls's theory is that the fairness of political institutions must be made manifest to citizens. For instance, laws may need to be changed so that political campaigns are financed to a greater extent by public funding rather than by corporate donations. Also, restrictions might be placed on the amount of funding that any one individual or corporation can contribute to a campaign. These measures are justified on grounds that they would make evident to the people that the political system is designed to prevent parties from having financial

reason to count some people's interests more than others.(Cohen, 2002, 88) Cohen points out that Rawls himself reasons that these measures are justified because they make manifest to citizens that the society is committed to the democratic principles of free and equal participation in politics by all.(Cohen, 2002, 88–9)

Lastly, Cohen argues that Rawls is committed to the deliberative ideal that, as Cohen puts it, "democratic politics should also shape the ways in which the members of the society understand themselves and their own legitimate interests."(Cohen, 2002, 89) For example, Rawls argues that individuals are entitled to the social bases of self-respect, that they ought to learn about their roles as citizens, and about their place in the structure of political institutions in a constitutional democracy. As Cohen points out, on Rawls's view, the point of democracy is not only to make justified decisions about how the state's power may be used to limit people's freedom in the ways it does. It is also to shape citizens' understandings of themselves as individuals living in a society with others, with whom they should be willing to find and submit to fair terms of cooperation.

Cohen's objection to egalitarianism is that although the way that institutions are designed can certainly shape people's understanding of themselves as citizens, it does not seem adequate to provide the grounding and direction for this feature of democratic institutions. That is, egalitarianism cannot justify the requirement that institutions promote a particular conception of the self, i.e., a view of how citizens should understand themselves as political agents in a modern liberal democracy. Rather, for Cohen, the principle of democracy justifies the requirement that that institutions should inculcate such values in

citizens.

Cohen identifies the following lines of defence in Rawls's theory for these three requirements: "The formal argument is that parties in the original position would choose the principle of participation with the proviso that the political liberties have their fair value."(Cohen, 2002, 89) Citizens (as parties in the social contract) in a liberal democracy who did not know their lot in society (e.g., their race, socioeconomic status, religion, etc.) would choose institutions that meet the three conditions named above. That is, citizens would choose institutions that allowed them to: (i) exchange reasons in terms of the common good; (ii) recognize the equality of all; and (iii) facilitate their understanding of themselves as members of society who share in a common good.

Cohen also identifies an alternative "informal" line of reasoning in Rawls's theory, in addition to his thought experiment to justify these requirements or constraints in politics. That is, (i)–(iii) are justified as a direct result of the commitment to fairness in general. Because citizens so highly value the principle of fairness, they recognize that their political institutions themselves ought to reflect and to be based on that value. As Cohen describes it,

> The suggestion is that, since we accept the intuitive ideal of a fair system of co-operation, we should want our political institutions themselves to conform, in so far as it is feasible, to the requirements that terms of association be worked out under fair conditions. And so we arrive directly at the requirement of equal liberties with fair value, rather than arriving at it indirectly, through a hypothetical choice of that requirement under fair conditions.(Cohen, 2002, 90)

So, the other reason for accepting the deliberative democratic conditions that Cohen identifies in Rawls is because the means for achieving fair decisions

ought to be consistent with the end that we are trying to achieve.

Cohen agrees with this view he finds in Rawls, that these deliberative democratic ideals ought to be reflected in democratic institutions. However, since, according to Cohen, the principle of egalitarianism cannot justify those ideals, Cohen holds that they ought to be considered as justified because these deliberative democratic commitments are essential to the view of democracy that citizens generally endorse. As Cohen puts the point of dispute between himself and Rawls:

> Taking the notion of fairness as fundamental [as Rawls does], and aiming (as in the informal argument) to model political arrangements on the original position, it is not clear why, for example, political debate ought to be focused on the common good, or why the manifest equality of citizens is an important feature of a democratic association. The pluralist conception of democratic politics as a system of bargaining with fair representation for all groups seems an equally good mirror of the ideal of fairness.(Cohen, 2002, 90)

Cohen's objection to Rawls then, is that the priority Rawls gives to the principle of equality to ground his theory of justice is inadequate to justify the deliberative commitments that Cohen finds in Rawls. The principle of equality could just as easily be thought to entail a fair system of bargaining in one's own self- or group-based interests.

But, given the commitments that Cohen ascribes to Rawls, self-interested bargaining is contrary to the goal of a well-functioning democracy. For, recall that according to Cohen, Rawls seems committed to the notion that what justifies political decisions is appeal to a common good. And bargaining for the sake of self- or group-based interests seems to violate the priority that Rawls places on the common good over individuals' other interests.

Gutmann and Thompson seem to agree that a fundamental commitment to the principles of deliberative democracy implies that self-interested bargaining should be excluded from political decision-making. As they argue, "The claim that self-interested (or group-interested) bargaining processes are better than deliberative ones relies on the premise that interest-based politics is more morally desirable and mutually justifiable than a deliberative politics."(Gutmann and Thompson, 2004, 113–4) So, according to Gutmann and Thompson, bargaining is only a legitimate form of political decision-making if its proponents can show that it is mutually justifiable.

As I will discuss in more detail in chapter 3, according to Gutmann and Thompson, in general, political procedures and decisions may only meet the principle of mutual justifiability if, "a citizen offers reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others."(Gutmann and Thompson, 1996, 53) The principle of mutual justifiability refers to a standard that is set by citizens who must hold a certain attitude towards one another. This attitude that citizens must hold is what Gutmann and Thompson refer to as the principle of reciprocity. For Gutmann and Thompson, the principle of reciprocity captures the idea that citizens are to advance reasons that others could accept, where those others must also be similarly disposed to provide mutually acceptable reasons for their views on issues. Roughly, we might say that the principles of mutual justifiability and reciprocity reflect the requirement that citizens ought to treat each other as moral equals, at least so long as others are similarly disposed.

Gutmann and Thompson object that the requirement of mutual justifiability generally precludes self-interested and group-based reasoning as a legiti-

mate way of political decision-making in most cases. They allow that a process of deliberation could lead stakeholders to endorse a bargaining approach to resolve a political issue. In that case, Gutmann and Thompson admit, "At least one claim that deliberative democrats often make would need to revised – but revised in order to satisfy the demands of deliberative democracy itself."(Gutmann and Thompson, 2004, 114) Even if a group of deliberators chose to determine a decision via a bargaining process, which would be contrary to Gutmann and Thompson's principles of deliberative democracy, what would justify the decision is that they chose the procedure deliberatively.

However, according to Gutmann and Thompson (2004, 114), "In any political context, a general defense of bargaining is not likely to be plausible." If Cohen's view that Rawls's theory is fundamentally a deliberative democratic one is right – i.e., it is fundamentally committed to deliberative democratic principles – then it seems that Rawls's view about what is required in legitimate democratic processes must agree with Gutmann and Thompson's view that bargaining on the basis of self- or group-interests is prohibited in political decision-making.

2.3   The epistemic objection

Gutmann and Thompson also raise an epistemic objection to Rawls's reliance on implicit monologues for political justification. In the absence of discussion about controversial issues, citizens and policymakers all too often underestimate the disagreement that exists about political issues. As Gutmann and Thompson put the point: "Actual deliberation has an important advantage

over hypothetical agreement: it encourages citizens to face up to their actual problems by listening to one another's moral claims rather than concluding (on the basis of only a thought experiment) that their fellow citizens would agree with them on all matters of justice if they were all living in an ideal society."(Gutmann and Thompson, 1996, 16)

Although Gutmann and Thompson do not develop the point explicitly, the idea seems to be related to a line of reasoning that John Stuart Mill advances in defence of the freedom of speech as a basic and inviolable liberty.(Mill, 1991b, 25) In *On Liberty*, Mill argues that one of the reasons for protecting freedom of speech as a basic liberty is because of its potential for exposing mistaken beliefs. As Mill points out, falsehoods about a subject eventually yield to "fact and argument," but this depends on, as he puts it, "hearing what can be said about it by persons of every variety of opinion, and studying it by every character of mind."(Mill, 1991b, 25)

So, one of the reasons to value and promote actual public discourse about political issues is because of its tendency to expose people's mistaken beliefs by subjecting them to the doubts and scrutiny of others. More specifically, a person's beliefs may be disproven when others from different backgrounds and perspectives who disagree confront the individual with lines of reasoning that challenge her beliefs. For Gutmann and Thompson also, the advantage of requiring actual public discourse about political decisions is that it may expose false beliefs in politics – namely, the false belief that one's own view is shared by the majority, if not everyone.

Another similar worry in Mill's arguments that is also mirrored in Gutmann and Thompson's objections is found in his "Considerations on Representative

Government". There, Mill draws attention to the problem of elitism in government, which has the potential to allow the interests of "the working class" to be neglected in government decisions. As Mill describes his concern:

> We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.(Mill, 1991a, 246)

For Mill, if political officials belong to a different class than much of the general citizenry, and do not engage with the working class, there is a real danger that policies will be decided in ignorance of those perspectives. To be clear, this worry is not that political officials will intentionally sacrifice the interests of the general citizenry (although that may be a problem, too). Mill's worry is that they may do so simply because all those in positions of decision-making authority are ignorant of the negative implications that their decisions are likely to have for other classes in society.

Such decision-making clearly runs counter to the commitment of democracy, which is meant to take into account the interests of all citizens as moral equals. Similarly, for Gutmann and Thompson, insofar as we know that certain groups' interests aren't being adequately represented in government, there is good reason for creating better opportunities for citizens to have a say in political decisions. Otherwise, government officials are likely to make their decisions on the basis of inaccurate judgements about how their constituents are likely to be affected.

Whether Mill would agree with Gutmann and Thompson about how best to

address this worry is beyond the scope of this chapter. The point is that he, an ardent supporter of representative government, recognizes the epistemic worry that it raises for democracy.[4] Gutmann and Thompson argue that the current political institutions, many of which do not fulfil the principles of deliberative democracy, do not give citizens the opportunity they ought to have to object to them. For representative institutions to fulfil the principles of democracy, they must be supplemented with deliberative democracy.

And the point to be made against Rawls is that if citizens lack meaningful opportunities to object to contemporary institutions, then inferring that citizens accept those institutions from their lack of objections is unwarranted. It is just as possible that citizens do object to those institutions, but their objections simply have not been heard by political decision-makers. In light of this sceptical worry, Gutmann and Thompson reject Rawls's view that hypothetical agreement is adequate for determining whether political institutions are justified according to democratic principles. It misses the epistemic advantage of actual dialogue, both in terms of bringing points of disagreement to light, and interrogating political decision-makers' beliefs about what people do in fact support to ensure that they are accurate.

2.4   Who is (not) behind the veil of ignorance

In an earlier quote by Cohen, the Rawlsian concept of the original position was introduced. Rawls develops this concept to represent the ideas of im-

---

[4]Gutmann and Thompson do make explicit appeal to other aspects of Mill's arguments in their defence of their deliberative democracy theory, but not to the argument that I am suggesting is implicit in the above-mentioned passage.

partiality and fairness in individuals' judgements about the basic structure, i.e., fundamental social, political, and economic institutions. When individuals adopt the original position, or go behind what Rawls refers to as the "veil of ignorance", they do not know particular features about themselves. In abstracting away particular features about themselves, their decision-making models the principle of equality: it reflects the requirement that people who are committed to a principle of equality ought to make their decisions impartially, or in a way that does not unfairly favour themselves or others, e.g., family, friends. When individuals are behind the veil, and do not have any personal information about themselves (including who they may be in close, personal relationships with), they are thereby prevented from choosing institutional arrangements that would unfairly favour themselves or others close to them.

Thus, (barring preferences for risk) a person should choose an arrangement that does not unfairly advantage anyone in virtue of particular features that they have. When individuals are in the original position, they do not know whether they are a particular racial or ethnic minority, hold particular religious or philosophical commitments, etc. Without this knowledge about themselves, it would be most rational for them to choose a basic structure that ensures that basic goods such as political liberties, a minimum level of security and education, etc. are ensured to all equally, regardless of these characteristics.

The idealization of the original position in Rawls's theory, as I have just outlined it, has attracted a number of criticisms.[5] One is by Susan Moller Okin, who points out that according to Rawls's account of the veil of ignorance, one

---

[5]In Chapter 4, I will outline an alternative conception of the original position.

feature that individuals do know about themselves is that they are "heads of households". As Okin argues, this is a necessary aspect of Rawls's account of the original position.

Individuals in the original position must be heads of households in order to address the question of how to take future generations into account in current decisions about justice. For Rawls, the obligation to future generations can be captured in the original position only if those behind the veil are making their choices in light of the implications they are likely to have for their own future generations. In this way, people behind the veil will be psychologically motivated to choose principles and institutions that take into account their likely consequences for the interests of existing family members, as well as those yet to come.

But Okin criticizes the invocation of heads of households on grounds that it renders concerns about justice within the family invisible. And Okin points out that Rawls himself explicitly states that considerations about justice are to apply to the family. "However," Okin continues, "the family is to a large extent ignored, though assumed, in the rest of the theory." (Okin, 1999, 93) For Okin, this is problematic because the family is a significant site of economic and social injustice against women.(Okin, 1987, 50) For instance, in many homes, unfair divisions of labour remain the norm, which limit women's liberty in numerous ways, e.g., to pursue successful careers and job advancement outside the home, and to achieve financial independence and emotional fulfilment. But any inegalitarian attitudes or beliefs held by "heads of households" and which may be advanced by those in the original position are rendered invisible by Rawls's thought experiment. For, the heads of households are assumed to

speak for the entire family about how to structure political institutions.

Okin argues that an adequate theory of justice must be equipped to allow issues of injustice within households to be brought into the public sphere. And Rawls seems to agree. But the structure of his theory excludes injustice that occurs inside people's private homes from being raised, much less addressed, in the sphere of public debate.

Martha Nussbaum also raises another objection to Rawls's idealization of agents in the original position. Nussbaum takes issue with the exclusion of individuals with disabilities from participating in the social contract. In social contract theories, a fundamental assumption is that the parties who are contracting with one another are equal, and ought to recognize each other as such. From there, the theorist has only to work out what would be reasonable and rational for the parties to agree.

But Nussbaum objects that this commitment results in a theory that neglects "the presence of a large asymmetry of power between the parties, which makes it no longer mutually advantageous for them to be included as fully equal parties to the social contract." (Nussbaum, 2009, 333) The theory neglects the reality that some people, such as those with disabilities, are significantly disempowered in society, and do not, in fact, have any sociopolitical clout to motivate others to address them as equals. As a result, these individuals are left to accept whatever advocates manage to gain on their behalf in the social contract negotiations.

Nussbaum argues that the only answer is that, "Rawls would ultimately need to jettison the idea of rough equality in power and the related idea of mutual advantage as the aim of the social contract, were he able to do justice

to the claims of people with disabilities."(Nussbaum, 2009, 333–4) That is, the only way that Rawls's theory could address the exclusion of people with disabilities is by foregoing its basic assumption that the parties must be roughly equal.

Furthermore, the aim of the social contract would need to be reformulated so that it is no longer for roughly equal individuals to try to find a fair way of ordering society such that they are all benefited. If the claims of individuals with disabilities are to be treated more justly, the "negotiations" will have to reflect that some claims (e.g., restructuring buildings to be more accessible to people with physical disabilities) will deserve to be met even though they will not benefit all or most others, i.e., people without disabilities. They will simply result in the conditions of some being raised to a level that better reflects their equal moral standing with others in society.

2.5   Taboo topics in Rawls's theory

In addition to the worries we have seen about who is not represented in Rawls's theory, Gutmann and Thompson also object that his theory is too restrictive in another sense. They argue that it discourages certain topics from being debated in the political sphere. Gutmann and Thompson argue that Rawls's commitment to an overlapping consensus as the basis for political justification results in the exclusion of topics that are too controversial or divisive, or that will be likely to throw into question citizens' acceptance of basic institutions. As Gutmann and Thompson (2004, 198n38) say, "the aim of a political conception of justice, on Rawls's account, is to create an overlapping consen-

sus and thereby decrease political controversy." In Rawls's theory, political justification rests on individuals' agreement about and acceptance of the institutions. However, as a result, the aim of the theory becomes to maintain that consensus.

Because its priority is maintaining a consensus about the institutions, Rawls's theory seems to discourage debate about controversial issues that are likely to be divisive, or that will call into question the legitimacy of the basic institutions in society. For, raising them could threaten the stability of the democracy itself by undermining the consensus. This leads to Gutmann and Thompson's charge that Rawls's theory justifies a sort of conservatism about which issues should be brought into the political spotlight for debate. Also, for the same reasons that controversial issues are to be kept out of the sphere of debate, challenges to the authority of fundamental institutions are also discouraged by the theory.

Furthermore, Gutmann and Thompson find that Rawls's commitment to maintaining the overlapping consensus results in unacceptable constraints on the way that citizens are to advance their reasons. As they describe Rawls's position, "Comprehensive moral theories contribute constructively to politics only to the extent that they serve as a source of common principles."(Gutmann and Thompson, 2004, 93) Similar to Cohen's finding (§2.1), they argue that in Rawls's theory, citizens are only supposed to advance reasons that follow from principles that would be accepted by all, or that would advance those principles.

Gutmann and Thompson object that this wrongly prevents people from advancing their deeply held values and beliefs in the public political sphere.

They argue that, "Because we should agree on how to be morally governed in our political behaviour, even when we morally disagree on fundamental political issues, a public philosophy should be more comprehensive than Rawls suggests."(Gutmann and Thompson, 2004, 93) Since the decisions that the government makes stand to affect our own and others' freedom to act on our conceptions of the good, and since democratic government's decisions are (supposed to) take into account our own and others' views about what it should do, we should be allowed to bring those moral reasons into the public sphere. For, not only do individuals' reasons based on their own conceptions of the good sometimes change other people's minds about political issues, but also, allowing people to argue from these reasons shows individuals' respect for each other even as they continue to disagree with one another.(Gutmann and Thompson, 2004, 93)

Iris Marion Young and Philip Pettit also object to the constraints of Rawls's theory, specifically on what sorts of liberties are worthy of protection by the state. Pettit charges Rawls with holding a conception of liberties as the right to non-interference. Pettit writes: "John Rawls (1971:302) manifests a concern for liberty as non-interference, for example, when he writes: 'liberty can be restricted only for the sake of liberty.'"(Pettit, 1999, 50,111) Pettit identifies the central aim of Rawls's theory as to restrict individuals' freedom as little as possible. And, to the extent that individuals' freedoms do have to be impinged upon, that can only be justified by appeal to the liberty of another.

Pettit objects that the liberal tradition of focussing on non-interference misses other important rights that his concept of non-domination captures, such as not being exposed to the arbitrary interference of others – by either

other individuals or the state.(Pettit, 1999, 52) Even if the state ensures that citizens' freedom is impinged upon as little as possible, it is no less important for citizens not to live under the *threat* of arbitrary interference by others (including the state) in their lives.

Young advances a related objection to what she refers to as the distributive paradigm, according to which Rawls develops his theory. Young objects to the exclusive focus of the distributive paradigm on the equitable *distribution* of the traditional basic liberties, e.g., freedom of expression, consciousness, etc. Young's concern is that this misses other important aspects of injustice in societies, namely: "decisionmaking procedures, division of labor, and culture."(Young, 1990, 39) Focussing on the "distribution" of the basic liberties misses procedural injustice, as well as the possibility that even though institutions seem to be well-structured, they can have unjust consequences because of other factors at work that determine their outcomes as well.

The inequitable distribution of the basic liberties only captures part of the injustice that some groups suffer from in modern liberal democracies. Another no less important source of injustice is that the design of political, economic, and social institutions result in the nearly insurmountable barriers to participation for marginalized groups in society. In Pettit's terms, they are subject to domination as a result of the structure of these institutions, i.e., they are subject to the arbitrary exercise of power by others in ways that they ought not to be.

Theories such as that of Rawls, which are built on the distributive paradigm, tend to focus our attention simply on whether the institutions are structured such that they do not discriminate against any particular social group. Young

argues that as a result, questions of how the basic structure contributes to and perpetuates the inequitable distribution of power are overlooked by these theories. And, as Young summarizes her objection, "Without a structural understanding of power and domination as processes rather than patterns of distribution, the existence and nature of domination and oppression in these societies cannot be identified."(Young, 1990, 33)

Young argues that theorists need to work within new paradigms that focus more attention on how the processes in traditional institutions, and their interactions with existing social circumstances and processes, contribute to the patterns of injustice we see. Rawls's theory leads us away from asking important questions about the role of political institutions themselves as processes that may perpetuate injustice. It does so in virtue of implicitly accepting the current structure, in spite of evidence that it contributes to ongoing oppression.

2.6 Conclusion

In this chapter, I have presented some of the major criticisms that have been advanced against Rawls's theory, and which motivate Gutmann and Thompson to develop their account of deliberative democracy as they do. As we saw, critics' interpretations of Rawls's theory has him neglecting the importance of giving people an actual opportunity to participate themselves in decision-making that significantly affects them, according to principles typically associated with deliberative democracy, e.g., exchanging impartial and non-self-interested reasons in a fair process that other stakeholders could accept.

According to these views of Rawls's theory, it allows typically marginalized

groups to continue to be neglected in political decisions, such as people with cognitive disabilities, or other family members besides the heads of households. Furthermore, Rawls's theory discourages institutional reform, and violates the principle of democracy by discouraging citizens from debating issues in political forums, if doing so might threaten the stability of the politico-legal structure. Finally, (if he rejects Cohen's view that he is deliberative democratist) his theory commits him to allowing self-interested and group-based bargaining, which Gutmann and Thompson argue conflicts with the principle of equality.

In the next chapter, I will present Gutmann and Thompson's theory, which they develop in response to these problems with standard liberal democratic theories and the practices built on them.

Chapter 3

Deliberative democracy in theory

3.1 Introduction

For Gutmann and Thompson, the driving idea behind deliberative democracy is that, "when citizens deliberate in democratic politics, they express and respect their status as political equals even as they continue to disagree about important matters of public policy."(Gutmann and Thompson, 1996, 18) Gutmann and Thompson recognize and accept that citizens rarely come to agreement about political issues. They do not hold that deliberative democracy ought to strive for an ideal of consensus to resolve particular political decisions. Rather, the aim of deliberative democracy is to enable citizens to come to terms with their disagreement in a way that treats them all with the equal respect that they deserve, according to the tenets of democracy.

However, Gutmann and Thompson (2004, 27) do hold that citizens should all be willing to agree that, "Finding fair terms of cooperation among free and equal persons is a common good for both individuals and society as a whole."

Thus, their theory is meant to provide a principled way to achieve the goals of democracy in this sense, i.e., of protecting citizens' basic liberties, including the opportunity to participate in political decision-making that affects them, given their moral disagreement with one another that affects their views in politics. In this chapter, I will outline the principles that they argue best fulfil the principles of democracy, by drawing from their two books, *Democracy and Disagreement* and *Why Deliberative Democracy?*

3.1.1 The aims of deliberative democracy

In 1996, Gutmann and Thompson published their first book-length treatment of deliberative democracy, *Democracy and Disagreement.* There, the theory is presented primarily as a response to the challenge of how to deal with the conflict that arises about political issues as a result of citizens' conflicting moral commitments. A particular worry that the book is meant to address is that in the face of political disagreement, citizens increasingly seem to either simply neglect each others' moral claims, or respond to them with contempt.(Gutmann and Thompson, 1996, 12) Gutmann and Thompson locate the source of this worry in the shortage of three features in public discourse: reciprocity, publicity, and accountability.(Gutmann and Thompson, 1996, 14–5) In §3.1.4, I will outline the principles – including these three – that Gutmann and Thompson advance to improve democratic decision-making in a way that is responsive to this problem they identify with contemporary politics.

Gutmann and Thompson (1996) argue that there should be more opportunities in politics to address disagreement through respectful public discourse between citizens and political officials. To be clear, Gutmann and Thompson

allow that addressing political issues in majoritarian representative and constitutionalist institutions may be legitimate. However, the legitimacy of these institutions depends on how well-supported they are once they are reviewed by the people in deliberative democratic institutions.

In 2004, Gutmann and Thompson published their second book, *Why Deliberative Democracy?* In it, they respond to a different but related problem for modern liberal democracies. They instead emphasize how their theory may resolve the problem of legitimate decision-making in contemporary politics. That is, they address the problem of how institutions should create legitimate laws and policies about divisive issues facing many democratic societies, such as health care.

One of the issues that Gutmann and Thompson address is that in many modern liberal democracies there are too few resources for everyone to get what they may feel is their fair share. Although citizens may never reach agreement about how much each person should get, as Gutmann and Thompson argue, "In the face of scarcity, deliberation can help those who do not get what they want, or even what they need, to come to accept the legitimacy of a decision."(Gutmann and Thompson, 2004, 10) Individuals may deeply disagree about political decisions, especially those that significantly affect their interests. But Gutmann and Thompson's view is that even those who do not get what they want or need may be more willing to accept decisions made by political institutions as legitimate, if the institutions strive to make their decisions in a way that fulfils Gutmann and Thompson's principles.

Gutmann and Thompson argue that compared to other theories, including that of Rawls, their principles (see §3.1.4) provide a superior strategy for

addressing disagreement, and in a way that facilitates the goal of making decisions that citizens will be willing to accept even if they continue to disagree. Contrary to Rawls's theory, theirs may be used to address any subject of disagreement, no matter how fundamental the question, or how controversial. Recall that earlier (see §2.5), Gutmann and Thompson objected that Rawls's theory privileged political stability over citizens' freedom to challenge the legitimacy of the basic structure, or to debate deeply controversial issues. Not only may their principles be used to address current controversial issues, they may also illuminate where past decisions have gone wrong, even in regards to the basic structure. In the next section, I will outline Gutmann and Thompson's account of the justification and legitimacy they advance for modern liberal democracies.

3.1.2 Political justification

In the opening pages of *Why Deliberative democracy?*, Gutmann and Thompson make the justificatory role of deliberative democracy explicit:

> Deliberative democracy makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process.(Gutmann and Thompson, 2004, 3)

As I mentioned earlier (§2.6), Gutmann and Thompson allow that justified political decisions may be made using non-deliberative democratic processes, such as bargaining. However, for any political decision, including which process(es) to use to make a decision, the decision is only justified insofar as it is reviewed in a process that fulfils the principles of deliberative democracy.

Or, a deliberative democratic process may be used retrospectively to review a decision that has already been made in some other process, such as decisions about which electoral system to use, or the structure of legislatures. So, for instance, a policy that results from bargaining may be justified, but only if a deliberative democratic process is used to choose or review the choice to accept bargaining as a legitimate way to settle an issue.

For Gutmann and Thompson, justifying political decisions to citizens rests on doing so in a process that is in accordance with the principles of deliberative democracy. This raises the question of how to further specify that process. In response, say Gutmann and Thompson,

> Public policies are justifiable insofar as they satisfy the principles that constitute both the content and the conditions of deliberative democracy (e.g., publicity, respectfulness, equality), according to the best understanding of the meaning and implications of each that citizens can achieve at any particular time.(Gutmann and Thompson, 1996, 229)

It is important to note that according to this passage, deliberative democracy is not merely one way among many to reach justified political decisions. In saying that public policies are justifiable insofar as they satisfy their principles, Gutmann and Thompson imply that fulfilling the principles of deliberative democracy at some point in the decision-making process is a *necessary* condition for the justification of political decisions.

Three further points come through in this statement about the justification for political decision-making by Gutmann and Thompson. First, they (rightly, I think) conceive of justification for political decisions as a matter of degree. This implies that it is not, by contrast, a dichotomous matter of being justified or not. Nor is it obviously a threshold concept, whereby for a decision to be

just, the principles must be fulfilled to a certain degree. Perhaps a threshold may be chosen for pragmatic reasons, to determine what decision ought to be made. But the justification for doing will also be a matter of disagreement, and must be determined in a deliberative democratic process if it is to be just.

Second, their theory recognizes the fallibility of current judgements about how best to fulfil the principles of liberal democracy. However, that does not undermine the possibility of making justified decisions. The best we can do, and what we ought to do, is continue to try to figure out both how best to resolve political issues in the face of deep disagreement in general, and given the implications that general answer holds for how we ought to determine any particular case before us.

Third, whether a policy-making procedure fulfils the principles of deliberative democracy is itself to be determined by our best judgements about that. If there is disagreement about the extent to which decisions meet the principles of deliberative democracy among the general citizenry, that is a matter to be resolved through further public deliberation in a process that best approximates the understanding the citizenry has of the principles of deliberative democracy.

3.1.3 The methodology of deliberative democracy

In the following passage, Gutmann and Thompson state what sets their theory apart from others, including Rawls's:

> Deliberative democracy, in contrast, admits reasons and principles that are suitable for actual societies, which all still suffer from discrimination and other kinds of injustice. Actual deliberation has

an important advantage over hypothetical agreement: it encourages citizens to face up to their actual problems by listening to one another's moral claims rather than concluding (on the basis of only a thought experiment) that their fellow citizens would agree with them on all matters of justice if they were all living in an ideal society.(Gutmann and Thompson, 1996, 16)

Recall that in §2.2, the objection was raised that Rawls's idealizations compromised the applicability of his theory to actual societies. Because Gutmann and Thompson's theory is grounded in actual discourse in actual societies, it avoids this problem.

Two other epistemic advantages result from Gutmann and Thompson's insistence on actual public discourse about political issues. First, engaging in actual public discourse may correct people's beliefs that their positions on political issues are uncontroversial. As discussed in the previous chapter, unless people engage in dialogue with others, and discuss their values and beliefs with others, they may mistakenly believe that few if any others disagree with them. Discussing political issues with others, then, may show people that there are those who object to their views.

The other epistemic advantage of actual public discourse is that the objections others have may bring to people's attention mistakes or problems in their reasoning. In other words, they may realize that others disagree for reasons that change a person's own view about the issue at hand. These mistakes may be errors in their reasoning process, such as making a bad inference that does not follow from the facts that they believe are true. Or actual discourse may strengthen people's positions by exposing the uncertainty or falsity of beliefs that underlie their positions.

Because of its ability to improve the epistemic grounds for decision-making,

Gutmann and Thompson argue that beliefs about citizens' acceptance of political decisions is only justified once that belief has been tested in a process that fulfils their deliberative democratic principles. Imagining oneself with interlocutors will not do as a substitute for actual dialogue with others, to determine whether citizens are satisfied with current institutions. For, all too often, people wrongly assume that others think as they do about things, and they fail to see the errors in their reasoning that discourse with others could bring to light.

Deliberative democracy is committed to making political decisions through deliberative public discussion wherever possible. However, because their theory rests most fundamentally on public deliberation to make and justify political decisions, they acknowledge that they face the following question: "How is it possible for a theory to propose substantive principles to assess laws while regarding citizens as the final moral judges of the laws they make?"(Gutmann and Thompson, 2004, 111) That is, their commitment to public deliberation to make and justify laws raises the question: how should we settle disagreement between citizens about the principles of deliberation, their implications for institutional design, or a particular political decision that results from a deliberative democratic process?

Gutmann and Thompson respond that the principles of deliberative democracy "are morally and politically provisional in ways that leave them open to challenge, and therefore more amenable to democratic discretion."(Gutmann and Thompson, 2004, 111) They recognize that there will be disagreement about what the principles of deliberative democracy mean in theory and in practice. But the point of their theory is to bring all such disagreement to

the fore, and to emphasize that citizens deserve an opportunity to voice their deliberative views about all levels of politics. Not only should they be able to voice their views on particular issues, such as abortion or public health insurance, they should also have a say in how citizens should participate in politics and how institutions should be structured.

Gutmann and Thompson describe their account as a "second-order theory," as opposed to a first-order theory. First-order theories, according to Gutmann and Thompson (2004, 126), are those that "seek to resolve moral disagreement by rejecting alternative theories or principles with which they conflict." The principles of a first-order theory are meant to resolve political conflict by showing that it is better than any of the other alternatives. A first-order theory may be judged as better or worse according to how well it resolves the particular problem with which we are grappling, as well as how well it is able to generalize over a variety of cases, or to be extended to other issues we may face.

Gutmann and Thompson's theory, on the other hand, is a second-order theory. As they describe it, their theory "can be held consistently without rejecting any of a wide range of moral principles expressed by first-order theories."(Gutmann and Thompson, 2004, 126) Their theory is meant to provide a framework for evaluating reasons that people have for holding particular views about political issues, even though individuals may disagree about their commitments at the first-order level.

Deliberative democracy thereby respects the depths to which citizens may disagree based on their moral differences. A political theory that is suitable for a liberal democracy should not reject the principles that some people may

hold as right for resolving political issues. Deliberative democracy respects this pluralism since people may bring their disagreements about this – i.e., disagreement about first-order theories – to political discussions. Deliberative democracy seems to have the advantage over Rawls's theory as it was outlined in the last chapter then. Critics, including Gutmann and Thompson, charged Rawls's theory with unjustifiedly excluding or imposing certain ways of decision-making, such as self-interested reasoning, or reasoning based on the common good. According to Gutmann and Thompson, all of this is open for deliberative discussion among citizens who are to be treated as equals.

As a result of the room that deliberative democracy leaves for disagreement about first-order theories, determining what deliberative democracy implies for any particular case will not be a matter of straightforward application of the principles. The principles of deliberative democracy (which follow in the next section) are not meant to provide an algorithm for resolving issues. Deliberative democracy is meant to be fundamentally flexible, and based on what best meets the demands of the particular society.

Which principles should be used or emphasized is to be determined by those who are significantly involved and affected by the decision (who I will refer to as "stakeholders"). In some cases, they may rely more heavily on some principles, and not draw on others much if at all. In each case, the parties involved are to engage in the reason-giving process with others, and to evaluate each reason without rejecting any of them out of hand. In the remainder of this chapter, I will present the principles that are fundamentally essential to deliberative democracy, according to Gutmann and Thompson.

3.1.4 The principles of deliberative democracy

Invoking the requirement that representatives publicly justify proposed laws or policies raises the question of what form such justification ought to take in modern democracies. Gutmann and Thompson offer the following summary of the principles that, to the extent they are fulfilled, will serve to justify government decisions:

> ...we can define deliberative democracy as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.(Gutmann and Thompson, 2004, 7)

In other words, fulfiling the principles of deliberative democracy requires that during actual discussions, individuals involved in the process must: treat each other respectfully, offer reasons that are moral (i.e., not exclusively self-interested), and ultimately, at some point, decide on an action to be taken, but always remain open to revisiting and revising decisions in future.

However, Gutmann and Thompson argue that the goal of their theory is fulfiling substantive principles as well, e.g., basic opportunity, fair opportunity, and the basic liberty of individuals. They acknowledge that this raises a difficulty for their theory, in that these principles are contested among individuals. About this challenge, Gutmann and Thompson (1996, 229) say, "each element of the content of deliberation – basic liberty, basic opportunity, and fair opportunity – depends on deliberative procedures to advance a common understanding of its substance." To the extent that there is disagreement about these fundamental principles, that is also to be settled through delibera-

tive democratic forums, rather than trying to impose one's own understanding of them on others.

Equipped with this understanding of the nature of deliberative democratic principles, and the role of those principles in justifying political decisions, I will next outline the principles of Gutmann and Thompson's theory of deliberative democracy. In the following, they argue for their conception of the principles that they regard as essential to deliberative democracy.

The principle of reciprocity

According to Gutmann and Thompson, the deliberative process for justifying political decisions in a liberal democratic society is constrained, first and foremost, by the principle of reciprocity. As they describe it, the principle of reciprocity is the general rule that "a citizen offers reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others."(Gutmann and Thompson, 1996, 53) Whether citizens' reasons are acceptable depends on the views of others who are similarly disposed to engage in public deliberation.

To elucidate the role of reciprocity as a constraint on the process of deliberative democracy, Gutmann and Thompson draw an analogy between its role and the replicability requirement they identify in science.(Gutmann and Thompson, 2004, 133–4) As they put the point,

> Reciprocity is to justice in political ethics what replication is to truth in science. A finding of truth in science requires replicability, which calls for public demonstration. A finding of justice in political ethics requires reciprocity, which calls for public deliberation.(Gutmann and Thompson, 2004, 133)

In science, being able to replicate the results of a study or experiment publicly is a necessary (though not sufficient) condition for justifying an hypothesis as true. Just so in politics, argue Gutmann and Thompson. Establishing a political decision as justified depends on whether it can withstand public scrutiny by stakeholders.

Another similarity between science and politics is that just as in science, there are some truths that we no longer need to revisit. In science, we no longer need to replicate experimental results once they have been "amply confirmed." Just so in politics, where we no longer need to deliberate over entitlements such as that all citizens have equal protection under the law. For this has been established already, through extensive public deliberation.(Gutmann and Thompson, 2004, 133–4)

The point of providing publicly accessible reasons for our beliefs to others is that although our beliefs may well be right or true, they aren't justified as such until they undergo public scrutiny under conditions that meet the principle of reciprocity. For, subjecting one's evidence and reasoning to public scrutiny in science is meant to give others an opportunity to bring to light countervailing evidence or objections to the reasoning of the scientist. It ensures that the claim is sufficiently robust to be justified as true.[1]

According to Gutmann and Thompson, the principle of reciprocity does not entail that citizens must deliberate over every decision that affects them. Their theory permits that, for example, representative forms of government may be justified, and may make justified decisions. Allowing someone else,

---

[1] I am grateful to Robert Batterman for introducing me to the concept of robustness as a standard for assessing truth.

such as an elected representative, to make a political decision on citizens'
behalf may fulfil the requirement of reciprocity if decision-makers take into
account citizens' views, not only about a particular issue at hand, but also,
about how decisions ought to be made. The process of public deliberation,
in which the citizens who are affected exchange reasons with each other and
decision-makers, confers legitimacy on the process in virtue of its publicity and
engagement with stakeholders.

As I argued earlier, this requirement may serve three aims. First, it may
serve as an epistemic checkpoint for the representative, that she understands
her constituents' interests. Second, it may serve to show constituents the
moral respect they deserve as political equals. And third, it highlights the
requirement that processes should be designed so that representatives continue
to communicate with their constituents.

Gutmann and Thompson acknowledge that merely having a disposition
to take seriously others' values and beliefs will not enable us to resolve all
disagreements. However, the best way to proceed in the face of political dis-
agreement is to continue to exchange reasons with one another in accordance
with the principles of deliberative democracy. That is, reasons should continue
to be given for one's own position that could reasonably be accepted by others,
who are similarly disposed to offer reasons that are acceptable to others than
themselves, in a process that must have some conclusion. And any conclusion
must also be open to revision in the light of new considerations raised by those
affected by the decision.

Gutmann and Thompson argue for the superiority of actual discussion
about moral disagreements versus hypothetical reasoning on the following

grounds, as well:

> Political theories that cope with irreconcilable disagreement by a (hypothetical) social agreement to disagree on these questions – letting each individual decide – seem increasingly evasive. They offer a false impartiality in place of social recognition of the persistence of fundamental conflicts of value in our society.(Gutmann and Thompson, 2004, 78)

As I stated in the introduction of the previous chapter, social contract theories try to find alternatives that the parties could generally accept. One way of achieving that aim is to find a solution that as much as possible, allows people to "agree to disagree". For, it only builds into the contract that to which the parties would agree.

But, as Gutmann and Thompson charge, this runs the risk of making it appear as though the decision that has been reached is "neutral" because it seems to favour no particular position at all on the issue. Gutmann and Thompson object that this perpetuates a false impression that a justified outcome has been reached because a resolution has been reached with which all are able to agree.[2] Instead, however, the controversy has merely been effectively removed from the political agenda, but the disagreement has not actually been resolved.

---

[2]One example of this may be the ruling in France to prohibit Muslim girls from wearing headscarves to public school. One principled reason that has been given for the policy is that prohibiting visible symbols of religious commitments serves to maintain secularism in public schools. However, the move has also been publicly defended on grounds that the headscarves are symbolic of the oppressive role that women have in their community, and so the prohibition is justified in order to promote the equality of women. The first principle against visible symbols of one's religious commitments seems to apply equally to everyone, and so may appear as though it is impartial. But the second principle seems to target one particular group and restrict its freedoms. E.g., it would seem to allow students to wear crucifixes, so long as they were discreet, which seems unfair. Thus, although it appears as though no one has reason to reject the policy, at least one group – *viz.*, Muslim girls who are old enough to choose to wear headscarves, and argue that doing so is not only a symbol of their religious commitment, but also a symbol of their autonomous rejection of Western values – may have good reason for rejecting the rule.

Gutmann and Thompson argue that allowing moral disagreement into public discussions provides citizens with an opportunity to "explore the full implications of their arguments" for the particular moral view they hold on a political issue.(Gutmann and Thompson, 2004, 78) This is important because it may improve the grounds of our arguments, by improving stakeholders' understandings about how their positions may affect others. And it may also change the attitudes and values that ground our and others' initial positions. The best hope we have of truly resolving disagreement in a way that results in politically justified decisions is through the respectful exchange of moral reasons for our differences, in a process that meets the principle of reciprocity and the other principles of deliberative democracy.

Respectful reasons

Besides being part of a justificatory standard for the process of reason-giving, the principle of reciprocity refers to a disposition that is to be adopted by citizens in the process of exchanging reasons. As Gutmann and Thompson describe it, the principle of mutual respect "requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."(Gutmann and Thompson, 2004, 79) So, the parties involved in the deliberation must be willing to seriously engage with and consider the reasons that others have for their conflicting positions, insofar as others are willing to do the same.

Moral reasons

Another constraint meant to serve the principle of reciprocity is that reasons must be moral. As Gutmann and Thompson put it, the standard for whether reasons are moral depends on whether they are generalizable, so that "moral arguments apply to everyone who is similarly situated in morally relevant respects."(Gutmann and Thompson, 2004, 147) Reasons should only justify one's views if their acceptance does not depend on the unfair advantage of those who are advancing them.

Gutmann and Thompson recognize that this raises the question, "what are the morally relevant respects in which people are similarly situated?"(Gutmann and Thompson, 2004, 148) For example, suppose that someone (Bob) disagrees with another person (Anne) about who should be provided with public drug insurance, how, and under what circumstances. Bob believes that, at a minimum, the government should ensure that all recipients of disability pensions (a category that includes himself) are provided with public drug insurance programme. Anne believes that narrower constraints should apply, such as a maximum income threshold, beyond which recipients of disability wouuld not be provided with public drug insurance. In part, Anne's position is motivated by concerns about the burden that Bob's more inclusive programme would place on those (including her), who sustain the public drug insurance programme through their taxes. Bob's position is motivated by his experience that those who rely on disability pensions for their income are seriously burdened by their health care costs, which do not affect the amount they receive from the government.

The problem that the criterion of moral reasons raises is: how do we decide

whether to give either of these claims moral weight, or dismiss either or both of them as merely self-interested – and hence, non-moral – arguments? Gutmann and Thompson argue that when the issue of whether a reason is moral is in dispute, it is better to subject *that* issue to public discussion and deliberation in accordance with the principles of deliberative democracy, rather than uncritically allow self-interested reasons into the decision-making process.

The requirement that reasons be moral effectively excludes reasons "that are intended to show that a policy is the best that all parties to the decision, given their relative decision-making power, can expect to achieve."(Gutmann and Thompson, 2004, 148) So, in the example of Anne and Bob, it seems that the criterion of morality is meant to prevent Anne from successfully making her case solely because she is in a superior socioeconomic and political position. For, that would violate the condition that reasons be generalizable, or in other words, that they must be ones that someone in Bob's position could accept. It is unclear whether, if Bob and Anne were truly on equal footing, Bob would be likely to accept Anne's position, although he may well be forced to accept it in reality. Instead, to fulfil the principles of deliberative democracy, they ought to continue to reason with one another about what should be done in a way that allows them to acknowledge each other's interests and values.

Public/accessible reasons

Another principle that Gutmann and Thompson (1996) argue must be fulfilled in the service of reciprocity is publicity, i.e., that the reasons for political decisions must be made public to those who are affected by them. This principle goes hand-in-hand with the next principle to be discussed, accountability. For,

citizens will be unable to evaluate the decisions made by officials unless they know what decisions they have made and why.

It also relates to representatives' obligation to serve the interests of their constituents. Representatives are unlikely to be able to adequately determine their constituents' interests unless they have consulted with them on the issue at hand. Ascertaining constituents' views on issues seems to require that constituents have some idea of what is going on in politics.

However, while Gutmann and Thompson advance a *prima facie* duty to make reasons public, they also recognize that sometimes governments claim to have good reasons that override this duty. Thus, rather than promote these principles absolutely, Gutmann and Thompson (1996, 96) take as their main task "to locate the place of a principle of publicity in deliberative democracy to establish the basis for a presumption in favor of publicity and the authority of claims of secrecy and other values that could rebut the presumption." That is, their goal is to determine under what conditions political officials may be justified in not informing the constituency about their actions.

When political officials claim to have good reason for keeping political secrets, such as national security, say Gutmann and Thompson (1996, 105), "citizens are right to insist that the secret-keepers give an account of the reasons for the secrets, and respond to demands to limit their scope." Thus, even if secrecy about the content of such decisions is necessary, this does not justify foregoing the obligation of disclosure altogether. The government still has an obligation to offer reasons why secrecy is needed. In this way, the government remains accountable to the people significantly affected by its decision. As Gutmann and Thompson (1996, 96) say, "publicity has its moral

limits, but those limits themselves must be publicly affirmed. "

Later, in *Why Deliberative Democracy?*, Gutmann and Thompson develop the principle of publicity further, and rename it as the principle of accessibility. The principle of accessibility not only entails that reasons be made public, but that the content of these reasons must be expressed in a certain way to be considered accessible as well. Gutmann and Thompson use the example of President Bush's decision to invade Iraq to demonstrate one way this principle constrains reason-giving. They point out that several times, President Bush claimed that "God was on his side," with respect to the war in Iraq. However, they argue that the principle of accessibility rules out appeals to God's support as justification for Bush's decision, since it fails to be a reason that any member of the general public could be expected to assess for its legitimacy.(Gutmann and Thompson, 2004, 4)

Also, the requirement that constituents must be able to assess reasons places a burden on experts involved in the decision-making process. The reasons that experts offer must be cast in terms that those to whom they are directed can understand and evaluate. For, as Gutmann and Thompson point out, "a deliberative justification does not even get off the ground if those to whom it is addressed cannot understand its essential content."(Gutmann and Thompson, 2004, 4) It is not enough merely to state one's reasons to other stakeholders; those reasons must be comprehensible for them to fulfil the principle of accessibility.

Furthermore, Gutmann and Thompson require that citizens must be given good reasons to accept the authority of experts who inform political decisions. About the justification of relying on experts in political decision-making, Gut-

mann and Thompson (2004, 5) say:

> Citizens are justified in relying on experts if they describe the basis for the conclusions in ways that citizens can understand; and if the citizens have some independent basis for believing the experts to be trustworthy (such as a past record of reliable judgments, or a decision-making structure that contains checks and balances by experts who have reason to exercise critical scrutiny over one another).

While this standard leaves much to be said about the degree and extent to which accepting authority will be justified, this room for disagreement should be seen as a virtue rather than a shortcoming, according to Gutmann and Thompson. For, if there is disagreement about the weight that should be given to the word of authorities, their theory makes room for settling this issue by public deliberation.

The principle of accountability

The previous requirement, that reasons can be understood by those to whom they are addressed, is important in part because it serves the principle of accountability. The centrality of this principle is perhaps one of the most appealing features of deliberative democracy for many. That is, an increasing number of citizens seem to be concerned about the apparent lack of accountability on the part of the government to the people.

According to Gutmann and Thompson, the principle of accountability requires that citizens be accountable to each other and officials, and officials are likewise accountable to each other and their citizens. However, they are well aware that this "universal accountability is obviously difficult to realize in practice," and that "it is also problematic in theory: it does not fit

comfortably with political representation, a necessary and desirable process in deliberative democracy."(Gutmann and Thompson, 1996, 128) The principle of accountability requires that all those whose interests are at stake in particular decisions have an opportunity to evaluate the decisions that are made by representatives on their behalf.

However, one reason why people accept representative institutions in politics is because they would rather leave some decisions in the hands of another, e.g., in the interests of time, or they feel that someone else is better situated to make some decisions than they themselves are. But Gutmann and Thompson's theory seems to require that constituents must be able to evaluate a representative's decision. And, in order to evaluate the representative's decision, it seems as though a constituent must be able to determine what she herself would have chosen. Thus, it seems as though fulfiling the requirements of deliberative democracy results in losing the benefits of representative decision-making processes.

However, Gutmann and Thompson identify two questions that are raised on the heels of this recommendation, "one concerning who gives the reasons, and the other concerning to whom the reasons should be given."(Gutmann and Thompson, 1996, 128) Gutmann and Thompson answer that a strength of deliberative democracy is its commitment to subjecting all political decisions, including how best to represent conflicting interests, to a process of public deliberation. For instance, a proposed improvement on the process concerning representation that continues to be debated in the U.S. is limiting the amount of money that can be spent on campaigning. Deliberative democracy would seem to require that this issue be subjected to public discussion that would

include all citizens, given its significant impact on everyone.

As Gutmann and Thompson put it, "deliberative democracy does not specify a single form of representation. It searches for modes of representation that support the give-and-take of serious and sustained moral argument with legislative bodies, between legislators and the citizens, and among the citizens themselves."(Gutmann and Thompson, 1996, 131) Thus, their theory allows for flexibility in developing processes for determining what forms representation should take. But the point seems to be that the forms that would be agreed to by constituents would result in a much more rigourous standard of accountability than is currently the case.

For example, Gutmann and Thompson consider the case of a politician whose own personal commitments about whether to support legalizing abortions conflict with those of many of his constituents. Rather than recommending a determinate decision about whether the politician should follow his constituents' commitments or his own, Gutmann and Thompson argue that deliberative democracy emphasizes the important aspects of the dilemma that require consideration, and a process for attempting to resolve it. For example, to whom does the elected official owe reasons – only citizens in his state, or in the rest of the U.S. as well, and is there adequate opportunity in the current political structure to deliberate with citizens about the conflict?(Gutmann and Thompson, 1996, 130)

In this way, the citizens and the elected official may work through the conflict in accordance with the principles of deliberative democracy. The elected official may publicize his reasons for holding the view that he does, while still recognizing the competing claims of other stakeholders. As Gutmann and

Thompson describe these sorts of processes, "Voters could listen to their reasons, present their own, and hold officials accountable at the next election, if necessary choosing new representatives to reverse the decision."(Gutmann and Thompson, 1996, 142)

Gutmann and Thompson discuss their accountability principle in the international context as well. In the example they consider, one group of city officials in the U.S. is considering whether to send its toxic waste to the countries of Bangladesh and South Africa. In this case, the U.S. representatives are in no way legally accountable to people whose interests stand to be greatly affected. However, the people who stand to be greatly affected in Bangladesh and South Africa are what Gutmann and Thompson refer to as "moral constituents" of the U.S. officials.

Gutmann and Thompson acknowledge that representatives' obligations to their own constituents will differ from their obligations to others. Furthermore, as they say, "deliberative democracy does not guarantee that the claims of foreigners will receive the attention they deserve. Nor does it provide any formula for determining how to balance the claims of our fellow citizens against those of foreigners when they come into conflict."(Gutmann and Thompson, 1996, 150) The theory does not guarantee that deliberation will be able to determine the right answer about what is owed to non-U.S. citizens. However, they argue that those who live in the proposed destination city ought to have their interests and concerns heard in public deliberation as well, in accordance with the principle of reciprocity.

Gutmann and Thompson point out that often countries that are approached to make agreements with other countries are not democracies, in which the

people who will be significantly affected will have an opportunity to have their interests heard. Or, even if they are, often those who will be affected have not been informed adequately, e.g., about the risks of being exposed to hazardous toxins, or given the opportunity to accept their representatives' decision on their behalf as truly representative. They argue that when political officials know that some stakeholders' interests will not be taken into account adequately through democratic mechanisms in their own country, political officials may have a moral obligation to take the interests of non-constituent stakeholders into account in their decision-making. For instance, in this case, the U.S. officials cannot rely on the South African government's agreement to take the toxic waste as adequate justification for imposing it on the citizens of Bangladesh.(Gutmann and Thompson, 1996, 149)

Gutmann and Thompson argue that making international justice as deliberative as possible serves to "inform representatives about the claims of foreigners," and also "to educate citizens about their [the Bangladeshi and South Africans'] circumstances."(Gutmann and Thompson, 1996, 151) This accords with one of the functions that Gutmann and Thompson advance for their theory in the domestic context, to educate others about the moral reasons that citizens have for their political views. In this case, considering the positions of stakeholders in other countries may serve to educate political officials about the likely consequences of their decisions.

Also, Gutmann and Thompson emphasize two reasons for requiring "horizontal justification", which is owed between moral constituents. One reason is that, as Gutmann and Thompson mentioned in their defence of reciprocity, and as Rawls seems to agree, it is morally required by citizens. But, also, jus-

tification between citizens is important because, as Gutmann and Thompson (1996, 151) point out, "the more closely the perspectives of electoral constituents track those of moral constituents, the more nearly the deliberative principle of accountability can be realized." If electoral constituents are sympathetic to reasons grounded in the interests of the non-electoral, though moral, constituents, then representatives will be more empowered to take the interests of non-electoral constituents into account.

Binding decisions

Another requirement for political decision-making processes is that at some point deliberation must end, and a decision must be made and implemented. As Gutmann and Thompson point out, deliberative democracy theory may raise the concern that its principles could impel us to continue talking indefinitely, in an effort to work through disagreement. For them, the requirement that a binding decision be made follows from the intended function of the exercise:

> In this respect the deliberative process is not like a talk show or an academic seminar. The participants do not argue for argument's sake; they do not even argue for truth's sake (although the truthfulness of their arguments is a deliberative virtue because it is a necessary aim in justifying their decision). They intend their discussion to influence a decision the government will make, or a process that will affect how future decisions are to be made. At some point, the deliberation temporarily ceases, and the leaders make a decision.(Gutmann and Thompson, 2004, 5)

The reason for employing a deliberative democratic process is essentially to try to determine what to do about a political issue about which citizens disagree.

Thus, it follows that the process must have implications for decision-making, which also presupposes that a decision will be made at some point.[3]

To illustrate the principle that the deliberative process must terminate with a binding decision, Gutmann and Thompson return to the U.S. government's decision to invade Iraq. Some people may claim that the decision was unjustified because the government was still facing heavy objections from critics at the time of its decision. They may argue that the government had an obligation to delay making a decision until more public deliberation took place, which raises the question of when public deliberation ought to have ended.

Gutmann and Thompson (2004, 6) instead locate the controversy about this decision in concerns about "the competence or judgment of the current administration." They argue that the problem with the decision was not in the fact that the U.S. government took action in spite of the failure to achieve a greater consensus about its decision. It was not that more deliberation was needed. Rather, the government's decision was unjustified because it presented evidence that it knew to be false as the basis for its decision. Insofar as the information on which it purportedly based its decision was false, the government lost its justification for making the decision it did.

---

[3]The question of whether deliberative democracy conceptually entails that a determinate decision must be made at some point is debated among deliberative democracy theorists. It seems that a simple answer of "yes" – including in Gutmann and Thompson's case – may be ambiguous in the following sense. One may say that a decision *necessarily* results from any process, whether the decision is to take an action that departs from the status quo or not. That is, even if nothing is done on the basis of the process, arguably, a decision will have been made and enacted, i.e., not take any (new) course of action, and to continue with the status quo. It is unclear to me whether this is the view that Gutmann and Thompson mean to take, or if they mean something stronger.

The principle of revisability

The Iraq example serves to illustrate another worry that is raised by the requirement that a decision must be made. That is, some may worry that the principle that a binding decision must be made may lead to action that is too hasty. For example, decisions may be made on the basis of faulty information that given more time, would have been exposed as flawed. Also, circumstances may change, which may affect the justifiability of decisions that were at one time good ones, but now it seems should not have been taken.

Their appreciation of the fallibility of decision-makers, and the importance of circumstances to the justification of decisions, motivates Gutmann and Thompson's principle that for any political decision made in a deliberative democratic process, it must be possible to revisit it. As Gutmann and Thompson (2004, 6) put the point, "although deliberation aims at a justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future." The principle of revisability is meant to address the fallibility of decision-makers, and the possibility that the basis for decisions may significantly change.

Furthermore, the principle of revisability has pragmatically desirable consequences. Gutmann and Thompson (2004, 6–7) point out that, "those citizens and representatives who disagreed with the original decision are more likely to accept it if they believe they have a chance to reverse or modify it in the future." It is much more likely that people will accept decisions that are explicitly provisional than decisions that are presented as final.

3.2   Conclusion

To summarize, it is a process of public deliberation, in which the citizens who are affected have the opportunity to exchange reasons for their views about how decisions ought to be made, that confers legitimacy on decisions made by individuals in deliberative democratic institutions. First, the deliberative process serves as an epistemic checkpoint for the representative and constituents, that they understand each others' interests and beliefs. For, these should be the basis for political reasoning. Second, it shows constituents the moral respect they deserve as political equals. And third, it serves to better ensure that the laws that are subsequently created will have the support of the people.

Although the principles of deliberative democracy have much to recommend them, in the following chapters, I will raise a number of principled concerns with the structure of Gutmann and Thompson's theory. First, however, I will respond to the criticisms to Rawls's theory that I presented in Chapter 2. My responses to Rawls's critics are intended to make clearer why I believe that Gutmann and Thompson are wrong to hold that the fundamental goal of institutions should be to strive to fulfil the principles of deliberative democracy, as they have argued. Instead, I will argue that the goal of fulfilling Gutmann and Thompson's principles should only be adopted in order to make institutions and their decisions better justified according to Rawls's theory of political justification.

Chapter 4

A defence of political liberalism

4.1   Introduction

In Chapter 2, I presented a number of criticisms that Gutmann and Thompson, as well as others, raise against Rawls's theory. In this chapter, I will develop a Rawlsian response to those objections. The Rawlsian account of political justification I defend here will then serve as the basis for my criticisms of Gutmann and Thompson's theory, which I will advance in the following chapters. On the basis of those criticisms, I will conclude that deliberative democratic theories such as Gutmann and Thompson's must be situated *within* a Rawlsian framework. In practice, this means that deliberative democratic processes will only be legitimate to the extent that they are supported by the Rawlsian framework that I describe in this chapter. Furthermore, the decisions produced by deliberative democratic processes will only be justified insofar as they meet the Rawlsian standard of public reason that I defend here.

4.2 Internal monologue versus explicit dialogue

One of the main objections that Gutmann and Thompson make to Rawls's theory is that justification for political decisions is based on hypothetical rather than actual agreement between citizens. As I discussed in §2.1, Rawls relies on hypothetical reasoning because relying on actual public discourse to settle political disagreement has two important shortcomings. First, we cannot rely on actual public discourse because of what Gutmann and Thompson refer to as the *burdens of injustice*. The burdens of injustice are those elements of the current structure that seem clearly to be contrary to the principles of democracy. However, these elements remain in place because those who could change them are well-served by that structure, and have significant incentive not to do so.

Second, the *burdens of judgement* prevent us from relying on public discourse to determine political decisions as well.(Rawls, 2005, 54–58) These are the circumstances that lead to disagreement among reasonable people, no matter how much they discuss political issues. These include reasonable people's values and beliefs, and the meanings they ascribe to concepts involved in political issues. And they will also disagree about, e.g., what information should count as evidence for any particular position, how much weight it adds to the strength of a position, etc.

As I pointed out in my discussion of their principle of reciprocity in §3.1.4, Gutmann and Thompson draw an analogy between justifying claims about what is true in science and how to determine which decisions are justified in politics. They argue that publicly replicating experimental results in science

serves a purpose similar to publicly defending political decisions to stakeholders. In both contexts, the process of publicly defending claims in open view of others improves the justificatory basis of the decision.

In his discussion of the burdens of judgement, Rawls also contrasts the role of public discourse in the context of science with that of politics. When Rawls (2001, 35) compares the two contexts, however, he draws a somewhat different conclusion. Within science, it seems as though public discourse eventually settles controversies and disputes about the truth. But ongoing public discourse in politics rarely seems to bring the parties to agreement about what the state ought to do about political issues. If what justifies claims in science is that eventually the parties involved come to agreement, then in politics, we need an alternative standard to adjudicate between conflicting claims about what is right, for agreement in the latter context rarely obtains.

In spite of these limitations of public discourse, Rawls explicitly acknowledges its valuable role in a well-functioning democracy:

> Here I am concerned only with a well-ordered constitutional democracy [...] understood also as a deliberative democracy. The definitive idea for a deliberative democracy is the idea of deliberation itself. When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions. They suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or non-political interests.(Rawls, 1997, 772)

Clearly, Rawls recognizes the important role that public deliberation among citizens can play in maintaining the stability and order of a modern liberal democracy.

And this quote suggests that he agrees with Gutmann and Thompson about the potential advantages of public discourse. Both acknowledge that engaging in public discourse with one another gives people the opportunity to reflect on their positions on political issues in light of others' perspectives. And public debate and deliberation about their reasons and views may result in changes to citizens' own, as well as others', views about the issues under discussion.

Indeed, according to Rawls, citizens have a moral obligation to explain their own views about political issues to each other. As he says,

> [...], the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.(Rawls, 2005, 217).

A citizen has a moral obligation to offer reasons for her views about political issues to others, and to explain why she believes that others should view her position as a reasonable one to hold. A person has this obligation because if the state is making decisions in accordance with the principles of liberal democracy, citizens will each carry some amount of responsibility for the actions it takes. And these decisions will have implications for other citizens' abilities to live out their conceptions of the good. Because of their shared responsibility for the actions of the state, and because individuals in a stable and well-ordered modern liberal democracy must (as I will argue below) recognize each other as moral equals, citizens have an obligation to account to one another for their political views and the ways that they act to direct government.[1]

---

[1]I think it is noteworthy that the way Rawls has worded this implies that the duty of civility does not require that citizens defend why they hold the view they do, in its

However, the aim of Rawls's theory is not to address the question of how citizens are to fulfil this moral obligation to one another. Its central aim is to develop a principled account of how to determine how to structure political institutions, and how democratic institutions ought to make their decisions, given persistent disagreement among citizens about these questions. Following Rawls, my account is not opposed to the idea that public discourse may be used for that end, or that the principles that Gutmann and Thompson outline may be good ones. But the Rawlsian account that I defend here rejects resting the justification of political decisions on public discourse because of the burdens of injustice and judgement. It is meant to supplement their view with an account of when and in what ways aspiring to fulfil their principles may be justified.

4.3 Unattainable idealizations

In Chapter 2, two sources of concern with Rawls's theory that I presented were: the idealization of a reasonable overlapping consensus about a public political conception of justice that is egalitarian, and the idealization of general, widespread support for constitutionalism in modern liberal democracies. Rawls's critics charged that such idealizations are problematic because not only are they unrealistic, but also, the theory draws one's attention away from the important fact that reality departs from the ideal.

In response, I argue that what appear to be idealizations in Rawls's theory are in fact better thought of as conditions[2] that must be true of a society to

---

requirement that they show it to be reasonable. If they are able to show the reasonableness of their view without spelling out their own personal reasons for endorsing it, this rightly seems as though it would be fine on Rawls's account.

[2]What I am calling conditions here may be thought of as preconditions in Rawls's own

some extent in order for a modern liberal democracy to remain stable and well-ordered. To the extent that they are not, the strength of the democracy will be compromised.

Rawls describes his approach to the problem of maintaining a modern liberal democracy in the following passage:

> The point, then, is that the problem of stability is not that of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions, if necessary, as if the task were to find ways to impose that conception once we are convinced it is sound. Rather, justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizen's reason, as explained within its own framework. Only so is it an account of the legitimacy of political authority as opposed to an account of how those who hold political power can satisfy themselves, and not citizens generally, that they are acting properly.(Rawls, 2005, 38-9)[3]

The point I wish to make with this lengthy quote is a methodological one. Rawls does suppose that most individuals in a stable and well-ordered modern liberal democracy hold egalitarian conceptions of justice, and endorse a constitutional democratic regime. But he makes this move because his strategy for developing a theory of justice is to begin with the question: what conditions

---

account. 'Preconditions' seems more appropriate in his account, since he is not, I think, explicit about their necessity in a stable and well-ordered modern liberal democracy. I refer to them as 'conditions' in my analysis, however, since one of my goals is to make explicit the importance of these assumptions in his theory and in reality.

[3]Having argued in §1.3 that Rawls admits other principles than justice as fairness to comprise the standard of public reason, I will not further elucidate or defend the principles that Rawls advances. Instead, I will focus on how Rawls conceives of the role of reasonable conceptions of justice within the framework of his theory of political liberalism. I agree with Rawls's concession that other conceptions of egalitarianism than justice as fairness may support a stable and well-ordered liberal democracy, which is reflected in his theory of political liberalism, although I agree with Rawls (2005, 149-50) that justice as fairness is the best public political conception of justice for a welfare egalitarian society.

are necessary to support a stable and well-ordered modern liberal democracy? On his view, the most fundamental conditions are that a significant proportion of the population is egalitarian, and that the constitutional essentials can garner widespread support from those citizens.

Then, Rawls uses his answer to this question to build an account of political justification that is suitable for modern liberal democracies. That is, it is meant to be a theory of political justification and legitimacy that is applicable to nation-states, insofar as they are recognizable as stable and well-ordered modern liberal democracies. Countries that may be included in this category are Canada, Australia, the United Kingdom and its constituent countries.

This point provides a response to objections raised by Cohen and Gutmann and Thompson. They charged that Rawls's theory is structured so that its most fundamental aim is to protect the political structure for the sake of maintaining stability and order. However, on my view, according to political liberalism, designing institutions in the ways that Rawls's framework recommends is only justified if there is good reason to believe that the people are or would be satisfied with those institutions and the decisions likely to come out of them, *given* citizens' own conceptions of the good.[4] It is not that the state is justified in doing whatever it can to try to bring about this state of affairs; it is that this state of affairs must obtain, as a matter of fact, for the state to be legitimate.

---

[4]Later I will discuss the epistemic issue of how to know whether there is support for existing institutions, or political decisions that have been made or are under consideration. Also, in §4.5, I will defend my view that citizens have good reason to endorse a political structure that protects it from change for the sake of stability and order to some extent. These arguments are not, however, meant to show how legitimate any particular constitutional structure is, in a particular society. That remains to be determined, on the basis of empirical data about the particular society in question.

His most fundamental condition is that most of the people in the society must view each other as equals, in order for a modern liberal democracy to persist. If the state's decisions are to be determined by "the people", and if the state is also to make decisions that recognize the equality of citizens, then a significant proportion of citizens must be committed to the principle of equality. If a significant proportion of citizens do not subscribe to a principle of equality in some form, then on my view, it will be unlikely that state institutions will be able to force them to do so in a way that is democratically justified. My theory highlights that under these conditions of prevailing inegalitarianism, it will be impossible for governments to make decisions that are supported by "the people" and that also treat them as equals.

However, the bare fact that a significant proportion of the population subscribes to a principle of equality is certainly not sufficient for political officials to be able to make democratically justified decisions. Even though people may subscribe to a principle of equality, the principles of equality that individuals in modern liberal democracies hold are often substantially different from one another's. These differences are likely to lead to conflicting views about what the government ought to do about particular political issues. Thus, individuals may hold such conflicting conceptions of equality that it is impossible for the state to make decisions that are satisfactory enough to most of the population to uphold the legitimacy of politico-legal institutions. The second challenge that my Rawlsian framework identifies is that there must be prevailing support among the (predominantly egalitarian) population for a set of constitutional essentials that define the society's political institutions.

As two examples of egalitarian conceptions of justice that may conflict,

some people may subscribe to a libertarian principle of equality, which gives primacy to protecting individuals' (negative) rights to be kept free from others' interference in their lives. Others may hold a more welfarist principle of equality, which places primary importance on ensuring that all people have their basic needs met, even if this means state interference into people's private lives (in the form of taxation). If a significant proportion of the population holds these two conflicting conceptions of equality, this may pose a serious challenge for the state when it comes to making democratically justified decisions, e.g., about taxation.

The account of political justification that I am developing here does not discriminate against any of these and the many other conceptions of equality that reasonable citizens may hold. The challenge for political officials (and for my theory) is how to make decisions *given* these conflicting conceptions of equality. On my view, decisions must be made in a way that allows current citizens, as well as those in the foreseeable future, to remain satisfied[5] enough with the institutions to continue to see them as authoritative. Moreover, they must view the institutions and their decisions as authoritative *because* enough aspects of the institutions and the decisions they make resonate enough with individuals' views about what are fair terms of social cooperation for the institutions and their decisions to maintain authoritative force for their intended subjects.

Given the disagreement that will persist about political issues, institutions will necessarily make decisions about which there will always be some disagree-

---

[5]I will explain in what sense I am using the term 'satisfaction' in more detail in later sections of this chapter.

ment. But I will argue that, nonetheless, it may be possible for institutions to remain legitimate and to make justified decisions. They may do so insofar as citizens are able to remain satisfied with the institutions as they are specified by the constitutional essentials.

The people's recognition of each other as moral equals is one of the features of modern liberal democracies that I believe allows them to persist in spite of the people's disagreement about politics. When they regard each other as moral equals, citizens will be more likely to accept the government's efforts to accommodate those conflicting views. If, on the other hand, some people regard others as inferior or undeserving of consideration by the state in its decisions, then it will be much more difficult, if not impossible, for the state to make decisions that take those others' views into account and maintain the satisfaction of the people in a way that allows it to remain legitimate. That is, it will be more difficult to make decisions that are conducive to the satisfaction of a significant proportion of its citizens with the institutions over time.

4.4 Reasonable persons

Underlying the requirement of egalitarianism among a significant proportion of the population is the most basic criterion that citizens must meet in order for their satisfaction to count towards the justification for political decisions: they must be reasonable. The criterion of reasonableness as it applies to persons serves to exclude those whose satisfaction ought not to determine political decisions.[6] Specifically, it excludes the satisfaction of those who do not

---

[6]As I will argue below, my Rawlsian framework does not exclude the interests of people who are not reasonable – i.e., do not have the powers of reason – from counting in po-

accept that other reasonable[7] people may legitimately hold conflicting views about political issues, and the government ought to take into account reasonable people's disagreement in its decision-making. Although individuals who are unreasonable may be satisfied with them, institutions and their decisions should not be evaluated according to how well they maintain the satisfaction of unreasonable people with the institutions involved in the decisions, over time.

For citizens' satisfaction to count towards political justification they must be free. And citizens are only free in the sense that matters for determining political institutions and their decisions if they are reasonable and rational. Rawls (2005, 19) explains the requirements as follows: "The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgement, thought, and inference connected with these powers), persons are free."

For individuals to be reasonable in Rawls's sense, they must have what Rawls refers to as the two moral powers: first, they must be able to formulate, revise, and determine how to rationally pursue a conception of the good, and second, they must have a developed capacity for a sense of justice. It is important to distinguish between the Rawlsian criterion of reasonableness and the concept of rationality, which is also a condition for individuals' satisfaction to count towards the legitimacy of political institutions. Reasonableness presupposes that someone is rational, but the reverse does not necessarily hold true.

---

litical decision-making. However, consideration of their interests is mediated through the satisfaction of those who do meet the condition of reasonableness.

[7]Unless I specify otherwise, 'reasonable' is being used in its Rawlsian sense, i.e., to refer to persons or doctrines that accept others who hold conflicting values and beliefs as morally equal.

In other words, a person who is reasonable will also necessarily be rational, but a person who is rational may not be reasonable, in Rawls's sense.

Although the concept of rationality is much contested in philosophy, for my purposes, the important point is that a person is able to order and determine how to achieve the ends that she has adopted for herself. As Rawls says, in our everyday conversations, we sometimes note the distinction between rationality and reasonableness in statements such as the following: "Their proposal was perfectly rational given their strong bargaining position, but it was nevertheless highly unreasonable, even outrageous."(Rawls, 2005, 48) Someone may *rationally* favour ways of structuring institutions and making decisions that were clearly unfair.[8] But the criterion of reasonableness implies that citizens are not only able to identify ends for themselves and formulate ways to pursue them, but also, that they consider whether their choices would treat others fairly as well.

This understanding of the reasonableness of persons relates to the criticisms

---

[8]A concrete example where the rational/reasonable distinction was recently invoked can be found in a blog entry in the Leiter Report on 25 May 2010. There, Brian Leiter responds to the announcement by Middlesex University that it was suspending faculty members who had been involved in a peaceful demonstration to protest the University's decision to close its high-ranking philosophy department. As Leiter described the decision to suspend the faculty members: "[...] given the character of the sanctions imposed, the administration's purpose [behind the suspensions] is quite clear: it is to silence protest, and make it more difficult to organize opposition to the administrative decision to eliminate philosophy. The Middlesex administrators are, indeed, bonkers, but they remain instrumentally rational in their vicious behavior."(Accessed 15 July 2010 at `http://leiterreports.typepad.com/blog/2010/05/more-on-the-middlesex-insanity.html`.) As Leiter's comments suggest, assuming he is right about the goal of the university, the decision makes perfect sense as a means to achieve that goal, and for that reason, is rational in Rawls's sense of the term. However, although the administration's actions did seem clearly to be rational, they were unreasonable in Rawls's sense – or in Leiter's terms, "bonkers". This conclusion about the administration follows because its actions, when considered in combination with other actions taken by the administration, such as shutting staff out of previous discussions that led up to the decision that the staff was protesting, seem to clearly demonstrate a commitment to ignoring its staff's views about decisions that significantly affected it.

of Rawls's theory raised by Okin and Nussbaum (see §2.4). Nussbaum objected that Rawls's criterion of reasonableness wrongly excludes some people, such as those with cognitive impairments or disabilities, from consideration in political decision-making that significantly affects them. In response, however, I wish to distinguish between the ideas of political and moral equality. With respect to those who are unreasonable, it is true that their satisfaction with political institutions is not to count directly for or against political decisions. In this way they are treated unequally, politically speaking.

But this does not imply that they should not and do not count as persons with equal moral worth, in that their interests should still be taken into account by those who do meet the conditions of reasonableness in the Rawlsian sense. Based on those people's reasonableness, and their commitment to a principle of equality, their satisfaction with the institutions and their decisions must take into account not only how their own interests are served, but those of others – both reasonable and unreasonable – as well.

Thus far, I have argued that for individuals' satisfaction to count towards the legitimacy and justification of political institutions and their decisions respectively, they must hold a principle of equality, and be reasonable, i.e., recognize the inherent moral worth of others. Later, when I discuss how to understand the veil of ignorance (see §4.7), which is a model for how we ought to think about justice, I will describe more fully in what sense people are to consider the interests of others. For now, the point I wish to make is that the condition of reasonableness does not exclude the interests of people who do not meet it from consideration in political decisions; it does, however, exclude their satisfaction with institutions and their decisions from counting towards

political justification.

Turning to Okin's critique, she objected to Rawls's conception of the person in the original position as the "head of the household". For, as she argued, this aspect of the theory reflects a mistaken assumption that is often reflected in practice. That is, the judgements of the head of the household, typically a man, are often taken to adequately represent those within the family, when in fact, this obscures oppressive forces at work within the family.

Although there are a number of potential objections that may be raised to this assumption, Okin's main objection is that the internal workings of families are often contrary to democratic principles. Political judgements held by heads of households may not reflect the interests of the other members of the family. As a result, we see the problems with the theory reflected in practice, i.e., laws and structures that in fact privilege men and disadvantage women are accepted as justified, based on the false belief that all have had an equal say in their formulation and adoption.

I agree with Okin that the concept of heads of households is problematic, and should be replaced by individuals as the arbiters of political justification and legitimacy. On my view, what matters to the question of political justification is reasonable citizens' satisfaction with the institutions making the decisions. For anyone who is reasonable (whatever their position in the family), it is their own satisfaction that counts for or against the justification of political decisions.

And anyone who is not reasonable, e.g., children, should be taken into account by considering what reasonable people believe would best serve their interests. If reasonable individuals, including members of the family such

as the parents of a child, disagree about what would serve the interests of unreasonable people, both of those reasonable people's views are to be taken into account. Moreover, if an individual believes that other persons who have equal moral status (in their own family or not) ought not to be taken into account in political decision-making, that individual's satisfaction with the institutions ought not to count towards the justification of political decisions.

Although I agree with Okin that the concept, "heads of households", should be dispensed with, I disagree with Okin that political liberalism needs this conceptual tool to address concerns about intergenerational justice. As I argue throughout this chapter, political justification depends on the satisfaction of reasonable people with the institutions making decisions, over time. The political justification for decisions that may significantly affect future generations has the same basis as other sorts of decisions: institutions should make their decisions based on the views of reasonable people who are currently members of the society. How institutions should take into account future generations depends on the conceptions of justice held by reasonable people.

The problem is, of course, that what serves the interests of citizens who exist now may conflict with what it seems will serve the interests of future generations. That is, the question of what is owed to future generations seems to become an issue when there is the possibility of promoting the interests of the current population, but only at the expense of future generations, or vice versa. Members of the current population may legitimately ask, "Why should my interests be compromised in order to serve the interests of those yet to be?" And future generations, it seems, have a legitimate expectation that previous decisions would have been made with some thought about the likely

implications for them.

In response, my view does not preclude the possibility that current citizens may concern themselves with the interests of future generations because of familial feelings or concern about the welfare of their own future generations. However, another reason that reasonable citizens may do so is because whether individuals exist now or in the future is a morally arbitrary characteristic that many people's conceptions of equality recognize as such. To see this, consider the reactions that many people have when confronted with the sometimes brutal conditions throughout history in which people have lived. Many have the reaction that at the very least, the people's suffering was bad, and that it would have been a better world had those affected not had to endure such hardship. I submit that underlying this moral response is the recognition of those affected as our moral equals.

A similar line of reasoning holds when we consider future generations, only in their case, the current population may have the power to make decisions that could improve the quality of life of future generations. However, reasonable people (who recognize future generations as their moral equals and hold that they should be considered in their decisions) may reasonably disagree about, e.g., how to take into account the interests of future generations, how much to allow their interests to determine current decisions, how to balance them against the interests of the current population, and what in fact will be the future implications of current decisions. In effect, the burdens of judgement about many of the decisions that significantly affect the interests of future generations will be magnified, because of the increased timeframe and complexity of the issue.

Another reason that the current population may take into account the interests of future generations is because the current population finds the institutional structure to be legitimate, and feels it has a vested interest in ensuring the continuance of that political structure. A goal, then, that current citizens may, which may give them reason to take into account the interests of subsequent generations, is to promote the continuance of the structures they endorse. Taking into account the interests of future generations in current decisions promotes the goal of maintaining the necessary support to uphold structures that the current population values.

4.5   Reasonable comprehensive doctrines

In addition to being reasonable, in order for citizens' satisfaction to count towards the justification of political decisions, citizens must also hold reasonable comprehensive doctrines.[9] That is, the systems of values and beliefs that individuals hold must allow them to acknowledge the burdens of judgement. Recall that the burdens of judgement explain how it is possible for people to reasonably disagree about what justice requires for political issues.

---

[9]As Richard Vernon has helpfully pointed out, on my view, the notion of comprehensive doctrines may just be another way of conceiving of the requirement of reasonableness, as articulated about persons. This may be a departure from Rawls's own view, which seems to treat them as two fundamentally distinct requirements. On my view, whether a comprehensive doctrine is unreasonable essentially depends on how it manifests itself from within an individual's own broader system of values and beliefs. So, no comprehensive doctrine is, on its own, unreasonable; whether it is depends on whether the person who holds it is unreasonable. Saying that a particular comprehensive doctrine is unreasonable is effectively shorthand for saying that everyone who subscribes to that comprehensive doctrine is unreasonable because they have done so. Nonetheless, I think it is helpful to discuss comprehensive doctrines on their own, to elucidate the implications that are unacceptable with respect to political justification and legitimacy. Also, it may be helpful to recognize them as the source of a group's unreasonableness for pragmatic reasons, when someone is considering how to address unreasonableness in a society.

Rawls defines comprehensive doctrines as reasonable so long as they recognize that the state should not base its decisions solely on any single particular comprehensive doctrine. An obvious example of a comprehensive doctrine that would be deemed unreasonable in Rawls's sense is a fundamentalist religion that holds that the state's decisions are only justified if they agree with the tenets of that religion. The satisfaction of an individual who subscribes to such a doctrine would not count towards the justification of political decisions.

To be clear, however, fundamentalist religions are not the only comprehensive doctrines that may be unreasonable.[10] As Rawls (2005, xviii) points out, philosophical and moral systems are also comprehensive doctrines as well, and may also commit individuals to the view that the state ought to make its decisions solely on the basis of what they believe. Insofar as they do hold such a commitment, people's satisfaction does not count towards the legitimacy or justification of institutions or their decisions.

It is important to be clear about why such doctrines are unreasonable, on Rawls's view. They are unreasonable not because they prevent someone from accepting decisions made by the state; that certainly may be justified, on Rawls's view. Nor are they unreasonable because the person believes that she is right about what the state ought to do. In Rawls's words:

> When we take the step beyond recognizing the reasonableness of a doctrine and affirm our belief in it, we are not being unreasonable. Beyond this, reasonable persons will think it unreasonable to use

---

[10]As discussed in the previous footnote, nor are they or any other comprehensive doctrine necessarily unreasonable, on my view. Whether the comprehensive doctrine is unreasonable depends on whether the person who subscribes to it holds a conception of justice such that they remain committed to fair terms of social cooperation. In recognition of the heterogeneity of comprehensive doctrines, even once we know that a person subscribes to a particular comprehensive doctrine, there is still a further question about whether a person's comprehensive doctrine allows her to be committed to fair terms of social cooperation.

> political power, should they possess it, to repress comprehensive
> doctrines that are not unreasonable, though different from their
> own.(Rawls, 2005, 60)

Reasonable people may be wholeheartedly committed to the view that their comprehensive doctrine is "right". What makes a comprehensive doctrine unreasonable is that, according to it, the state's power should be used to suppress other reasonable comprehensive doctrines that conflict with it. Those who hold unreasonable comprehensive doctrines believe that the state may legitimately impose their comprehensive doctrines on others who reject those doctrines. Their satisfaction is not to count towards the legitimacy or justification of political institutions and their decisions because they will not be committed to finding fair terms of social cooperation in politics. And this requirement is necessary in order for a stable and well-ordered modern liberal democracy to persist.

4.6   The reasonable overlapping consensus

Thus far, I have argued that in order for a stable and well-ordered modern liberal democracy to persist, a significant proportion of the population must hold a commitment to egalitarianism. And in order for people's satisfaction to count for or against the legitimacy and justification of political institutions and their decisions, they themselves must be reasonable and hold reasonable comprehensive doctrines.[11] The other essential feature that I will now discuss is that it must be possible to construct a set of constitutional essentials that

---

[11]In what follows, I shall use the term 'reasonable people' to refer to people who meet both conditions of being reasonable and holding reasonable comprehensive doctrines.

are capable of garnering the satisfaction of a significant proportion of the reasonable people in the society.

In *Political Liberalism*, Rawls (2005, 15) describes the relationship between individuals' conflicting comprehensive doctrines, and this support for the constitutional essentials, which he refers to as a reasonable overlapping consensus:

> Such a consensus consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself.

The concept of a reasonable overlapping consensus, which enables a democracy to remain stable and well-ordered over time, does not suppose a single fundamental conception of the good that most citizens must hold, e.g., a national identity or particular religion to which all are expected to subscribe. It consists in the satisfaction of the reasonable people in society with the constitutional essentials, given their own conflicting comprehensive doctrines. I will discuss the question of exactly what is meant to garner consensus momentarily, when I further explain what is included in the constitutional essentials.

The consensus about the constitutional essentials is reasonable in the sense that it is comprised of people who are reasonable and who hold reasonable comprehensive doctrines. However, the idea of a consensus returns us to another of the objections to Rawls's theory that I considered in Chapter 2. Gutmann and Thompson objected to the idealization that in modern liberal democracies there is such widespread agreement about the constitutional essentials.

Furthermore, as Cohen's analysis suggested, Rawls's theory may seem to suppose that consensus forms about the constitutional essentials because cit-

izens hold some common conception of the good. For example, perhaps citizens hold a nationalist conception of justice that gives the interests of the community priority over individual interests, and this is what grounds their consensus about the constitutional essentials. If achieving consensus about the constitutional essentials depends on this sort of agreement, then Rawls's theory is in serious jeopardy. The assumption of a common good flies in the face of acceptable pluralism that (Rawls agrees) characterizes modern liberal democracies.

I follow Rawls in rejecting a common good as either an attainable or desirable feature of modern liberal democracies.(Rawls, 2005, 9–10) For, such a condition does not adequately take into account the depth or amount of reasonable disagreement that exists among citizens in modern liberal democracies. This is why Rawls develops the idea of an 'overlapping' consensus, rather than a consensus *simpliciter*. Consensus about the structure of institutions is overlapping when it garners the support of citizens, even though they hold conflicting views about how best to structure the institutions, and what decisions they ought to make. It is not that citizens have the same conceptions of justice or of the good. Rather, citizens' conceptions of justice must overlap in the sense that, given their own varying and often conflicting conceptions of justice, nonetheless they are able to remain satisfied with the institutions that govern them over time.

Relatedly, an important concept that Rawls mentions in the quote above is the political conception of justice. This is the conception of justice that may be worked up from the decisions that are made by political institutions in a stable and well-ordered modern liberal democracy, and which maintain a

reasonable overlapping consensus. For example, some hold that Rawls's theory of justice as fairness, with its welfarist egalitarian principles, is reflected in many Canadian political institutions and their decisions. If this is an accurate view of Canadian political institutions – i.e., their decisions do in fact reflect the principles of justice as fairness – then it is right to understand Rawls's theory of justice as fairness as the political conception of justice that should be used to evaluate political decisions in Canada.

To say that the principles of justice as fairness are an accurate characterization of the political conception of justice that underlies Canadian political institutions does not mean that all, or even most, reasonable Canadians hold them. Rather, it means that insofar as Canadian institutions and their decisions reflect these principles, we may expect them to maintain their legitimacy. That is, we may expect that reasonable citizens in Canada will continue to be satisfied enough with the institutions that govern them that the obligatory force of those institutions will remain intact.

Paterson et al. (2001, 1,11,13) also describe an example that may illustrate a reasonable overlapping consensus that supports a particular constitutional regime. According to them, one of the key factors that enabled Scotland to adopt its own constitution, and gain authority over some aspects of political decision-making, such as taxation powers and education, was the wide variety of interests these changes served amongst the people in Scotland. For instance, unionists, who were strongly committed to remaining part of the U.K., were willing to agree to the changes because they believed that relinquishing some amount of authority to a Scottish government might reduce nationalists' zeal and support for complete independence. Nationalists, on the other hand,

endorsed the move because they believed it to be a step towards complete independence. And those concerned about the lack of women in the legislature endorsed the change because they were convinced that the structure of the new legislature being proposed could address their issues as well.

The key point is that the decision to create the Scottish Parliament did not garner the support it did because everyone agreed about a common good. The people who supported the decision did so because it was acceptable given the conflicting conceptions of justice and the good they held, and their beliefs about how to pursue those ends.

4.7   The original position

The conditions of reasonableness as they apply to persons and comprehensive doctrines define whose satisfaction is to count towards the justification of political decisions. These criteria effectively define in what sense the reasonable overlapping consensus is reasonable. But this still leaves the question of in what sense citizens must be satisfied with the institutions that govern them, so that it is appropriate to say there is 'consensus' about the structure of existing institutions. To conceptualize in what sense citizens must be satisfied with the institutions that govern them, so that it is appropriate to say there is something approaching consensus, Rawls suggests that a person put herself into what he calls the original position, or place herself behind the "veil of ignorance".

In developing his account of the legitimacy of institutions and the justification of their decisions, Rawls distinguishes between four stages of political

decision-making: choosing the principles of justice, agreement on the constitutional essentials, deciding particular laws and regulations, and implementing those laws and policies in particular cases and contexts. In discussing the four-stage sequence in his theory of justice as fairness, Rawls says,

> [...] the four-stage sequence describes neither an actual political process, nor a purely theoretical one. Rather, it is part of justice as fairness, and constitutes part of a framework of thought that citizens in civil society who accept justice as fairness are to use in applying its concepts and principles.(Rawls, 1995, 151)

This returns me to a point that I made earlier, about the structure of Rawls's theory. As with the other concepts we have seen, conceptualizing political decision-making as a four-stage sequence is meant to allow us to see the relationship between the principles of justice that are prevalent in a modern liberal democracy and how they may justify particular political decisions that are made therein.

So far, we have seen Rawls require that in a stable and well-ordered modern liberal democracy, justification for political decisions depends on reasonable citizens who support egalitarian principles of justice, the first of the four-stage sequence. To draw out his conception of political justification for the other stages, Rawls develops the following concepts: the veil of ignorance, the original position, and (narrow and wide) reflective equilibrium. These conceptual tools are meant to provide models of how we are to determine decisions at the various levels.

Another way of thinking about the function of these concepts in Rawls's theory is that they may be used as heuristic devices for thinking about what justice requires. To begin with the veil of ignorance and the original position,

when people go behind the veil of ignorance, they place themselves in what Rawls refers to as the original position. As Rawls describes it, "To model this equality in the original position we say that the parties, as representatives of those who meet this condition, are symmetrically situated."(Rawls, 2005, 79)

So, the original position is meant to reflect the ways that people should think of themselves and others when they are considering how to organize the basic political and economic institutions. It is worth emphasizing that Rawls refers to what is being done when someone is in the original position, or when they go behind the veil of ignorance, as *modeling* their conception of equality. We are to think of the original position, or adopting the veil of ignorance as representing a way to determine what individuals already hold their conception of equality to imply for the various levels of decision-making. Specifically, the veil of ignorance and the original position may help to elucidate the views of those who are reasonable, subscribe to reasonable comprehensive doctrines, and hold an egalitarian conception of justice.

However, these processes are not meant to convince individuals to adopt any other views than those they have about equality, or to justify imposing a particular conception of equality on them. The veil of ignorance and the original position are concepts that are meant to make salient what the reasonable individuals with their reasonable comprehensive doctrines in a society believe that justice requires. The outcome of these processes – the veil and wide reflective equilibrium (which I will explain momentarily) – are meant to be determined by the conception of equality that reasonable citizens already hold.

Rawls defends his conception of the person as symmetrically situated to

others, which is modelled by the original position, in the following way:

> This requirement [of being symmetrically situated] is fair because in establishing the fair terms of social cooperation (in the case of the basic structure) the only relevant feature of persons is their possessing the moral powers (to the sufficient minimum degree) and having the normal capacities to be a cooperating member of society over a complete life.(Rawls, 2005, 79)

As I argued earlier, according to Rawls, decisions about how to design the political and legal institutions of modern liberal democracies should be based on the views of individuals in that society, so long as they are free and equal in virtue of possessing the two moral powers sufficiently developed, and their comprehensive doctrines are reasonable.

To understand what features of the individual the original position effectively includes and excludes from our considerations about justice, Rawls explains, "Features relating to social position, native endowment, and historical accident, as well as to the content of persons' determinate conceptions of the good, are irrelevant, politically speaking, and hence, placed behind the veil of ignorance."(Rawls, 2005, 79) So, behind the veil of ignorance, these features of the person are to be excluded from consideration when one is determining how to structure the basic social, political, and economic institutions.

The features that Rawls points to in the quote are to be excluded on grounds that egalitarian conceptions of justice that are held in modern liberal democracies generally support their exclusion. A characteristic feature of modern liberal democracies is that, ideally, political institutions should be structured so as not to favour particular classes, privilege certain natural abilities that people may have, or privilege certain conceptions of the good, e.g.,

a particular religion. The fact that citizens predominantly regard each other as equals in modern liberal democracies is not merely an historical accident. It is a necessary feature of the general population, if the liberal democracy is to remain stable and well-ordered.

Upholding a person's political status as equal means that in the arrangement of social, political, and economic institutions, the rules that define those institutions do not discriminate against anyone on the basis of these features. As with the rest of Rawls's theory, this is not because he takes this to be an essential aspect of the institutions in modern liberal democracies, independent of the people's views about them. The democratic legitimacy of non-discriminatory political institutions depends on the extent to which individuals' conceptions of equality in a given society support them. If the exclusion of these features of persons as the basis for determining the political structure were not supported by the conceptions of equality that exist in a society, then the veil of ignorance does not justify their exclusion. But, on the other hand, Rawls seems to believe, as do I, that the ability of a modern liberal democracy to persist in such conditions would be compromised.

To determine how to structure political institutions in a way that does not discriminate against people on the basis of their having these features, when a person goes behind the veil, she is to consider what she would want if she did not know her lot in life, with respect to these features. That is, she is to ask herself: "Which principles would I choose to order society's basic social, political and economic institutions if I might have any of the possible characteristics that do or could exist in the foreseeable future of this society, such as a different race, religion, social or political status, etc., when I come

out from behind the veil?"

In explicating his concept of the original position, Rawls draws a similarity between the metaphysical implications of adopting it and taking on a role in a play.(Rawls, 2005, 27) The two processes are similar in that when we speak of a person who adopts the original position, that identity no more becomes the true nature of the person than when a person takes on a role in a play, that role becomes that person's true identity. Indeed, I think the analogy to acting is an apt one for understanding what one who adopts the veil is meant to do.

Individuals behind the veil may determine how the different ways of structuring institutions would be likely to affect others by "becoming others" in much the same way that an actor adopting a role in a play does. She does her best to understand what it would be like to exist as others who occupy the many different social, economic, and political positions in society. The person behind the veil may then choose the principles to structure the institutions in light of her understanding of which structures will and will not unfairly disadvantage people on that basis.

With respect to how a person should carry out this endeavour, she may have relevant personal experience that enables her to understand quite easily (e.g., through merely imagining) the situation of others. But she may need to work much harder to accurately understand how different structures are likely to affect others who are much differently situated than her. To do so, she may need to spend time with other people whose experiences are not known to her. Or, she may also find out about others' situations in less direct ways than engaging with them herself, such as through literature, academic studies and reports, works of fine art that portray others' lives, etc.

Earlier I outlined the criticism that Rawls's reliance on hypothetical reasoning about what individuals would accept reflects the standard that is practiced in actual politics, that political officials assume they can know what they should do by merely imagining what their constituents would endorse. However, according to my view, to the extent that individuals behind the veil fail to accurately understand others' positions, they have failed to achieve what is represented by Rawls's device. And the standard holds in practice. If political officials make their decisions based on inaccurate beliefs about the likely implications for people's satisfaction with the institutions, Rawls's theory does not justify this.

The problem lies with the person's failure to obtain accurate knowledge of others' experiences, not with the original position or the veil of ignorance. The theory is meant to illuminate what information is needed to make good political decisions. People attempting to "go behind the veil" may do better or worse jobs of understanding others, just as actors may do better or worse jobs of researching and understanding the character whose persona they are meant to adopt.

4.8   Wide reflective equilibrium

Another concept that Rawls develops to determine what structure could garner the support necessary for it to be legitimate is the process of *wide reflective equilibrium.*(Rawls, 2001, 30-2) The notion of wide reflective equilibrium serves a similar function as the original position in Rawls's justificatory schema, but as Rawls puts it, it adopts a different point of view. As I outlined it, the

concept of the original position is meant to model how we may identify the principles of justice that we ourselves hold, given that, for all we know about ourselves, we could be anyone in our society.

The process of reflective equilibrium may be used to assess the coherence between the conception of justice that we arrive at in the original position, our determinations about the basic structure behind the veil, and our more particular judgements about justice. By striving for wide reflective equilibrium, we may uncover tensions in our belief and value systems that should have been taken into account differently in the original position, when we were determining the political structure that could be supported by our value and belief systems.

To achieve a state of wide reflective equilibrium, first, individuals are to consider the settled judgements they have about justice, such as that slavery is wrong. On the basis of those settled judgements, they work up abstract, generalized principles that serve to capture those particular judgements. Next, as Rawls (2001, 30–1) describes it,

> Focussing on any one person, suppose we (as observers) find the conception of justice that makes the fewest revisions in that person's initial judgements and proves to be acceptable when the conception is presented and explained. When the person adopts this conception and brings other judgements in line with it we say this person is in narrow reflective equilibrium.

A person has achieved narrow reflective equilibrium when she arrives at a general conception of justice that seems to capture her considered judgements about justice.

Rawls refers to this process as achieving a state of *equilibrium* because

if the person encounters particular judgements that are in tension with her initial principles, she may choose *either* to revise the principles or to revise the particular judgements; neither is necessarily privileged. The goal is to bring our own personal views about justice at all levels of generality into line with one another for the purposes of choosing the principles that we would want to be used as the basis for the political structure to govern us. Sometimes it may be appropriate to revise the principles we have come to hold on the basis of our considered judgements. However, in the light of a tension between the two, we also may choose to revise particular judgements instead, and bring those into line with our principles.

To achieve wide reflective equilibrium, individuals then go on to consider which political regime would best "fit" with the principles they have chosen. As Rawls describes someone in wide reflective equilibrium,

> More exactly, this person has considered the leading conceptions of political justice found in our philosophical tradition (including views critical of the concept of justice itself (some think Marx's view is an example)), and has weighed the force of the different philosophical and other reasons for them. In this case, we suppose this person's general convictions, first principles, and particular judgements are in line; but now the reflective equilibrium is wide, given the wide-ranging and possibly many changes of view that have preceded it.(Rawls, 2001, 31)

To achieve a state of wide reflective equilibrium, one considers, on an ongoing basis, the fit between the principles of justice and the particular considered judgements one has about justice, in light of arguments for possible alternative conceptions of justice and political regimes. And, as with narrow reflective equilibrium, no level of generality is privileged.

The role of wide reflective equilibrium is to bring to light what arrangement or structure of political institutions would be capable of garnering a reasonable overlapping consensus. A political structure will be legitimate to the extent that reasonable people would support it in wide reflective equilibrium. However, the idea that any particular structure would be capable of garnering such support in the face of the burdens of judgement and injustice may seem quite dubious to some. Certainly there are critics of the current political regimes in modern liberal democracies.

Throughout the thesis, I have used the phrase that citizens must be "satisfied" with the institutions that govern them, in order for those institutions to have legitimacy, and to make justified decisions. According to Rawls, as his notion of wide reflective equilibrium captures, the satisfaction that is necessary to uphold the legitimacy of constitutionalism is that citizens view it as the best *out of the alternatives on offer*, given the conceptions of justice they hold. So, although people may well object to aspects of the political regime as it exists in their society, they may still be included among the reasonable overlapping consensus that supports the constitutional essentials. They will still be included if, given their reasonableness and their reasonable comprehensive doctrines, they "endorse" the current political regime in the sense we sometimes hear colloquially expressed as, "it's the least worst option". To be sure, hopefully, there is more support than this threadbare form among the general population. But Rawls's notion of wide reflective equilibrium captures that this is all that is necessary for political legitimacy.

So, contrary to Cohen's view of Rawls, and in answer to Gutmann and Thompson's criticisms I reviewed at the outset of this section, Rawls does

not presume a common good to ground his reasonable overlapping consensus about the constitutional essentials. Nor, I have argued, does he suppose that everyone is satisfied with all aspects of the existing constitutional essentials, so that they should be held as justified and protected from reform in modern liberal democracies. Rather, on his account, people's conflicting conceptions of the good must be such that individuals are able to support the constitutional essentials in the way that is modelled in wide reflective equilibrium. Otherwise, according to Rawls's theory, the legitimacy of the institutions will be compromised.

Another objection that I examined in the second chapter, which was raised by Cohen, was that the priority Rawls gives to the principle of equality conflicts with the commitment that Cohen finds in Rawls's theory to deliberative democratic institutions. Cohen argues that the latter cannot be justified by the principle of equality. Rather, according to Cohen, Rawls must either acknowledge that his theory is in fact committed to deliberative democracy, first and foremost, or he must be willing to accept that features such as bargaining out of self-interest must be permitted in judgements about the political structure, since it seems evident that people's conceptions of justice allow this. On my view of Rawls's theory, however, people's conceptions of justice are prior. Only those elements of a political structure – including deliberative democratic institutions – that are, as a matter of fact, capable of garnering the support modelled by the reasonable overlapping consensus of individuals in wide reflective equilibrium are justified.

If people's egalitarian conceptions of justice do not support the deliberative democratic elements Cohen identifies in Rawls's theory, then, according to the

structure of political justification that I am defending, these elements are not to be imposed on the people. However, in *Political Liberalism*, Rawls discusses the conditions under which it would be legitimate to structure political institutions on the basis of the theory of justice as fairness, which is the target of Cohen's critical analysis. There, Rawls says:

> Whether justice as fairness (or some similar view) can gain the support of an overlapping consensus so defined is a speculative question. One can reach an educated conjecture only by working it out and exhibiting the way it might be supported.(Rawls, 2005, 15)

Cohen's interpretation of Rawls's theory of political justification, which identifies it as essentially committed to the deliberative democratic elements he describes does not hold for the Rawlsian theory of political liberalism I am defending here; these are only contingent aspects of democracy. Whether or not they are politically justified depends on the public political conception of justice that belongs to the society in question.

Having outlined a way of thinking about how to go from individuals' conceptions of justice to making determinations about the structure of institutions, next I will respond to another of Gutmann and Thompson's objections: even if we suppose that the general population supports egalitarianism and constitutionalism, consensus is unlikely to come at the other stages of decision-making. In Rawlsian terms, even if a significant proportion of reasonable people in wide reflective equilibrium support a constitutionalist regime, they still will continue to disagree at the other stages of decision-making.

To respond to this, I will agree with Gutmann and Thompson, that even with support for a constitutional regime, disagreement is likely to increase as

we move to the other stages of decision-making. Individuals will continue to disagree about the particular political decisions made by institutions defined by the constitutional essentials. However, I will argue that in spite of this, the concept of reasonable overlapping consensus about the constitutional essentials does provide a principled way to make political decisions that are justified, in the face of the burdens of judgement and reasonable disagreement.

4.9 The constitutional essentials

In order to argue that satisfaction about the constitutional essentials may provide an adequate foundation for making particular decisions, I must first outline more precisely what the constitutional essentials include. In his elucidation of them, Rawls says, "Constitutional essentials concern questions about what political rights and liberties, say, may reasonably be included in a written constitution, when assuming the constitution may be interpreted by a supreme court, or some similar body."(Rawls, 2005, 442n7) As this reflects, one aspect of a constitution that many people are familiar with is to make explicit the rights and liberties to which all citizens are entitled. For instance, it typically espouses a principle of equality that is to apply to all citizens, and makes explicit the basic rights and freedoms they are owed, e.g., freedom of speech or expression, thought, and association.

Another aspect of the constitutional essentials that Rawls's account draws attention to is that they provide guiding rules or principles about how decisions are to be made by political and legal institutions, e.g., legislatures and supreme courts. In other words, constitutional-level laws generally define the roles of

individuals within the political and legal structure, e.g., the roles of judges, voters, and legislators.[12] So, besides making explicit the values and principles to which a society subscribes, constitutional-level laws also outline the rules that, for example, define the electoral system and related processes, such as setting electoral boundaries, processes for appointing judges, the structure and duties of members of the legislatures, etc.

To better understand the nature and importance of the constitutional essentials in this second sense, and Rawls's reasons for emphasizing the importance of their support, it may be helpful to consider H.L.A. Hart's theory about the nature of the law.[13] One of the questions that Hart's theory addresses is the puzzle of what gives laws obligatory force over subjects, even when they disagree with those laws. That is, what makes the law legitimate in the sense that subjects recognize an obligation to follow it, even when they themselves may strongly believe that they have good reason to disobey it?

As Hart argues, the legitimacy or obligatory force of particular laws, e.g., not to steal or murder, cannot rest with individuals' support for the laws themselves. For, it seems that the very point of having laws is to express what people ought (not) to do, even (or perhaps, especially) when they wish to act

---

[12]Another point to note about this view of the constitutional essentials is that the function of the constitution is to *define* important concepts, such as what it means to be a private citizen, judge, legislator, etc. My account supports this view of the function of the constitutional essentials, rather than the Ulyssian view that its function is to tie the hands of society in order to protect individuals from the tyranny of the (apparent) majority.

[13]Here, I only intend to sketch out the elements of Hart's theory that pertain to the nature of the rule of law, for the purposes of better understanding the importance of the constitutional essentials in my Rawlsian account of political justification. Because my primary aim here is to defend the view that the constitutional essentials have special importance in an adequate account of political justification, I will not offer a defence of my interpretation of Hart's theory against others, or against alternative conceptions or interpretations of the rule of law. But for those who are sympathetic to (my account of) Hart's theory of the rule of law, perhaps it may help to understand my view of political justification.

contrary to them. However, it also seems that the obligatory force of the law should not rest on some metaphysical property independent of "the people". That is, the law should not be binding on citizens independent of their support for it.[14] It should somehow be related to the people's views about what the law ought to be.

Hart argues that the obligatory force of the law depends on there being a sufficient number of people who are sufficiently satisfied with the institutions that make the decisions. Or, more precisely, as Jean Hampton puts it, the obligatory force of the law depends on there being a sufficient number of citizens who are sufficiently satisfied with the roles as they are defined within those institutions.(Hampton, 1994, 27-8),(Hart, 1982, 59-60) Insofar as this condition – I will call it the *sufficiency condition* – holds in a given society, the decisions by those institutions are more likely to have obligatory force for the subjects in that society.

In the sufficiency condition, I referred to the roles as they are defined within institutions. Hart's account distinguishes between two categories of rules, primary and secondary. The former, primary rules, place direct obligations on us. For example, written laws such as not to kill, or not to steal from others are primary rules. Secondary rules, on the other hand, define how to make primary rules, by defining the roles of those who operate within the political structure, e.g., private citizens, political and legal officials. As Hart summarizes the distinction: "Rules of the first type impose duties; rules of the second

---

[14]Another way of stating this problem is by going back to Simmons' framework, and his problem of justification of the state, in general. If the state's function is essentially to impose and enforce laws that people are sometimes wont to violate, then it seems that an essential function of the state is to inhibit people's freedoms. But how can this be justified in a way that is consistent with the concept of democracy?

type confer powers, public or private."(Hart, 1982, 81) The primary function of secondary rules is to define individuals' roles in the processes that create primary rules.

Examples of secondary rules are those that define the electoral system, the structure of the supreme courts, how judges are appointed to them, how judges are to make their decisions, how our legislatures are to operate, who is the head-of-state, etc. As Hart further describes secondary rules, "They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."(Hart, 1982, 94) Secondary rules define the process of how laws are to be made, changed, and decided. Although secondary rules may be explicitly written laws, they may not be; thus, I will continue to use the terminology of primary and secondary rules rather than laws.

For my purposes, the useful insight in Hart's theory is that he locates the source of authority of the law in citizens' satisfaction with the secondary rules. Since the obligatory force of particular laws depends on there being a sufficient number of subjects who are sufficiently satisfied with the secondary rules, decision-makers do not have the impossible task of ensuring that all individuals are satisfied with every decision they make, in order to uphold the rule of law. Rather, to maintain the obligatory force of particular laws (or the primary rules), they must make decisions that are conducive to the satisfaction of a sufficient number of citizens with the secondary rules.

As I stated earlier, one aspect of the constitutional essentials is that they serve to define the roles of individuals within politico-legal institutions. Translating between Hart's and Rawls's theories, we may say that some of the consti-

tutional essentials are secondary rules. How does this help with understanding the question of support for the constitutional essentials, and how to determine particular decisions on their basis? Hart's theory elucidates the important connection between the obligatory force of the law, and citizens' satisfaction with particular decisions and the secondary rules.

If enough people become dissatisfied enough with the secondary rules, then the obligatory force of the institutions could be weakened or lost altogether. That is to say, the sufficiency condition would be lost. This may happen because people become dissatisfied with the secondary rules "in themselves", i.e., they may hold that the rules are unacceptable regardless of their consequences, or people may become dissatisfied with secondary rules because of their consequences. For instance, they may lead to primary rules to which people vehemently object, or some other sort of injustice may arise, which people may believe could be best addressed by changing the secondary rules.

On my view, if elected officials repeatedly make political decisions with which citizens disagree, support for the secondary rules that comprise part of the constitutional essentials is likely to diminish, thereby threatening the authority of institutions and their decisions. To state the point in terms of wide reflective equilibrium, particular decisions may generate enough dissatisfaction that at the final stage of wide reflective equilibrium, citizens may find the democratic regime that currently governs them is *not* the best of all possible options of which they can conceive. Or, they may determine that the regime that they are living with is unsatisfactory enough, and to enough people, to throw its authority into question.

Furthermore, the sufficiency condition provides an explanation for why it

may be desirable to try to facilitate citizens' understandings of how political officials make their decisions. The primary aim is not to get citizens to agree with a decision. Rather, by making explicit the reasons that underlie the decision, citizens may be better able to recognize the decision as fair under the circumstances, including the disagreement that existed among their fellow citizens. As a result of making decisions more publicly, citizens may be better able to see how the burdens of judgement resulted in a different decision than the one they thought best. Thus, making public the reasons for decisions may be conducive to fulfilling the sufficiency condition, if it allows citizens to remain satisfied with the processes used to reach the decisions, in spite of not agreeing with the decision itself.

In sum, Hart's theory may help to make sense of why widespread support for the constitutional essentials is so important. That support explains the obligatory force of institutions and their decisions, in the face of persistent disagreement about particular decisions. And, recall that my goal is to explain how it is possible for a stable and well-ordered modern liberal democracy to remain that way. According to my Hartian analysis of the legitimacy of politico-legal institutions, the stability and order of institutions is grounded in the widespread and general satisfaction with them, which is determined by their particular decisions.

The sufficiency condition, as I am bringing it into my Rawlsian framework, effectively says that the stronger (i.e., the more widespread and prevalent) the support for the constitutional essentials amongst the population, the more legitimate the institutions that are defined by them. Conversely, if support for them drops below a certain level, the obligatory force of institutions and

their decisions will be compromised, and may be lost altogether. Thus, as I will argue further in the following chapters, it is extremely important to try to ensure that there is a great deal of widespread support for the constitutional essentials. Furthermore, this principle also applies to any changes that are proposed for constitutional essentials.

As Gutmann and Thompson point out, we know the current political system is flawed in many ways. So, they argue, the requirement that changes have such widespread support among the population sets the bar for reform too high. As they object,

> Although unlimited opportunities to reopen questions would of course paralyze government, some of the existing barriers to fundamental changes may be too high. The procedures for amending the Constitution, for example, make the possibility of future change on some major policies seem hopelessly remote.(Gutmann and Thompson, 1996, 91)

While they recognize that there is a need to not revisit everything in the political structure, placing such a high priority on maintaining the stability of the constitution seems to effectively justify quashing any efforts at reform.

To take an example, the U.S. Constitution is often criticized because the conditions for amending it make it all but impossible to do so. But to the extent that such a high threshold thwarts a reasonable overlapping consensus – i.e., there is evidence[15] to support that reasonable people are dissatisfied with rules that make it so difficult to change – it is not justified on my ac-

---

[15]In the next chapter, I will discuss in more detail the differences between my Rawlsian account and Gutmann and Thompson's theory, when determining the extent to which the sufficiency condition is met and whether reform is called for. Briefly, justification for reform does not rest on deliberative democratic processes, although such processes may strengthen justification for constitutional reform.

count. To the extent that citizens are dissatisfied with the constitutional essentials enough for it to affect their judgement in wide reflective equilibrium, my account agrees with Gutmann and Thompson that this compromises their justification. Thus, when formulating a constitution, according to my Rawlsian account, it is important to ensure that the constitutional essentials are constructed in a way that is likely to garner and retain the satisfaction of reasonable citizens with the institutions so defined over time.

This still leaves the problem that Rawls's theory may appear to legitimate not only constitutional essentials that most believe to be, on the whole, just, but also, to protect unjust constitutional regimes. In the next section, I will explain how Rawls's theory accounts for the potential problem someone might raise, that the structure could be so unjust that it would be better if it did not have obligatory force.

4.9.1   Justness and legitimacy

Thus far, I have used Hart only to help make sense of Rawls's emphasis on the constitutional essentials as a locus of political justification. However, as I have outlined Hart's theory, it is only intended to make sense of how, as a matter of fact, particular political decisions may have obligatory force for citizens, even though they disagree with them. What I have said so far does not address the question of how to ensure that the obligatory force of decisions by institutions is just in a modern liberal democracy. To address that issue, I argue that Rawls's theory of political justification builds on Hart's point about the locus of legitimacy for the law, and elucidates the conditions that are necessary for the rule of law in a modern liberal democracy to be just.

Rawls's theory agrees with Hart's view that in order for institutions to have legitimacy, as a matter of fact, they must meet the sufficiency condition: a significant proportion of citizens must be sufficiently satisfied with the constitutional essentials. For that legitimacy to be consistent with the tenets of democracy, in Rawlsian terms, the legitimacy or obligatory force will be just insofar as the sufficiency condition is met by people who also qualify for inclusion in the reasonable overlapping consensus. Institutions will continue to have democratic legitimacy so long as those making decisions do so in a way that is sufficiently satisfactory to a significant proportion of citizens, who, again, also comprise the reasonable overlapping consensus.

Insofar as particular decisions meet this desideratum, they will effectively promote the legitimacy of the institutions in accordance with the principles of liberal democracy. This explains statements Rawls makes about the constitutional essentials such as, "The point is that if a political conception of justice covers the constitutional essentials, it is already of enormous importance even if it has little to say about many economic and social issues that legislative bodies must consider." (Rawls, 2001, 28) If it is possible to identify constitutional essentials that are to the satisfaction of most reasonable citizens, this implies that the institutions defined by the constitutional essentials will have obligatory force, and that this power over citizens will be in accordance with the principles of liberal democracy, i.e., based on principles of respect for citizens' equality and freedom.

This statement by Rawls recalls a criticism that Gutmann and Thompson made about the importance that Rawls places on the constitutional essentials. Rawls clearly agrees that laws at the constitutional level typically do not spell

out everything that many citizens believe should be protected, e.g., financial security, access to a minimum level of health care, adequate education for those with cognitive impairments. Nor do they determine particular decisions about what people are entitled to on the basis of those things that are included.[16] But I have argued that a reasonable overlapping consensus about the constitutional essentials is important nonetheless because it implies that there is an adequate foundation to support decisions at the other levels that have been discussed.

As we move through the levels of of decision-making, the theory (rightly, I think) reflects that beyond the level of constitutional essentials to the questions of particular laws and how to decide their application to particular cases, determining which course of action is politically justified becomes increasingly difficult. The account that I have just laid out provides a locus for justification that does not rest on agreement about particular decisions directly, but on satisfaction with the institutions that make decisions. In the next section, I will draw out the relationship between this source of justification and how decision-makers in politico-legal institutions should determine particular decisions.

4.10   The constraints of public reason

Rawls agrees with Gutmann and Thompson that his theory admits a great deal of indeterminacy when we are considering what response(s) to a political issue would be justified. But he defends this aspect of his theory on grounds that, "To some degree these matters are always open to reasonable differences

---

[16]Indeed, recall that Rawls himself argued for a third principle in his theory of justice as fairness that included the basic resources required to exercise one's political liberties. This might be read as a commitment to the idea that these basic resources should be included in the constitutional essentials.

of opinion; they depend on inference and judgement in assessing complex social and economic information."(Rawls, 2001, 48) While some decisions clearly may be ruled out as wrong or unjustified, the difficulty in uniquely determining decisions must not be underestimated. However, some normative standard is needed to determine and evaluate particular political decisions, which should be connected in some way to the actual views that people have about those decisions being made by political officials.

The ideal that Rawls develops to determine the justification for particular decisions is public reason. Public reason provides a standard or ideal to be used by officials making political decisions, as well as by citizens to evaluate those decisions. As Rawls describes it:

> This ideal is realized, or satisfied, whenever judges, legislators, chief executives, and other government officials, as well as political candidates for public office, act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable.(Rawls, 1997, 768-9)

Public reason is to be used by political officials who are making decisions in finding alternatives that could be supported by the reasonable individuals in society, given their conflicting but reasonable comprehensive doctrines. That is, political officials are to look for alternatives that would be likely to allow those in the reasonable overlapping consensus to remain satisfied with the institutions making the decisions.

To determine whether a particular decision meets the standard of public reason, a person is to consider whether the decision could be defended to reasonable citizens who hold reasonable, albeit conflicting, comprehensive doc-

trines. Earlier we saw Rawls propose that a principle of reciprocity should be the basis for public reason. As he describes it,

> The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.(Rawls, 1997, 770-1)

So, when citizens or their representatives are engaged in reasoning about political issues, the process ought to be one that citizens who are free and equal can recognize as fair. And they also must be able to expect others, as free and equal, to recognize those terms for making decisions as fair. They need not necessarily agree that the terms of engagement are the best ones, or the ones that they most wish to advance. But still, they must be able to recognize such terms as reasonable, in spite of their disagreement.

This conception of reciprocity may appear very similar to the principle of reciprocity that Gutmann and Thompson advance in their theory. However, there is a significant difference that lies in in the basis of each. Rawls distinguishes his conception from that of Gutmann and Thompson in the following way:

> The idea of reciprocity has an important place in Amy Gutmann and Dennis Thompson (Gutmann and Thompson, 1996, Chs 1 and 2). However, the meaning and setting of our views are not the same. Public reason in political liberalism is purely political, although political values are intrinsically moral, whereas Gutmann and Thompson's account is more general and seems to work from a comprehensive doctrine.(Rawls, 1997, 770n19)

The difference that Rawls identifies between his conception of reciprocity and that of Gutmann and Thompson is that for Rawls, the basis of reciprocity is the reasonable overlapping consensus.

Because those in the reasonable overlapping consensus determine what will fulfil the principle of reciprocity in practice, Rawls argues that his concept of reciprocity is more "political" than that of Gutmann and Thompson. So long as citizens meet the criteria of being reasonable and holding reasonable comprehensive doctrines, it is their views that determine what the principle of reciprocity requires. More precisely, the political conception of justice, which is worked up from the reasonable overlapping consensus, and that supports the authority of the constitutional essentials determines what the principle of reciprocity implies in practice.

For Gutmann and Thompson, in contrast, how to fulfil the principle of reciprocity is determined by a process that conforms to the best understanding of their other principles. The principle of reciprocity is prior to the other principles in the sense that it gives rise to the obligation to engage in deliberative democratic processes in the first place. However, political decisions are still justified, at bottom, by whether the process fulfils the other principles they advance, and that I discussed in §3.1.4, e.g., that reasons be moral and respectful.

Still, it may seem as though substantively, Rawls and Gutmann and Thompson's principles of reciprocity come to the same thing. That is, perhaps if we were to go through Rawls's process of identifying what public reason supports, we would come to Gutmann and Thompson's principles anyways. However, Rawls's comments above draw attention to a significant difference that remains

between the two. In spite of the burdens of judgement and injustice, Gutmann and Thompson remain committed to public discourse as the fundamental basis for settling political disagreement, including about deciding the fair terms of engagement about the basic structure.

According to Rawls's theory, on the other hand, requiring a process of public discourse to justify political decisions is only justified to the extent that public reason supports doing so. And insofar as public discourse is supported by public reason, the way to structure that discourse is to be determined by the ideal of public reason. In other words, whereas Gutmann and Thompson give priority to public discourse, and hold that it should determine what the principle of reciprocity requires in practice, Rawls's theory holds the reverse: public reason, based on a reasonable overlapping consensus, determines what the principle of reciprocity requires in practice.

While public discourse may be helpful for determining what meets the standard of public reason, it may not be the best way of doing so. As I will discuss in more detail in the last chapter, other mechanisms may be used to better meet the standard of public reason, such as polls, referenda, sociological, political, and psychological studies. For the moment though, I wish to continue to focus on the limitations of giving priority to public discourse, as deliberative democracy does.

Gutmann and Thompson are right that people raise compelling objections to the current basic structure. However, while it is important that political officials be aware of these objections, what we need from a political theory is a principled basis for deciding what to do in light of the fact that people will not come to explicit agreement in discourse about what decisions ought to be

made, either about what is wrong with the system or how it could be improved. Decisions will best fulfil this goal, according to Rawls's theory, by striving to meet the standard of public reason, or by attempting to make decisions according to what reasonable citizens, with their reasonable comprehensive doctrines, could recognize as fair. That may be achieved by adopting a process that meets the principles that Gutmann and Thompson recommend, but it may be done by other means as well. If a process based on Gutmann and Thompson's principles does not meet the standard of public reason, subjecting a decision to such a process is not politically justified.

Also, the emphasis on actual public discourse about political decisions runs the risk of going wrong, epistemically. By privileging public discourse as a source of information about citizens' preferences, Gutmann and Thompson's theory wrongly marginalizes other ways that may be used to assess which policies would be justified. Other methods of collecting information that could be useful for developing and deciding justified policies, such as sociological studies, seem to be treated as epistemically inferior, unless the information is gathered in a process that fulfils their principles.

As I will draw out more fully in the last chapter, the most fundamental difference between the Rawlsian view I have advanced and that of Gutmann and Thompson is that decisions about the design of institutions are determined according to whether they are likely to conduce to reasonable citizens' satisfaction with the institutions that are involved with making them. On my view, whether a deliberative democratic institution as defined by Gutmann and Thompson contributes to the justification of political decisions depends on whether it gives political officials good information about whether reason-

able citizens in wide reflective equilibrium are likely to remain satisfied with the institutions over time. It may strengthen the political justification of a decision if the process increases the satisfaction of citizens with the institutions involved. But the justification for the decision to create a deliberative democratic process according to Gutmann and Thompson's principles, and for making any subsequent decisions, ultimately depends on whether the institution and its decisions are likely to be conducive to reasonable citizens' satisfaction (based on their reasonable comprehensive doctrines) with the institutions involved.

As they contrast with Rawls, Gutmann and Thompson develop the concept of "an economy of moral disagreement" to address the issue of persistent disagreement. As they describe this goal, "It does not ask us to compromise our moral understandings in the interest of agreement but rather to search for significant points of convergence between our own understandings and those of citizens whose positions, taken in their more comprehensive forms, we must reject."(Gutmann and Thompson, 2004, 86) When citizens hold conflicting points of view on issues, they ought not to be expected to forego their own beliefs and values for the sake of maintaining the stability of the basic structure; they are to search for common ground between their own and others' comprehensive doctrines.

Gutmann and Thompson argue that in some cases, disagreement about political issues may be resolved by finding such an economy of moral disagreement. This concept is similar to Rawls's reasonable overlapping consensus in that both seek out points of convergence between conflicting views. However, Gutmann and Thompson distinguish their economy of moral disagreement

from reasonable overlapping consensus in the following way:

> In our view, an economy of moral disagreement is not a defining feature of a political theory. It is only one form that respectful accommodation of moral conflict may take in a pluralist society in those cases in which conflicting moral perspectives fortuitously converge in their practical applications.(Gutmann and Thompson, 2004, 198n27)

According to Gutmann and Thompson, their economy of moral disagreement differs from reasonable overlapping consensus because the former better recognizes that we cannot always achieve agreement, no matter how hard we strive for it. Their economy of moral disagreement better takes into account that agreement is only one possible manifestation of good political decision-making. Sometimes, however, it may not be possible to find points of convergence, in which case an alternative resolution will have to be sought out.

I agree with Gutmann and Thompson that the best way to resolve political issues may not always be to seek points of convergence between people's moral commitments. But I maintain that people's conflicting moral perspectives must "fortuitously converge" on a very particular aspect of politics, namely, the constitutional essentials. For political decision-makers, the goal is to try to make decisions in such a way that reasonable people are likely to continue to be satisfied with the institutions making decisions. As I have argued, there must be something that approaches consensus about the constitutional essentials because to the extent that citizens are dissatisfied with them, the rule of law may be compromised. Furthermore, the justness of the rule of law that prevails in a stable democracy depends on whether the conceptions of justice that comprise the overlapping consensus are egalitarian.

The standard of public reason, which is worked up from the conceptions of justice in the reasonable overlapping consensus, still leaves us with a considerable degree of indeterminacy in theory about what is the right political decision to make in any particular case. However, it does tell us – albeit indirectly – what information should be the basis for making political decisions, how to engage in the process of reasoning though political issues, and what standard should be used to evaluate the options that have been identified. First, decision-making should take into account the views of reasonable people who hold reasonable comprehensive doctrines. Second, the processes that should be used are those that will be conducive to maintaining the reasonable overlapping consensus to support the constitutional essentials. And third, the outcomes of those processes should be determined by what are likely to maintain reasonable citizens' satisfaction with the institutions that make the decisions, over time.

4.11   Pluralism and public reason

Another objection to Rawls's public reason that I raised in Chapter 2 is that it does not allow citizens to offer reasons in terms of their own comprehensive doctrines. One of the strengths that Gutmann and Thompson claim for their theory is that it allows citizens to express their reasons in terms of their most fundamental values and beliefs with others. While they acknowledge that such discussions can sometimes be divisive, they can also serve to allow citizens to educate one another about their ways of life and what is important to them.

Although in his earlier works, Rawls does argue that citizens ought not to

present reasons from within their comprehensive doctrines initially, later he revises this in *Political Liberalism* (2005). As he says:

> When engaged in public reasoning, may we also include reasons of our comprehensive doctrines? I now believe, and hereby I revise VI:8 [in *Political Liberalism* (1996)] that such reasonable doctrines may be introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support. I refer to this as the proviso and it specifies what I now call the wide view of public reason.(Rawls, 2005, xlix-l)

Thus, Rawls (rightly, I think) allows that citizens may advance reasons in terms of their comprehensive doctrines when they are engaged in public reasoning about politics. What matters is whether the comprehensive doctrine, whatever it may be, is reasonable.

One objection that some may raise to widening public reason is that it will be less likely that citizens will find shared reasons to support particular decisions, or find common ground when they hold conflicting comprehensive doctrines. However, as a matter of fact, it seems as though people can and do communicate with one another even though one or both of them make explicit reference to their reasonable comprehensive doctrines that are not shared by others in the conversation. The narrow view of public reason (wrongly, I think) supposed that it would be better if, in advance of engaging in political discourse, people "translated" their reasoning into "secular" language.

Instead, the wide view of public reason allows that people may, in fact, better carry out this translation process in dialogue *with* others. One reason that it may be desirable to talk about political issues in terms of comprehen-

sive doctrines may be simply that, pragmatically, it is more likely to avoid misunderstandings or mistakes in communication. Another is that doing so may illuminate in what ways disagreement is a result of the comprehensive doctrine, or the particular ways that individuals have interpreted or incorporated a comprehensive doctrine into their conception of the good.[17] Third, if people discuss political issues with others, and make explicit how their comprehensive doctrines affect their views about political issues, people may come to see that in spite of differences in their comprehensive doctrines, they share certain values as well, e.g., the importance of health, family and relationships, security.

The preceding discussion addresses the issue of how the ideal of public reason might be actualized in processes that involve actual discourse. However, it is important to remember that, according to my Rawlsian framework, the outcome of such a discursive process does not solely determine what meets the standard of public reason. Public reason*ing* is not the same as public reason. While public discourse may be helpful for determining what meets the standard of public reason, it only does so insofar as it is a reliable indicator of reasonable citizens' satisfaction with the institutions involved in the decision, over time. Additionally, it is important to remember that the sense of satisfaction that I

---

[17]To take an example from fiction, on the episode, "Loose Lips", of the CBC television programme, *Little Mosque on the Prairie*, a character portraying an extremely conservative Muslim held that Yasir's wife, Sarah, was prohibited from running her husband's company in his absence by the comprehensive doctrine, Islam. However, the Imam was quick to point out that many devout Muslims reject this as a legitimate interpretation of what Islam requires of its followers. Indeed, the show portrays through its range of characters the diversity of positions that people who are committed to the same comprehensive doctrine may take on particular issues. Allowing individuals to be explicit about why they hold their positions on political issues may illuminate which aspects of people's choices are based on the comprehensive doctrines they hold and how, since their views are likely to be only partially determined by their comprehensive doctrines.

mean here is that which is modelled by wide reflective equilibrium.

4.12 Self-interest and justice

The final objection that I wish to consider from Chapter 2 is that Rawls's theory may allow people to treat political decision-making as a bargaining process, and use whatever means they can to advance their own self-interest. As we have seen, a central aim in theories of justice is to find fair terms of cooperation in order to resolve political controversies. But then, approaching discussions with the primary goal of advancing one's own self-interest seems necessarily inconsistent with justice so conceived.

The Rawlsian structure of political justification I have outlined provides a way of understanding why, and in what way, including considerations of self-interest in citizens' evaluations of political decisions should be permissible. As Rawls's theory holds, justification for political decisions rests on reasonable citizens' satisfaction with the institutions making the decisions. I submit that reasonable people are likely to share the view that one's evaluations of decisions should, in part, be based on their implications for one's own interests. Moreover, they are also likely to share the view that one's satisfaction with institutions making the decisions should be based on how one's own interests are thwarted or advanced over time.

Although constraints should be placed on the role of self-interest in judgements about political issues, those constraints must be determined by public reason. So, the extent to which political officials allow people's self-interested claims to affect the outcomes must be conducive to the satisfaction of those

in the reasonable overlapping consensus with the institutions. Furthermore, it seems that the criterion of reasonableness as it applies to persons excludes those who would judge decisions based solely on the consequences for themselves from counting towards the justification of a decision.

The ability for institutions to be flexible in how they accommodate self-interested reasons is, I think, a virtue when one considers that the aim of political institutions is to fulfil the principle of equality over time. Examining decisions and evaluating the fairness of institutions by looking at how they affect the interests of particular citizens allows institutions to consider whether their decisions are systematically disadvantaging certain citizens, i.e., whether decisions are systematically thwarting their interests. If the citizens whose interests are being systematically thwarted are reasonable ones who hold reasonable comprehensive doctrines, then my account suggests that the mere fact that they are being systematically disadvantaged warrants attention on the part of political officials. And it allows for citizens to make an appeal couched in the language of public reason, on their own behalf.

Political officials ought to take the systematic thwarting of citizens' interests into account because the objective of political officials is to promote the satisfaction of citizens with the institutions. And insofar as citizens regard each other as equals, if institutions systematically thwart the interests of some, then it seems that all reasonable citizens should agree that this is cause to be concerned about the goodness of the institutions or those making decisions within them. They may disagree about what should be done as a result, and they may disagree about the precise sources of unfairness. But they should agree that it is a problem worth examining and addressing. For, systematic

thwarting of some interests suggests that there may be something unfair about the current structure of institutions.

4.13   Conclusion

In this chapter, I have defended Rawls's political theory against the criticisms raised in Chapter 2, and laid the groundwork for the main objections that I see arising for Gutmann and Thompson, which I will raise in the final chapter. One difference between the two theories that emerges is what sort of evidence each believes should be privileged in political decisions. Rawls holds that political officials should base their decisions on information that tells them about what would be likely to meet the standard of public reason. Gutmann and Thompson argue instead that political decisions should be grounded in public discourse that fulfils their standards to a significant degree.

As a result of Gutmann and Thompson's commitment to the view that decisions should be determined by actual public discourse, it is helpful to examine their theory at work, which I will do in the next chapter. There, I will use the Ontario Citizens' Assembly (OCA) to illustrate the moves they make to address the limitations they identified in Rawls's theory. This also makes it possible to see the differences between how each theory guides the approaches and decision-making processes in practice. In the final chapter, on the basis of the Rawlsian framework I have developed here, I will argue that the OCA could have been strengthened by grounding decisions about it in political liberalism. However, I will also argue that there is a role for Gutmann and Thompson's theory, so long as it is situated within the framework built on

political liberalism.

Chapter 5

Deliberative Democracy in Action

5.1 Introduction

In the previous chapter, I defended a Rawlsian framework of political justification. There, I argued that the justification of a political decision depends on whether it is conducive to the satisfaction of reasonable people in the society, with the institutions as defined by the constitutional essentials. In other words, the justification of a political decision depends on whether it meets the standard of public reason.

In this chapter, I will return to Gutmann and Thompson's theory, which holds that political decisions are justified insofar as they are made in a process in which citizens exchange reasons that are *respectful* and *moral*, and that a *binding decision* must be made at some point, although it should be possible to *revisit* any decision after a period of time. I will outline Thompson's argument that a citizens' assembly, designed according to the principles of Gutmann's and his theory of deliberative democracy, should be used to review and make

decisions about reforming electoral systems.

Thompson draws out his arguments using the British Columbia Citizens' Assembly (BCCA), which was held to review the electoral system, and potentially recommend a new one to the people to vote on in a referendum. However, I will argue that the Ontario Citizens' Assembly (OCA) fulfilled Thompson's principles at least as well as did the BCCA. Thus, in the last chapter, I will use the OCA to draw out my critique of Gutmann and Thompson's theory and the practical implications of it.

5.2   Citizens' Assemblies

In 2003, 161 British Columbians were selected to be members of the British Columbia Citizens' Assembly (BCCA), which was responsible for developing an electoral system that could replace the current electoral system in British Columbia. After the BCCA had developed an alternative electoral system, the broader population of B.C. would vote on whether it endorsed the new electoral system in a referendum. In the first phase of its decision-making, the BCCA met for 6 weekend sessions, during which time they learned about different electoral systems. Next, some of the members attended public consultation meetings that were held throughout B.C. This was followed by the final deliberation phase, which consisted in 6 weekend sessions held over the course of 3 months, when the members made their decisions about what to propose to the people of B.C. in the referendum.

At the end of the process, the BCCA recommended a single transferable

voting (STV) system.[1] In the referendum, of the total number of ballots cast, 57.3% of the population responded "yes" in answer to the question of whether B.C. should adopt the new system recommended by the BCCA.(Lang, 2007, 36) This fell just short of the 60% margin that was required in order for the new system to be adopted. Thus, no change was made to the electoral system, although the government committed to revisiting the issue again.

Then, in 2006, a similar process took place in Ontario, when 103 Ontarians were selected to be members of the Ontario Citizens' Assembly (OCA). They met on weekends over the course of approximately 8 months to learn about alternative electoral systems, have public consultation meetings with the broader Ontario population, and to develop an electoral system that would be proposed in the subsequent referendum. In Ontario, only 37% of the votes cast in the referendum were in support of the mixed member proportional (MMP) system the OCA had recommended.[2] Here, too, the process did not result in changes being made to the electoral system.

In spite of neither process resulting in a mandate for change, according to Thompson (2008, 49) and other proponents of citizens' assemblies, institutions such as the BCCA and OCA were successes. They were successes in the sense that they had enabled the people to make an important decision – *viz.*, about electoral reform – themselves.

---

[1]In the most general sense, single transferable voting systems are characterized by the use of a ballot system that allows voters to rank the candidates in order of preference.(Gallagher and Mitchell, 2005, 10)

[2]In mixed member proportional systems, a fixed number of seats in the legislature are determined by the candidate who has gotten the most votes in the particular riding represented by that seat in the legislature. After this process, the remaining seats are assigned in a way that ameliorates discrepancies between the proportion of seats occupied by each party in the legislature and the proportion of votes for them.

Even though in the referendum, the OCA failed to meet the threshold set for changing the electoral system, proponents of the OCA and electoral reform argued that this was largely due to bad decisions that were made by the government about the design of the citizens' assembly. For example, the government set a timeframe for the assembly to come to a decision and to inform the public that critics objected was obviously far too short. Furthermore, the strategies to inform the general public about the upcoming referendum on electoral reform were clearly inadequate. Despite these shortcomings, however, proponents argued that the legitimacy of the citizens' assembly as a means of strengthening democracy remained intact, since it enabled citizens to participate in important decisions about democracy.(Rose, 2007, 16)

In the next chapter, I wish to take issue with two aspects of the view that the OCA was a success. One is the standard against which proponents judge the success of citizens' assemblies, i.e., to increase citizens' participation in decisions that significantly affect them. This may be a laudable goal. However, insofar as the goal is to strengthen democracy, or increase the legitimacy of political institutions, I will argue that the appropriate standard against which to measure the success of the OCA is whether it was conducive to the satisfaction of Ontarians, both with the OCA and with the Ontario government, not merely whether it increased citizens' participation and engagement with politics.

Second, I wish to show that the shortcomings of the OCA reflect principled problems with the theory, and are not merely accidental byproducts of the government's decisions. Although the failure of the OCA likely was the result of the government's decisions, it was a foreseeable consequence of the structure

of the theory.

In my critique of Gutmann and Thompson's theory and the OCA, I will argue that the principles of deliberative democratic theory may still "strengthen democracy", by which I mean they may be conducive to more justified political decisions and more legitimate institutions. However, they only do so insofar as decisions about deliberative democratic mechanisms are situated within a Rawlsian framework. That is, deliberative democratic institutions may strengthen the justification of political decisions, but only by leading to decisions that better meet the standard of public reason.

On my view, fulfilling the principles of deliberative democracy will only improve political institutions and decisions insofar as they conduce to the satisfaction of reasonable citizens with the institutions involved, over time. For instance, they may strengthen the justification of political decisions by: showing citizens that political decisions meet the standard of public reason; providing information to the government about how reasonable citizens are likely to respond to decisions (so that the government may make decisions that better meet the standard of public reason); and affecting how citizens are likely to respond to particular decisions, such that citizens are more satisfied with the institutions making the decisions.

5.3   Thompson's defence of the BCCA

As I argued in Chapter 3, Gutmann and Thompson hold that the justification of political decisions depends on whether they are made in processes that ultimately are based on their principles of deliberative democracy. If there is

disagreement about the design or implementation of a decision-making process, that disagreement should be addressed in a process that fulfills the principles of deliberative democracy. Those principles include that reasons are to be *moral* and *respectful*, in a process that meets the principle of *reciprocity*. And at some point, deliberation should cease and a *binding decision* should be made, although any decision may be *revisited* in future.[3]

According to Gutmann and Thompson, it may not always be necessary for citizens themselves to engage in a deliberative democratic process in order for a political decision to be justified. Citizens may authorize the use of different decision-making processes, such as a majoritarian process of voting in a referendum, to make decisions. However, for this choice to be justified, i.e., to use an alternative process, it must be made by citizens in a process that fulfils deliberative democratic principles.

This is one of the reasons why Thompson argues that a deliberative democratic process such as the citizens' assembly should be held to determine the electoral system. In many places, including Canada, the initial decision to use the first past the post (FPTP) system that dominates in Canada was not adopted according to deliberative democratic principles. In Canada, it was initially instituted by the British government when Canada's politico-legal system was first constructed, and has remained intact, both federally and provincially, ever since.(Gallagher and Mitchell, 2005, 102)

Another reason that Thompson argues the people ought to make their own decision about the electoral system is the significance it has for them. As Thompson (2008, 22) says, "the type of the electoral system significantly

---

[3]See §3.1.4 for further explication of the principles of Gutmann and Thompson's theory.

affects the value and range of choices that citizens enjoy when they exercise the right to vote." For example, smaller parties in Canada (e.g., the Independents and members of the Green Party) rarely win enough votes to gain any seats in the legislatures in elections under the FPTP system. This seems to effectively diminish people's choices who do not identify with the more dominant parties, since their vote for a candidate from a smaller party is unlikely to result in that candidate actually taking a seat in the legislature.

Furthermore, Thompson argues that "ordinary" citizens should be the ones to determine the electoral system since, given the right conditions, they are likely to do just as well as the other alternatives he identifies, i.e., a commission, the Supreme Court, or legislature. In other words, according to Thompson (2008, 25-6), a citizens' assembly is justified as a way for the people to choose the electoral system that governs them so long as they are shown to be at least as capable of making this decision as the aforementioned institutions. After drawing out the problems with the three alternatives, he goes on to argue that the concerns with allowing citizens to make the decision for themselves can be overcome in institutions designed according to Gutmann's and his principles.

In the following sections, I will examine Thompson's argument that citizens have good reason to accept the decision to call a citizens' assembly to review and potentially reform the electoral system. Thompson uses the experience of the BCCA to argue that using a deliberative democratic mechanism (i.e., a citizens' assembly) to review and potentially reform the electoral system is justified. He also uses the BCCA to draw out his arguments for how citizens' assemblies about electoral reform should be designed and implemented to best fulfil the principles of deliberative democracy.

After presenting Thompson's defence of the BCCA, I will then present the process of the OCA. Although the OCA largely followed that of the BCCA, the former did differ in some ways, which moved it closer to fulfilling Thompson's criteria than the BCCA, e.g., its decisions about member selection, and the interactions between OCA members and elected officials. However, in the last chapter, I will argue that in spite of attempts to strengthen the process according to the theory, the OCA still did not succeed in the goal of strengthening democracy because of principled problems with the theory.

5.3.1 Against legislatures

Thompson (2008, 24) argues that legislatures ought not to decide the issue of electoral reform since, in his words, "electoral reform is less likely to receive consideration on its merits if those who are deciding whether to undertake it are the same as those whose electoral future it would determine." Although Thompson does not draw out the objection to partisan values explicitly in terms of the principles of deliberative democracy we examined earlier, it seems as though two principles at issue are that reasons must be respectful, and that they must be moral.[4] Legislators are likely to violate the principle that reasons must be moral, in that their decisions are likely to be based on their own partisan reasons, and not those of private citizens. Also, according to the principle of respect, decisions must take into account the interests of others who stand to be significantly affected. And since the electoral system does significantly impact citizens, decision-makers have an obligation to take citizens' non-partisan interests into account, even though they may be at odds

---

[4]For a more detailed explication of the principles, please see §3.1.4.

with legislators' partisan interests.

Furthermore, the principle of reciprocity also requires that decision-makers should take seriously others' reasons for their disagreement, so long as those others are disposed to do the same. But given the partisan interests that legislators have in choosing particular electoral systems, they seem to have significant incentive to discount the interests of private citizens. As Thompson (2008, 24) argues, "A prudent principle of constitutional design is that decisions about rules that affect who is elected should not be controlled by individuals who have a preponderant interest against (or for) change in the membership of the institution in question."[5]

5.3.2   Against government-appointed commissions

In considering the view that the electoral system should be determined by expert commissions, Thompson identifies two main problems. First, as we just saw, legislators have partisan reasons to favour certain electoral systems over others. Since those same legislators are typically responsible for appointing the members of a commission, it seems plausible that committee members may suffer the same biases as those responsible for their appointment. Rather than make their decisions according to what ordinary citizens would want, members of commissions may be inclined to make decisions to favour those who appointed them, i.e., they would be inclined to maintain the *status quo*.(Thompson, 2008, 25)

On the other hand, the second problem that Thompson identifies is that, "it

---

[5]To put the point in Hartian terms, those who have a direct interest in what the secondary rules are ought not to be the ones setting them. To be clear, this is not an objection *by* Hart; I am merely putting the point in Hartian terms in case it is helpful to the reader.

may be possible to keep the appointment process more independent of current politics, but to the extent that members are distant, they are also too removed from the experiences of citizens."(Thompson, 2008, 25)[6] If experts do escape the criticism that they have partisan interests, this seems to imply a general disinterest in political parties and the effects of the electoral system on them as citizens. But interest in the decision and its likely effects on citizens seems to be a necessary condition for good decisions about the electoral system. Thus, government-appointed commissions are unlikely to be able to make choices that serve the interests of "ordinary citizens".

5.3.3 Against judiciaries

The last alternative that Thompson considers is using the judiciary to make decisions about the electoral system. Judiciaries have the advantage over the previous two institutions in that they are unlikely to have interests that conflict with those of citizens with respect to electoral systems. However, Thompson objects to judiciaries on grounds that their role makes them ill-suited to address questions of institutional design. As he says, "questions about change in the electoral system itself – to what extent it should preserve a two-party system, for example – raise issues that are less about individual voters than about institutional structures and the nature of democratic representation itself, which courts are not well placed, and are usually reluctant, to ad-

---

[6]Although this argument seems much weaker than the other, I mention it because it creates a particular structure of argument that I think does contribute some support to Thompson's overall point: the problem with experts is that their interests are unlikely to reflect citizens' views in the right way for the former to be legitimate decision-makers on behalf of the people. Experts' views may be skewed by partisan bias, or they may be skewed by their relationship to politics.

judicate."(Thompson, 2008, 24) In Hartian terms, the judiciary is generally charged with how to interpret and apply the primary rules with respect to individual citizens, rather than construct the secondary rules. The function of judges is not to create or design other institutions, but only to work within one, *viz.*, the courts.

5.3.4 The competence of "ordinary" citizens

Having rejected the courts, legislatures, and government-appointed commissions as particularly well-suited to address electoral reform, Thompson addresses the possible objection that, nonetheless, any of these alternatives would be better than a citizens' assembly. Thompson argues that citizens are capable of meeting standards that he develops as good measures of their competence for choosing their electoral system. In answer to the question, "In what sense must citizens be competent?", Thompson identifies the following five standards that citizens ought to meet to be a suitable alternative to the others who might make the decision.(Thompson, 2008, 26)

First, citizens should demonstrate a commitment to becoming informed enough about electoral systems to enable them to make a sensible decision. Second, they should be able to formulate goals or standards for the sort of electoral system they want, which should enable them to differentiate and decide between the alternatives. So, for instance, "preservation of local representation", is an appropriate goal because some electoral systems meet it better than others. Third, they should be able to make basic distinctions between the different electoral systems, and understand the different consequences generally associated with each. Fourth, they should be able to connect their goals

with the different electoral systems on offer. And lastly, they should be willing to engage in a process with one another in a respectful manner in accordance with the principle of reciprocity.

Thompson argues that, "although most citizens do not now come close to satisfying the criteria set out above, some may develop sufficient competence under the right conditions."(Thompson, 2008, 27) Citizens' assemblies provide just those conditions necessary for citizens to meet these standards. For example, when members of the BCCA were asked questions such as, "How informed about electoral systems do you feel?", about their level of interest in politics, and how "informed about politics" they felt they were throughout the process, Thompson notes their responses generally indicated that they felt that all had "increased significantly." And videos and transcripts of the discussions and website exchanges provided evidence of how well informed the committee members became. According to Thompson (2008, 35), "on most of the five criteria of competence set out earlier, the members seemed to do well, at least those members who spoke or wrote."

Although the BCCA was precluded from revisiting the mandate, Thompson argues that, "their [i.e., the members'] control of the agenda and the choice of the alternatives on which they would later vote should be seen as relatively free."(Thompson, 2008, 33) After deliberating amongst themselves, the BCCA members were the ones to choose which electoral system they would develop, and made the many decisions to determine its final formulation. So, although they were not able to make all of the decisions, they did make many important ones themselves. As Thompson (2008, 33) notes, "Although members relied on expert advice to decide on some of the issues (few had strong feelings about

the Droop quota or the weighted inclusive Gregory method), they participated fully in the framing of the final versions of each of the models."

Thompson considers the view that once ordinary citizens chose the electoral system they preferred, a commission could be used to make the more detailed decisions about its design. Thompson raises two worries, however, with the possibility of using a commission to develop an alternative electoral system that was chosen by an assembly. First, when citizens are evaluating the alternatives, Thompson states, "they should be able to make sure that each type appears in the form that is most attractive, and that none has avoidable features that would disqualify it in the eyes of most voters."(Thompson, 2008, 29) One worry, then, is that a commission may construct a weaker alternative than a citizens' assembly, out of a desire to maintain the *status quo*, as mentioned earlier. Thus, the citizenry would not really have been given the opportunity to choose their own electoral system, because the one put before them was so weak as to not be a real option at all.[7]

The second worry is that whether or not the commission developed a strong alternative, citizens are unlikely to have the level of understanding that would allow them to evaluate the choices of the commission in light of their own values. Even after taking several weeks to learn about electoral systems, many OCA members still felt uncertain about their decisions regarding the MMP system they developed.(Rose, 2007, 15) It seems unlikely then, that citizens

---

[7]In his comparative analysis, Lundberg (2007) uses the case of the British electoral reform process, which used a government-appointed commission, and the BCCA as an example of a case in which a citizens' assembly was used, to illustrate the reality of this worry shared by him and Thompson. Lundberg (2007, 490) concludes that indeed, "the more independent of the government (and the wider political establishment) the reviewers, the more radical the electoral reform recommendation."

who hadn't undergone the education process about electoral systems would be in a position to evaluate a commission's decisions, so that they could decide whether they agreed or not.

Of course, a similar worry arises for a citizens' assembly, as Thompson recognizes. There may be an inherent tension between appointing a citizens' assembly to construct the choices that will be put to referendum voting, and arriving at an outcome that is reflective of the views of "ordinary citizens". As Thompson (2008, 47) states the problem in his analysis of the BCCA: "Designed to reduce the gap between citizens and experts, the process itself reproduced the problem that it was intended to overcome. The greater the success of the deliberative process in the Assembly, the greater the gap between the Assembly and the electorate." To the extent that the process succeeds at educating citizens, and enabling them to deliberate with one another in a way that shifts their views about the electoral system, the views of decision-makers in the assembly will no longer reflect the views of "ordinary citizens." Educating ordinary citizens so that they can make informed decisions on the basis of relevant information simply creates a segment of the population that understands the issue in a way that the rest of the citizenry does not. The problem that using experts introduces – that ordinary citizens cannot retrace the decision-making, and thus cannot know whether the decision is one that they can endorse given their own values – seems to plague the citizens' assembly as well.

Thompson's response to this problem is that, "if members take seriously their obligation to explain the process to voters, and voters are prepared to trust the judgement of members, the moral gap disappears, even if the com-

petence gap remains."(Thompson, 2008, 47) Even if non-members are unable to retrace the reasoning of members, according to Gutmann and Thompson's account of deliberative democracy, what matters to the justification of decisions is the extent to which the processes fulfil their principles. The decisions may be acceptable to non-members then in virtue of being made in a process that they can see is fair, i.e., made according to the principles of deliberative democracy, even if they cannot understand the reasoning used in the process.

In his analysis of the BCCA, Thompson outlines how to conceive of and carry out the selection process to fulfil the principle of equality. Thompson argues that, "the Assembly was supposed to be deliberative and representative, and therefore needed members who could credibly express the views of major interests or groups in the society."(Thompson, 2008, 41) Besides using a deliberative process that fulfills the principles of the theory, fulfilling the principle of equality requires ensuring that the dominant views in the general population are taken into account in that process as well.

Because of the obligation to ensure that the dominant perspectives of the general population would be reflected in the deliberations of the assembly, Thompson rejects a purely random selection process as best for choosing members of citizens' assemblies. Instead, he endorses stratifying the population from which the assembly members were chosen according to gender and geographic location.(Thompson, 2008, 42) Also, ensuring that the distribution of age in the assembly roughly matched that of the general population was identified as important, since this too may be viewed as affecting the decisions by the assembly.(Secretariat, 2007, 47)[8]

---

[8]Although there was some overrepresentation of seniors on the assemblies, it was deemed

Thompson acknowledges that objections to the way that representativeness was addressed on the assembly are likely to come from two directions. On the one hand, one may object that striving to ensure the presence of particular groups is disrespectful.(Thompson, 2008, 42) For instance, one might object that efforts to ensure an equal number of men and women wrongly assumes an essential difference between the two that is relevant to how they will reason about the electoral system.

One of the main reasons Thompson gives for attempting to ensure diversity (with respect to people's ascriptive characteristics) in the BCCA was to make the fairness of the process readily apparent to the general citizenry. As he says, "however representative the substance of the deliberations might be, it could never be as transparent as the composition of the Assembly itself."(Thompson, 2008, 42) Even if deliberations in the assembly took into account the views of different groups, those designing the process needed to ensure that it would be evident to citizens outside the assembly that deliberations took into account diverse perspectives. Since citizens did not have access to all of the discussions and consultations to establish this for themselves, organizers selected members who others would be able to see would be likely to represent a diverse range of perspectives.

From the other direction, some may object that the assembly did not go far enough in ensuring an adequately diverse assembly. Thompson defends the decision to only ensure representation with respect to age, gender, geographic location, and Aboriginal status on the following grounds:

> Among groups that are potentially disadvantaged, these four [age, gender, geographic location, and (self-identified) Aboriginal iden-

---

negligible by organizers.

> tity] are defined by criteria of membership that are more objectively
> ascertainable. Who is a woman is less contestable than who counts
> as poor; who is a Northerner is clearer than who is Asian enough
> to qualify for that ethnic group. (Aboriginal status raises similar
> problems, which is probably why it was not included as a criterion
> in the original terms of reference.)(Thompson, 2008, 43)

If representativeness and selection criteria were based on any other group identities except for the first three he mentions, this would be likely to raise controversies about whether the person chosen is a legitimate representative of the group. In accordance with Thompson's view, the designers of the process in B.C. decided not to select members on the basis of ethnicity to ensure that certain groups were represented.

However, upon checking the demographics of the assembly at the end of its selection process, only one individual had been chosen who was "a status Indian through marriage," and another who had "recently discovered Métis ancestry." (Thompson, 2008, 42) The Chair, Gordon Gibson, determined that this did not sufficiently represent the "Aboriginal point of view." He subsequently got approval from the government to add one self-identifying Aboriginal man and one woman to the assembly.

It seems as though the decision to add two self-identifying people may be supported by Thompson's arguments about representativeness in two ways, even though, generally speaking, he may be read as being opposed to it. First, the decision may be justified in light of the importance he places on whether citizens are likely to believe that the assembly has considered diverse points of view about the issue. So, including a member who self-identifies as Aboriginal may be more likely to convince British Columbians that the views of Aboriginal

peoples were taken into account in the assembly's deliberations.

Second, one might argue that for the purposes of the assembly – to convince others that Aboriginal views have been taken into account – the question of who should count as a representative can be adequately settled by self-selection with respect to the Aboriginal people. Of course, the question of how to determine who should have "Indian status" for the purposes of government policy has certainly been a source of significant controversy, e.g., determining who are eligible recipients of benefits from some social programmes. However, determining membership on the assembly by self-identification, so that others are likely to agree that perspectives of Aboriginal people have been included, may seem to be an acceptable way to settle the issue.

Thompson confirms that BCCA members did consider issues from more than just their own perspectives. As he describes it, "many members usually did not express only views that their ascriptive status would lead one to expect."(Thompson, 2008, 42) So, the experience in the BCCA suggests that ascriptive representation is not as significant as one might think, in fulfilling the goal of representing a diversity of perspectives on an issue. Ensuring a diversity of viewpoints may not straightforwardly depend on including members of particular groups who are thought to hold certain views. Rather, what matters is the extent to which those in the assembly are aware of and willing to put forward other points of view.

Another potential problem is that even if the assembly is roughly representative in its composition, as Thompson (2008, 45) points out, "some people talk more than others, and the talkers come disproportionately from the relatively advantaged groups in the society." So, even if the assembly included

people from groups that are often marginalized in politics, such as Aboriginal peoples, the concern remains that they will not be as comfortable as others are with voicing their concerns or objections in the assembly. Thus, even if the assembly is comprised of a diverse group of citizens, this still does not ensure that the discussions will be substantively diverse.

Thompson (2008, 45) acknowledges this concern, but argues that, "even strict egalitarians should not want to insist on completely equal participation. Even if it were possible to achieve, the elaborate rules and artificial constraints would hardly show respect for the otherwise disadvantaged members." Trying to impose rules to ensure that members from all groups participate equally seems likely to not make those from marginalized groups feel or be seen as more equal. If other members did hold prejudices against those from marginalized groups, imposing rules that may appear to privilege participation of the latter over others' could well create or perpetuate feelings of unfairness or animosity towards those from marginalized groups.

Thompson favours the approach taken by Gibson to address this in the BCCA. Gibson informally approached members who seemed reluctant to speak out in the assembly proceedings to hear their views, and personally encouraged them to speak in the public forums.(Thompson, 2008, 44) Thompson suggests some other measures that could have been taken to make the discussions more balanced, such as "authorizing the Chair to call on members rather than waiting for them to volunteer." Also, suggests Thompson (2008, 45), "the Chair could have distributed assigned tasks more widely – for example, by asking less vocal members to take responsibility for preparing short reports for the Assembly or the website." So, rather than implementing procedural mechanisms

to increase the participation of some, the chair could act as a facilitator, and create opportunities within the standard mechanisms to enable more balanced participation in decisions.

Another feature of the BCCA that Thompson considers is the relationship the citizens' assembly should have with other groups, such as the media, lobbyists, or party members. Thompson notes that in B.C., the pressure exerted on assembly members by partisans, lobbyists, or public officials was rarely of the sort that he considers to be of real concern. Indeed, after interviewing representatives of the BCCA, the Ontario Select Committee[9] found that, "there seemed to be considerable resentment among BC-STV[10] supporters that neither the Green Party nor the [New Democratic Party] officially endorsed the BC-STV model, and in particular, that the Greens were actively campaigning for the MMP option, even while the Assembly was doing its work."(on Electoral Reform, 2007, 53) Rather than attempting to sway the decisions of the assembly by manipulating them directly, the assembly and the parties simply adopted an adversarial position, and the latter began their own anti-STV campaign in competition with the assembly.

In the BCCA, another way of ensuring equality was to conduct votes by secret ballot to avoid members exerting pressure on one another to vote in a particular way.(Thompson, 2008, 38) Thompson recognizes that this had a number of benefits. One main advantage is that people would likely feel freer to vote whichever way they felt was appropriate without fear of reprisal from

---

[9]This was a committee of political officials that did preliminary research on the question of how to design a citizens' assembly in Ontario. Much of their report was based on research done on other similar initiatives by other countries and the province of British Columbia.

[10]The alternative single-transferable voting system developed by the BCCA.

any others who disagreed with their position.(Thompson, 2008, 38)

However, Thompson points out that this choice comes at the cost of transparency, accountability, and the ability for those affected by the assembly's decisions to raise legitimate challenges to the reasoning of members. His complaint is that allowing secret ballot voting "is to let members abdicate their individual responsibility."(Thompson, 2008, 39) He argues that, "unlike ordinary voters, the members were acting at least in part as representatives. Even – or especially – if they were representing not any particular group or constituency but the general public, they should have been willing to defend their own votes in public."(Thompson, 2008, 39) Insofar as members of the assembly were meant to be making decisions on behalf of the people, citizens should be able to see the ways that members contributed to the outcome of the assembly. We might understand this commitment by Thompson as similar to the Rawlsian view I outlined in the last chapter. That is, citizens have a moral obligation to account to one another for their positions on political issues because (ideally) these will affect political decisions that in turn could significantly affect others.[11]

Thompson notes that the issue of fairness and equal opportunity to participate also arises because those who were content with the *status quo* may have been less likely to take part in the project. As Thompson speculates, "those who were content with the status quo were probably less likely to want to participate in this project. The selection process favored volunteers, and may have also attracted citizens less sympathetic to major parties than the

---

[11]I say "similar" because Rawls's view is that this is a moral obligation, but the issue of what this implies in terms of political obligations is to be settled by what meets the standard of public reason.

general electorate is."(Thompson, 2008, 34) Thus, the deliberations by the assembly may not have reflected the views of the general populations because of an under-representation of those opposed to changing the *status quo*.

Thompson also considers the possibility that assembly members might have chosen to reform the electoral system because, as he puts the point, "the very existence of an Assembly with the mandate it had may have predisposed members – not toward any particular model, but against the *status quo*. To many members, it might well have seemed a failure if after all this work they had come to a conclusion that the existing system should be retained."(Thompson, 2008, 34) Many may have felt that everything that had been spent on their extensive education and public deliberation would have been all for naught, or been seen by the general public as a waste if they decided not to recommend an alternative to the status quo.

In response, Thompson (2008, 34) points out that, "even so, a substantial minority, including some of the most articulate members, defended the existing system;" seven members of the BCCA continued to maintain their support for the status quo, up to, and including in, the final vote. This may be taken as evidence that the decision-making process was carried out in such a way that the choice to retain the current system was a live possibility for members.

In his analysis of the outcome of the BCCA, Thompson argues that the only grounds for criticizing the final decision of the assembly is by finding fault with the process. Any of the systems the BCCA was considering would have been reasonable ones to choose. According to Thompson (2008, 39–40),

> We should not judge how well members performed (or the extent to which they were autonomous) by whether they reached the right conclusion. All of the alternatives on which members voted are

within a range of reasonable disagreement. None violates basic
liberties or fundamental rights. The Assembly's case is closer to a
case of pure procedural justice, in which there is no independent
criterion for what counts as a correct outcome.

Each electoral system promotes certain values and necessarily compromises on
others, such that reasonable citizens may favour different alternatives. Since
none of the choices that the assembly considered were contrary to democratic
principles, it would have been reasonable for the assemblies to accept and
recommend any of the options under consideration. There is no way in this
case to judge the outcome independently of the process used to reach the
decision. In other words, asking whether the assembly reached the "correct"
decision *just is* to ask whether the process it used was the right one.

However, Thompson argues that the decision by the assembly could still
be criticized, for example, "by showing that STV does not satisfy the goals
the Assembly set as well as another system does, or by showing that the
goals themselves are mistaken or incomplete."(Thompson, 2008, 40) So we
see the theoretical structure of justification in deliberative democracy theory
reflected in practice. The principles of the theory are substantive, but those
substantive constraints apply to the procedure of decision-making. And what
those principles should imply in practice is to be determined according to
the best understanding of the principles, to the best understanding of the
individuals involved. Thus, the outcome of the BCCA may be criticized by
showing that it did not complete its task adequately, in light of the values and
commitments espoused by the assembly.

But Thompson (2008, 40) argues that even if such apparent mistakes in

reasoning are identified, "unless we are prepared to try to persuade the Assembly to change its collective mind (assuming we could call it back into session), we are not justified in substituting our view for that of the Assembly (assuming we had the power to do so)." So while we may take issue with the process used to arrive at its conclusion, and call into question the justification for its decision, changing the conclusion itself would be justified only after engaging in a deliberative democratic process with the reasoners whose decision is at issue.

5.3.5 The referendum

Thompson argues that the decision to hold a citizens' assembly, and to design it according to the reasoning just discussed, is normatively justified because of the significance of the electoral system for citizens, and because a process so designed fulfils the principles of deliberative democracy. Once the assembly reaches a decision, however, the question remains of how to determine whether to implement its recommendation. Thompson argues that the decision of whether to adopt the recommendation of the assembly should be made by popular referendum. And indeed referenda were held in both B.C. and Ontario. However, in both provinces, there was controversy about whether more than a simple majority of votes supporting change should be required.

In B.C., politicians made the decision to require that a minimum of 60% of voters support BC-STV before the electoral system would be changed. However, as Thompson objects, "As a result, the 57 percent of the voters who supported the Assembly's proposal did not get their way. The bar was set higher than for other electoral reforms in the province, and arguably set ex-

cessively high."(Thompson, 2008, 38) This position reflects the worry we saw Gutmann and Thompson (1996, 91) raise earlier, that "procedures for amending the Constitution, for example, make the possibility of future change in some major policies seem hopelessly remote." Holding a citizens' assembly on the question of electoral reform may be seen as a step in the right direction in terms of promoting democracy. However, the decision to require a supermajority seems to thwart the goal of making the political structure more just because it makes reform on the basis of deliberative democratic decisions too difficult.

In spite of the referendum results in B.C., Thompson concludes that the BCCA was a success, given that it affirmed a desire on the part of the electorate for reform, and that those involved in the process had been able to identify a key limitation to be resolved in the future reform process. In his words, "The deliberative process in which the B.C. citizens engaged stands as an exemplar that can guide future efforts to give citizens greater control over their electoral systems."(Thompson, 2008, 49) The B.C. experience was a success in that it demonstrated that deliberative democratic mechanisms such as citizens' assemblies may be used to empower citizens in societies undertaking electoral reform.

For Thompson (2008, 49), while it may not be possible in all cases to employ deliberative democratic mechanisms for political decision-making, the B.C. experience showed that, "no democracy can now responsibly undertake electoral reform without seriously considering an assembly of citizens as part of the answer to the question, who should govern who governs?" While it may have encountered some difficulties, for Thompson, its success lies in the fact

that a citizens' assembly remains a viable alternative in principle for addressing the question of electoral reform.

Thompson may be right that the BCCA did provide evidence to some that citizens could come to a decision about the electoral system in a process that would meet their deliberative democratic principles. This seemed to be the view of the Ontario government that followed suit and instituted the OCA. In the next section, I will outline the reasoning and decisions that were made about the OCA, which largely fulfilled Gutmann and Thompson's principles, as well as the further specifications in Thompson's defence of the BCCA.

5.4   In defence of the OCA

The reasoning that the Ontario government gave for holding the OCA reflects Thompson's defence of holding a citizens' assembly about the electoral system. As the Secretariat of the OCA said, "It was timely, early in this new century, to examine our electoral system from the perspective of a group representative of Ontario as it exists today".(Secretariat, 2007, 3) One reason to institute the OCA was that the initial adoption of the FPTP system was not made in a process that fulfilled deliberative democratic principles. The FPTP system that currently prevails in Canada was initially decided upon by the British government, when the British North America Act was enacted in 1867, and has remained in place ever since.(Gallagher and Mitchell, 2005, 102) Second, the population at the time that FPTP was initially instituted is significantly different than the current population. So, even if the adoption of FPTP had been according to deliberative democratic principles, there may still be good

reason for the current population to have the opportunity to revisit the decision.

In its decision about the size of the assembly, and who would be included in it, the Ontario organizers chose to have one individual from each riding, rather than two (on female and one male from each) as they had done in B.C. In the OCA, either a female or a male would be chosen from each riding to represent it, so that 52 females and 51 males would be chosen, and the alternate for each riding would be the same sex as the primary representative. Thus, the size of the assembly was as small as possible while still being representative in the relevant ways (i.e., with respect to gender and ridings), to make deliberations more manageable.

The selection meetings in Ontario were advertised to take place in various locations across the province, and at those meetings, respondents were chosen by lottery to fulfil the necessary gender and riding criteria. Also, measures were taken to address a problem that arose for the BCCA, namely, that the first selection process had resulted in a lack of any Aboriginal or First Nations' peoples being chosen as members on the assembly.[12] To ensure that representatives from the Aboriginal communities were on the assembly, one of the selection meetings was designated specifically to select a member and 2 alternates who self-identified as Aboriginal. As a result, ensuring representation of Aboriginal peoples did not upset the equal representation of ridings in the OCA. Also, it better integrated the goal of ensuring representation of Aboriginal peoples into the overall process, rather than making it seem like an

---

[12]As a result, in B.C , they selected two self-identifying Aboriginal members who were added to the membership consisting in two people from each riding.

afterthought.

Before the meetings commenced, and throughout the learning, consultation, and deliberation phases in Ontario, the assembly had the opportunity to review and question decisions about how the meetings would be conducted, e.g., the processes that would be used to come to decisions by the group, and the values that would be promoted throughout the process.(Secretariat, 2007, 51)[13] The first decision that OCA members made was about the values that would underlie each stage of decision-making. Ultimately, they chose values that generally reflected those advanced by Gutmann and Thompson, such as respectfulness towards others, and the requirement that people leave their biases at home.(Secretariat, 2007, 63)

Another aspect of the OCA that seems to have met Thompson's requirement that citizens should have a say in all aspects of decision-making is that members seemed to feel free to take control of the process used to reach the final decision. For example, towards the end of the deliberation process, when it was time to make the final decisions, members revised the decision-making procedure they would use. Two changes they made were to have a scrutineer who would oversee ballot counting, and to videotape votes that were done by show of hands.(Secretariat, 2007, 120)

Also, the decision to videotape votes done by a show of hands met Thompson's recommendation to make the decision-making process more transparent than secret-ballot voting. However, for some decisions, the OCA still resorted to secret ballot, presumably to ensure that members felt fully free to vote as

---

[13]For a list of the decision-making points in the OCA process, consult, e.g., Secretariat (2007, 101).

they truly felt they should. So, they seemed to understand the tension between the two values – transparency/accountability and autonomy – and the need to balance them on a case-by-case basis.

Throughout the OCA, an independent, non-profit organization, the Institute on Governance, collected information through surveys and observation to evaluate the OCA. Its questions reflected Thompson's criteria of competence to develop an alternative electoral system. For example, the surveys asked participants about whether they felt the process gave people equitable opportunities to participate, and whether information was presented in a way that facilitated members' education about electoral systems.(on Governance, 2007, 33) According to it, members ranked quite.[14](on Governance, 2007, 59–60)

In its concluding statements about the OCA, the Institute on Governance (2007, 2) agrees with Thompson about the potential for citizens' assemblies in general, and says about the OCA in particular: "It serves as a model of how to engage and empower citizens to deliberate and decide on selected public policy questions". Under the proper conditions, which can be met in citizens' assemblies, citizens may meet Thompson's criteria for good decision-making about the electoral system. Citizens' assemblies provide a good way of remedying the deficiencies in ordinary citizens' knowledge, and provide a forum in which they may deliberate together effectively about the issue at hand.

A question that is absent from the report by the Institute on Governance reflects Thompson's view about the appropriate standards to use to evalu-

---

[14]In the rankings associated with these criteria, scores were, on average, 4 out of 5 or better.

ate the assembly. Thompson (2008, 39–40) rejects that critics may judge the outcome of a citizens' assembly on electoral reform independently of the reasoning process used to reach its conclusion. Accordingly, surveys used to evaluate the process did not include questions to test how well the OCA understood electoral systems or their implications, generally. The only questions that were asked about their substantive understanding of electoral systems were about whether members knew where different systems had been employed, or whether members felt competent in their knowledge of electoral systems.(on Governance, 2007, 41) Members answered in the affirmative, and they had in fact invested a great deal of time and energy into learning about electoral systems. Thus, one may reason that their own positive evaluations were likely an accurate reflection of their understanding.

The view that one could not evaluate the OCA's decision apart from the process used to reach it was also reflected in the instructions given to the OCA by its Chair, George Thomson. For example, the OCA repeatedly heard statements such as that, "We know the date of arrival, we just don't know the destination yet."(Secretariat, 2007, 94) Through this advice and slogans such as Yogi Berra's, "It ain't over till it's over"(Secretariat, 2007, 60), assembly members were advised throughout the process that although they would have to arrive at *some* decision in the end, they were to keep an open mind about what should be the final decision.

Insofar as citizens were successful in improving their understanding of electoral systems, however, the problem of how well they represent the views of non-members in their deliberations and decisions is raised. In his analysis of the OCA, its Academic Director, Jonathan Rose, considers the possibil-

ity that public consultation meetings may help to close the knowledge gap between members and non-members. For, it seems as though public consultation meetings may result in ordinary citizens becoming better informed about assembly members' decisions, and the assembly members may become better informed of citizens' values and views about their decisions.

However, Rose (2007, 14) rejects this as a way of overcoming the apparent paradox of citizens' assemblies. For he reports that, "As one OCA member put it when asked if anything new was learned at these meetings, 'No, it goes to show you how well prepared we are'." In some cases, when their views diverged, members may have gained insights from non-members to consider in deliberations. But it seems that members also attributed disagreements to lack of knowledge by the general public. Thus, disagreements with the general public may have been seen by assembly members as the result of inadequate understanding on the part of the general public, rather than legitimate disagreement with their reasoning.

There is, however, another way that the public consultation meetings may address the gap between members and non-members, which would go towards fulfilling Gutmann and Thompson's principles. Communicating with the general citizenry about the activities of the assembly may have the result that, in Thompson's words:

> A voter can say to an Assembly member not only, 'I trust you because you engaged in a process that seemed fair and reasonable' (which might be said to any representative), but also, 'I trust you because you are a person not so different from me, and you decided as I can imagine that I might have done in similar circumstances.'(Thompson, 2008, 47)

Public consultations and correspondence may serve to narrow the gap created

by education and deliberation by showing the general citizenry that people similar to themselves deliberated about the question, and came to the answer that citizens themselves would have, if they had participated in the deliberative democratic process. Even though they may not fully understand the decisions the assembly made, through hearing from the assembly members, the general public may come to appreciate assembly members' commitment and effort to make a decision that was in the interests of all Ontarians. Seeing the commitment and effort that assembly members spent on learning, thinking about, and discussing, electoral systems in light of their values as fellow Ontarians, may have increased the trust of the general public that the OCA would likely arrive at a system that it would accept if it went through the same process.

Rose's analysis about the point of the public consultation meetings seems to confirm this view by Thompson. In Rose's words:

> The difficulty is that although the members were obliged to listen to the concerns of other citizens they struggled with the fact that the consultation phase was not primarily about obtaining information (like the learning phase) but could more easily be understood as an exercise in legitimacy. It can be argued that the OCA consultation phase was designed not to benefit those doing the consulting (the OCA members) but instead to benefit the public whose views were sought.(Rose, 2007, 14)

As Rose diagnoses it, the problem of understanding the role for public consultation arises if we assume that they are primarily to exchange information between the assembly and citizens. Rather, as Thompson's argument elucidates, it seems as though we ought to conceive of public consultation meetings as an exercise for the benefit of the general public, specifically, to build trust

between members and the general citizenry. In this way, the latter can be better assured that the decisions about the electoral system were made in such a way that citizens would be able to accept them.

Additionally, plenary sessions were open to the public, as well as some of the smaller group sessions, at the discretion of the Chair so that the public could see deliberations as they were taking place. This could also have served to show the public that deliberations were taking place in a way that allowed citizens "just like them" to learn about electoral systems, and make competent decisions about their design.

Another aspect of the OCA that may be seen as a method of building this trust in non-members was the emphasis on the diversity of the OCA membership in public communications. In public education material, such as a video that was published about the process used in Ontario, assembly members made statements such as the following:

> We [the members] were selected at random. We had different perspectives. Different backgrounds, different views. But none of us represented any particular group. We were representing all of Ontario. So we had a common goal. Our goal was to decide on the best electoral system for Ontario, one that reflected all of our values.(on Electoral Reform, 2007)

And in the brochure sent out to Ontarian households, entitled "Who We Are," the brochure explains that the assembly was randomly selected, and describes itself as "a cross-section of Ontario voters." Although the brochure does not make Thompson's point explicit, it describes its recommendation as a decision that Ontarians who were just like the rest of the general citizenry (achieved by the unbiased method of random sampling) agreed was best.(on Electoral Re-

form, 2007)

After the OCA reached its decision to recommend the mixed member pro-
portional (MMP) system it had developed, the government called a referendum
to be held in conjunction with the general election in 2007. The government
followed B.C. in requiring the support of a supermajority of 60% of the votes.
Moreover, it required that there be a supermajority in 64 of the ridings in
Ontario in order for it to consider adopting the new system.

But in Ontario, in spite of revisions to the process, of the approximately
56% of constituents who turned out to vote in that election, only 37% sup-
ported reform; 63% voted to retain the FPTP. In his analysis, LeDuc et al.
(2008, 42–3) argues that the two main reasons for the shortfall were lack of
knowledge about the referendum, as well as lack of knowledge about the OCA
process itself. In spite of the shortfall in the referendum however, proponents
insist it was a success. For, in Rose's words: "Its significance is determined not
by whether or not its recommendation will be accepted but whether or not as
a process of learning, consulting and deliberation it offered a creative approach
to citizen-participation. On these grounds it was clearly a success."Rose (2007,
16)

In this chapter, I have presented deliberative democratists' arguments for
holding that the OCA and the BCCA were a success, in spite of not leading
to electoral reform. These processes did enable citizens to have a say about a
decision that significantly affects them, and to become more engaged with the
political structure that governs them. In the next chapter, I will challenge the
view that "strengthening democracy", or increasing the legitimacy of political
institutions, should be thought of in these terms. Although these measures

may improve the legitimacy of democratic institutions, they only do so insofar as they increase the satisfaction of reasonable citizens with the institutions that govern them.

Chapter 6

A Rawlsian Deliberative Democracy

6.1 Introduction

As I argued in Chapter 5, the design of the OCA seemed to meet the desiderata in Thompson's defence at least as well as the BCCA, and in some respects, did better. Thus, instead of the BCCA, I will use the OCA as a case study to draw out my principled concerns with Gutmann and Thompson's theory, and Thompson's defence of it in practice. Specifically, I will use the OCA to draw out my argument that although Gutmann and Thompson's theory may be useful for strengthening democracy, it lacks an adequate foundation to determine political decisions about how to pursue this goal in the face of reasonable disagreement.

Furthermore, I will show how my Rawlsian framework provides the foundation that is lacking in deliberative democracy. As I argued in Chapter 4, according to my view, the legitimacy of political institutions does not depend directly on citizens' participation, but rather on the satisfaction of reasonable

people with the institutions that are meant to govern them, over time. Citizen participation may have implications for their satisfaction with institutions, but it is the latter that determines the legitimacy of institutions.

Accordingly, the OCA and its promotion of citizen involvement in decision-making may have strengthened democracy in Ontario in some ways. For example, the OCA shed light on some people's opinions about electoral reform, which may be taken into account in decisions about how to proceed on the issue. And Ontarians who agree with Gutmann and Thompson's view, that institutions such as the OCA are the most democratically legitimate way of making decisions, may have become more satisfied with the government because of its decision to hold the OCA.

But the point is that deliberative democratic institutions such as the OCA only strengthen the legitimacy of political institutions insofar as they increase the satisfaction of reasonable citizens with the institutions involved. Thus, political officials also need to take into account whether some citizens' satisfaction with the institutions involved may not have increased, and indeed may have even diminished, as a result of decisions made about the citizens' assembly. My arguments in this chapter are meant to show how the Rawlsian framework I have developed provides a basis for determining decisions such as whether to hold the OCA and how to design it, in light of my conception of democratic legitimacy. In so doing, I will draw out my view of how deliberative democratic institutions may (and may not) serve to strengthen the legitimacy of political structures.

6.2   The regress problem

Earlier in the thesis, one of the fundamental problems I presented for relying on public discourse to settle issues in politics was reasonable disagreement. That is, public discourse between even the most reasonable people rarely leads to agreement in politics. Thus, political officials are left wanting for something more on which to base their decision. Thompson's defence of using a citizens' assembly to address the issue of electoral reform, and his commitment that the principles of deliberative democracy provide a foundation for institutions and their decisions, fails to adequately address the fact that reasonable people will persistently disagree with Gutmann and Thompson about their theory or its principles.

Gutmann and Thompson recognize that turning back to the principles of deliberative democracy to settle disagreement about the principles themselves raises a problem for their theory. As they themselves acknowledge, because the theory rests most fundamentally on actual public discourse among stakeholders to make and justify political decisions, they face the following question: "How is it possible for a theory to propose substantive principles to assess laws while regarding citizens as the final moral judges of the laws they make?"(Gutmann and Thompson, 2004, 111)

If one is committed to the view that citizens should be the final arbiters of political decisions, it seems that what is right will just be whatever the people decide. This view encounters a number of problems, but here, both I, and Gutmann and Thompson, are concerned with the problem of reasonable disagreement. Even citizens who are fully committed to a principle of equality,

and recognize an obligation on the part of political officials to take others' views into account in their decisions, will continue to disagree with one another about what ought to be done in politics.

Gutmann and Thompson recognize the persistence and depth of disagreement among citizens in politics, and that this may threaten their claim to offer substantive principles to guide decision-making. Nevertheless, according to them, "each element of the content of deliberation – basic liberty, basic opportunity, and fair opportunity – depends on deliberative procedures to advance a common understanding of its substance."(Gutmann and Thompson, 1996, 229) In the face of disagreement about how to fulfil the basic principles of democracy such as liberty and fairness, we should try to find deliberative democratic ways to settle *this* disagreement, i.e., about how to decide the issue with which we began.

However, it seems unlikely that citizens will be able to reach agreement at this next level either. The threat of a regress looms.

I appreciate Gutmann and Thompson's aims to better engage citizens in political decision-making, and to allow them to have more say in decisions about the basic structure of political institutions. However, Gutmann and Thompson's response to the threat of a regress poses a significant problem for their view. Because their theory rests political justification on public deliberation, it fails to provide an answer to the question: on what *basis* are decisions by political officials justified, given that people will continue to disagree, and given that governments are supposed to make decisions in a way that respects citizens' equality? In other words, when a decision is made in a deliberative democratic institution, why is it justified for a democratic government to im-

pose a decision on those who continue to disagree with it or the way it was made?

Indeed, this issue arose in the OCA. There, 104 Ontarians (including the Chair) were selected to review and make a recommendation about how to reform the electoral system, which Ontarians would then have the opportunity to vote on in a subsequent referendum. And, as I argued in the previous chapter, the decision-making process adopted by the OCA was structured according to deliberative democratic principles. In spite of this, however, at the end of the process, members of the OCA continued to disagree about whether to recommend the Mixed Member Proportional (MMP) system that it had developed to the broader population in a subsequent referendum.

Two final votes were put to the OCA, which both relate to my objection. First, in the second-to-last question on which members voted, they were asked whether they believed that the alternative MMP system should replace the first-past-the-post (FPTP) system. Sixteen out of the 102 members (approximately 15%) who were present voted "no".(Secretariat, 2007, 128) In spite of designing and making decisions in the OCA according to deliberative democratic principles, disagreement persisted about which electoral system members thought was better.

The last question that members voted on was whether the system that had been developed should be recommended to the broader population of Ontario. Even if members answered "no" to the previous question, they might still have agreed to recommend the alternative MMP system to the general public, e.g., because of the fairness of the process. But 8 members answered "no" to this question as well.(Secretariat, 2007, 131) The question that Gutmann

and Thompson's theory seems to leave unanswered is: given the disagreement that persisted, why was the decision to recommend the alternative system to Ontarians justified, even though some members continued to reject it?

The challenge that I am raising for Gutmann and Thompson is not unlike the one they raised in Chapter 5, to requiring a supermajority in the B.C. referendum. However, I contend that justification for overruling a minority is no less required than for overruling a majority, given the reasonable disagreement that exists about both. A strength of my framework, as opposed to Gutmann and Thompson's theory, is that mine is equipped to answer that challenge.

According to my theory, the legitimacy of any institution depends on whether reasonable citizens are satisfied enough with it so that the institution and its decisions have obligatory force. The sense in which I am arguing they must be satisfied is modelled by the concept of wide reflective equilibrium. As I have said before, hopefully institutions will have more than the minimal degree of "support", whereby the current regime is the "least worst" option.

But the important point is that this notion of satisfaction is the place to look to determine the legitimacy of institutions; it is not the espoused views of citizens *per se*. Citizens may criticize their government, even heavily, and it may remain legitimate nonetheless. The views that citizens espouse, including within deliberative democratic mechanisms, is only relevant to the question of legitimacy insofar as it accurately reflects how well the sufficiency condition is met by reasonable citizens.

Gutmann and Thompson's response – that citizens are to continue to deliberate with one another to determine what principles are meant to apply in

making particular decisions, and how they are meant to apply – falls short of resolving the issue that reasonable disagreement raises. For, Gutmann and Thompson (rightly, I think) reject consensus as an appropriate aim for democratic theories and institutions. However, if consensus is not the justificatory basis for decisions, then they must provide a principled alternative for determining how to proceed in the face of persistent and reasonable disagreement. Holding further deliberative democratic processes seems unlikely to resolve the problem, and as Gutmann and Thompson themselves hold, at some point, a binding decision must be made.

6.3   Addressing the regress problem

In considering the regress objection in the context of electoral reform, Thompson (2008, 31) offers the response that, "The potential regress can be forestalled by appealing partly to pragmatic considerations (the marginal benefits of creating yet another level of decision are likely to be small compared to the costs), and partly to normative considerations (free and equal citizens should not object to stopping the process at the level of an assembly)." Pragmatically speaking, disagreement is likely to continue at each successive step of decision-making that is created to deal with the last, e.g., citizens will disagree about how to choose the electoral system, and then, how to decide how to choose the electoral system, and so on, and so forth. Thus, since disagreement is likely to persist at all levels of decision-making, little seems to be gained by continuing to create yet more deliberative democratic institutions about how to proceed.

And although he himself does not develop it explicitly, I take it that the

normative line of reasoning returns us to the arguments that Gutmann and Thompson make, that the principles of deliberative democracy best respect citizens as free and equal. Their theory provides citizens with meaningful opportunities to participate in political decisions that significantly affect them, and to do so in a process that recognizes their status as equals who have the capacity to deliberate with each other to decide issues that stand to affect them all.

However, as I pointed out in Chapter 4, Gutmann and Thompson's deliberative democracy theory is more "comprehensive" than Rawls's theory. The justification for deliberative democracy rests on Gutmann and Thompson's arguments that its principles best fulfil the tenets of democracy. Political officials are to make their decisions according to Gutmann and Thompson's principles as best they can within the current structure. And if it is not possible to involve citizens initially in a decision about a contentious political issue, then, as we shall see, they may construct a mechanism for doing so, such as a citizens' assembly.

Then, once citizens are within the fold of deliberative democracy, they may revisit any prior decisions that were made. That process of revisiting decisions from within a deliberative democratic institution may thereby confer legitimacy on those decisions. For instance, the assemblies in Ontario and British Columbia could have asked that another citizens' assembly be called about any issues they identified within the deliberative democratic forum, or about any disagreements they could not resolve within the OCA or BCCA. Although neither did so, as Thompson claims, "if the danger of a regress were to come to be regarded as a serious practical problem, there is no reason why a

future assembly could not have the responsibility for resolving it."(Thompson, 2008, 32) So, if citizens believed that there was good reason not to rely on the citizens' assembly to make a decision about some political issue, a citizens' assembly could have been convened about *that.*

6.3.1 The initiation problem

Thompson's response to the regress problem is that citizens may provisionally accept an institution that has been designed according to decision-makers' best understanding of its principles. Then, once within the deliberative democratic institution that is formed, they may challenge any decisions that have been made about it. But even accepting Thompson's response to the regress problem for the moment, there is still the question of how to initiate a deliberative democratic institution.

In answer to this, Thompson (2008, 29–30) states, "It is preferable, for pragmatic and constitutional reasons, that the institution be established by the legislature or some regular procedure of government." In the face of reasonable disagreement among citizens, we may fall back on what I will refer to as 'ordinary legislative mechanisms' (e.g., legislatures, courts, ministries) to make the decision to create a deliberative democratic institution, as well as to make the initial decisions about its design.[1] For example, in Ontario, the Premier, Dalton McGuinty, seemed to be primarily responsible for the decision to hold it (Secretariat, 2007, 197–198), and the Ministry Responsible for Democratic Renewal, headed by Marie Bountrogianni, was charged with its

---

[1]More precisely, it would determine how to make decisions about the design – i.e., it might make them itself, or decide to delegate them to another body, or do something in between, e.g., make the final decisions on the basis of recommendations of a commission.

implementation (Secretariat, 2007, 205–206).

Thompson does not expand on what he means by "constitutional reasons", but the reasoning to support this move may relate to Gutmann's and his view that justification for political institutions comes in degrees (§3.1.2.).[2] Often, institutions such as the legislature are not fully justified according to deliberative democratic principles. For, often, neither those institutions nor the decisions they make have been determined by the people in deliberative democratic processes.

However, ordinary legislative mechanisms may still make decisions to form a deliberative democratic process, and these may be justified to some extent initially. How well justified they are seems to depend on the extent to which the process fulfils the principles that Gutmann and Thompson advance, according to the best understanding of the principles at the time. And, as we have seen, there seemed to be good reasons for thinking that the OCA, as it was constructed by the government and decision-makers initially, fulfilled Gutmann and Thompson's principles to a significant degree. Then, in subsequent deliberative democratic institutions, citizens may revisit prior decisions, which have been made by ordinary legislative mechanisms on the basis of how those involved believe Gutmann and Thompson's principles are best fulfiled. The subsequent democratic deliberation by citizens would then seem to more fully justify either the initial decisions or their revision.

I agree with Thompson that ordinary legislative mechanisms may be used

---

[2]On my view, I generally conceive of institutions as legitimate, and decisions as justified, although institutions may confer some degree of legitimacy on decisions they make. However, I have adopted Gutmann and Thompson's terminology throughout this part of my argument, which seems to apply the concept of justification to both institutions and their decisions.

to create a deliberative democratic institution to address an issue such as electoral reform. However, this is not the only way to initiate deliberative democratic institutions that may be legitimate, and that may give rise to legitimate decisions. Deliberative democratic institutions may also be initiated and developed by people in other institutions, such as academics and professionals such as physicians, clinicians, or lawyers.

Also, mechanisms may be developed by grassroots or non-governmental organizations to enable citizens to communicate with one another and political officials about policy decisions. For example, the Directgov online petition website (`http://epetitions.direct.gov.uk/`) was initially developed by a grassroots organization to facilitate British citizens' ability to communicate with their government. Eventually, it was incorporated into the formal political structure. If more than 100,000 citizens sign a particular e-petition, the issue may be debated in the House of Commons. Also, political officials may respond to petitions on the website.

So, although they go unnoticed in Thompson's analysis, there are alternatives to ordinary legislative mechanisms that may initiate deliberative democratic institutions. The existence of alternative ways to initiate deliberative democratic institutions is worth noting, since I will argue that there is a serious challenge for relying on ordinary legislative mechanisms to stop the regress and initiation problems, as Gutmann and Thompson do. The problem arises from what motivates many deliberative democratists, including Gutmann and Thompson, to ground their conception of legitimacy in citizen participation: ordinary legislative mechanisms have systematically failed to protect and promote at least some citizens' interests.

I agree with Gutmann and Thompson that this is a serious problem that plagues many political institutions in many modern liberal democracies. But insofar as this is what motivates deliberative democratists, there is a problem with turning to ordinary legislative mechanisms to initiate deliberative democratic institutions. If ordinary legislative mechanisms have consistently failed to adequately consider citizens in their decisions, it seems as though we should not be surprised when, yet again, political officials fail to fulfil that goal in designing and implementing new institutions.

Of course, some change in context may occur to make it more likely that existing legislative mechanisms will construct an institution that serves to strengthen democracy.[3] But generally, there must be some change in the ordinary legislative mechanism *first*, if it is to be likely to construct a deliberative democratic mechanism that strengthens democracy. In Rawlsian terms, the institution must do better at consistently meeting the standard of public reason in its decisions, including those about the deliberative democratic mechanism. Gutmann and Thompson's theory fails to address the question: why think that political officials would construct an institution that would fulfil their principles, if they have systematically failed to do so in the past?

And indeed, the OCA seems to bear out this worry with Thompson's re-

---

[3]For example, political officials may change their behaviour because they perceive that many citizens are becoming so dissatisfied with current politics that the authority of the institutions (from which political officials derive their authority) is under threat. Two examples of this may be found in British Columbia, when a number of scandals associated with the ruling New Democratic Party was made public(Lundberg, 2007, 482), and seemed to do significant damage to the legitimacy of the provincial government there, and in Scotland, when, during the Thatcher era, the British government implemented numerous policies that many of the Scottish people found objectionable, because the policies during that era strongly conflicted with their public political conception of justice, which favoured a more welfarist government.(Paterson et al., 2001, 121)

sponse to the regress problem. Prior to the OCA, there was evidence to suggest that one of the most serious problems with Ontario's political institutions was that officials were not meeting the standard of public reason adequately, and that this was affecting the legitimacy of the Ontario government. This is not to say that at any point, the Ontario government had no legitimacy. But there was evidence to suggest that its legitimacy seemed to be weakening in recent years.

For instance, prior to the government's announcement to convene the OCA, Cameron et al. (2003, 42) reported that 68% of Ontarians felt that, in the authors' words, "legislators lose touch with the people." Furthermore, supporting the view that the electoral system undermined the legitimacy of the political structure for some, Cameron et al. (2003, 42) also noted that "almost half of respondents indicated that the first-past-the-post system is 'unacceptable'." In its report to the Ontario government, submitted before the OCA began, the Law Commission of Canada (2002, 5) cited that over 70% of Canadians polled in 1997 reported believing that "both federal and provincial political systems are highly corrupt." And, in his report on the special consultation meetings[4] held during the OCA, Clutterbuck (2007, 3-11–3-12) notes that "Participants in all four communities felt strongly that there were major barriers to the participation of many people in the general democratic political process at all levels of government, which went beyond the electoral system itself."

On my view, these complaints with the government are usefully understood as being about failures of public reason. That is, the basic reason for

---

[4]Four "special consultation meetings" were designed and held for the specific purpose of engaging citizens who are often excluded from politics, such as those in northern Ontario and predominantly Aboriginal communities.

Ontarians' dissatisfaction was because it was not apparent to them that political officials were striving to take into account citizens' views about what they ought to do. Although a significant number of citizens reported being dissatisfied with the electoral system, the sources of their dissatisfaction were much broader in scope. Besides the electoral system, the references to corruption and major barriers to political participation suggest that many citizens believed that political officials, in general, were failing to take into account reasonable people's views about political issues that significantly affect them.[5] In short, political officials were making decisions in ways that citizens perceived as unjust.

And a number of decisions by the Ontario government about the OCA suggest that this trend continued, of not adequately meeting the standard of public reason. For example, the Ontario government was heavily criticized for the inadequate amount of time that the assembly had to make its decisions about the alternative electoral system, as well as for public engagement and education of the general public prior to the referendum. And although an analysis of the demographics of the OCA has not yet been made public, it seems unlikely that the OCA fared any better than the BCCA on the question of whether marginalized groups were better represented on the assembly.[6] These aspects of the OCA seem to be the basis of reasonable people's further

---

[5]It is worth noting, I think, that citizens' complaints were not that political officials were making decisions to which citizens deeply or strongly objected, but were about the apparent lack of any consideration at all of their own or other citizens' views about politics. The distinction is important, since the first may suggest that such citizens were unreasonable, while the second does not. Rather, in Rawlsian terms, in the second line of objection may be restated as that political officials were failing to acknowledge the political equality of some citizens, thereby apparently failing to meet the standard of public reason.

[6]For a thorough critique of the BCCA on this score, see Rabinder (2008).

dissatisfaction with the Ontario government, because they violate people's conceptions of justice.

6.3.2 Path dependence

To be clear, many proponents of the citizens' assembly took issue with features of the design for which the OCA was criticized, e.g., the timing and public education campaigns. And I agree that the justification of such decisions was questionable at best. However, my contention is that the structure of Gutmann and Thompson's theory allows these problems to arise, in principle and in practice. It does so because it provisionally justifies these decisions, until they may be revisited at a later time in a deliberative democratic mechanism.

While any decision remains open to being revisited in future, it is important to recognize how difficult it may be to revise decisions once they have been made. To understand the challenge this presents, the concept of path dependence may be useful. As Margaret Levi (1997, 28) defines it,

> Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and smaller branches. Although it is possible to turn around or to clamber from one to the other – and essential if the chosen branch dies – the branch on which a climber begins is the one she tends to follow.

In some cases, political decisions may be easily changed, but this possibility generally depends on multiple factors. Some of those factors may be best

understood as a matter of relatively arbitrary choice, such as what percentage of the vote in a referendum must support it to reform the electoral system. But other factors, as Levi points out, that may affect the ability to revise previous political decisions are the amount of resources that have already been spent to develop and implement a particular course of action (the resources to "grow" a particular part of the tree, and how far up the tree and along a particular branch one has travelled), and the additional cost in resources that will be required to pursue an alternative course instead (how much it will cost to get to another branch to which one wishes to switch).

To give examples from the OCA, I have suggested that public reason may have supported selecting a different mandate than electoral reform. Or the government might have reconsidered other decisions, such as the amount of time and resources it was willing to invest in public education and engagement. In Rawlsian terms, I have argued that it should have better addressed that these decisions apparently (in the eyes of reasonable citizens) did not adequately address reasonable citizens' dissatisfaction with the OCA or the government.

While I do believe that the government ought to have revisited many fundamental decisions about the OCA, such as its mandate and the timeframe for public engagement for the purposes of strengthening democracy, the concept of path dependence may be useful for understanding the reasons it had for not doing so. Put simply, the farther along in the process of designing and implementing the OCA, the greater the cost of most of these changes. For example, a change to the mandate, just in terms of the resources that had been invested to design the process on the presumption of electoral reform,

much less those used once the process had begun, would have resulted in a significant loss of resources with no apparent return on the investment.

To return to Levi's metaphor of a tree, the choice of mandate would be quite close to the base of the trunk. And many other aspects of the OCA would be dependent on that one, or would branch out from that point in the base, e.g., the design and planning of learning exercises about electoral systems through voting simulations, arranging visits by guest speakers to give presentations on electoral systems. Thus, getting something of value in return for the resources spent on these preparations would depend on the mandate remaining the same. If a decision so far down on the base of the tree were changed, this would entail at least losing the value of resources that had been used to develop the original structure of the tree. And, to the extent that the original plans had been executed, a significant amount of additional resources would likely be required to get to an alternative part of the tree.

In contrast, other decisions may cost less to change, as they are farther up the tree. For instance, it may be relatively easier, and cost fewer resources, for the assembly to change its decision about which electoral system to develop, rather than its general mandate to develop an alternative electoral system. How much it would cost to change its decision about which electoral system to develop would depend, in part, on how far up the tree the assembly had actually travelled, or how far along the decision-making process about its first choice the OCA had gotten.

In other words, the cost of changing its decision to develop one electoral system instead of another may be thought of in terms of how much distance would have to be travelled to get from one branch of the tree to the other. In

contrast with the decision to change its mandate, the choice to change its decision about which electoral system to develop would not require going all the way back down to the base of the trunk of the tree. Nor would it require growing a new part of the tree, so long as the assembly chose to change its decision to another system already included among the options to be considered.

According to Rose (2007, 15), the OCA had 15 decisions to make about the MMP system that it would recommend to Ontarians. If the OCA had not yet begun to make any of these decisions, the switch to another system, e.g., Single Transferable Vote (STV), would be relatively "cheap," compared to the cost of switching after it had worked through all of these decision points. In its initial learning phase, the assembly participated in simulations designed to teach it about all of the electoral systems they would have the option of developing. Thus, they could have made a move from the "branch" to design an MMP system to another, e.g., to design an STV system, at very little cost if they had not yet begun to work through the decisions about the design of an MMP system.

I raise all of this to explain another problem with Thompson's argument that citizens should accept ordinary legislative mechanisms to make the initial decisions about a citizens' assembly. Thompson's view that the benefits of accepting their decisions is likely to outweigh the costs because they may be revisited later is weakened by two questionable assumptions. The first is that, as the concept of path dependence may help to illustrate, decisions may be more resistant to change than Thompson seems to acknowledge. This depends on how entrenched the decisions are, and the costs that have already been spent on pursuing a particular path. Second, as I will argue below, some citizens,

particularly those who are marginalized, may have good reason to doubt that they will have an opportunity to challenge decisions that have been made by ordinary legislative mechanisms.

On my view, citizens may rely on ordinary legislative mechanisms to design institutions, but whether they should do so depends on how well ordinary legislative mechanisms meet the standard of public reason. This avoids the pitfalls of placing so much weight on the opportunity to revisit decisions. Decisions are only ever justified to the extent that they meet the standard of public reason, or are likely to be conducive to citizens' satisfaction with the institutions involved, over time. This is not to deny that the justification of a particular decision may change with time. But on my view, insofar as any of the decisions made by the Ontario government and decision-makers were likely to compromise the legitimacy of the OCA or the institutions involved, they were less justified.

6.4   The scope and nature of evidence

I have argued that when they are assessing their options, political officials ought to be wary of placing too much weight on the idea that decisions may be revisited in the future, and that a theory of political justification should reflect this. At the time when political officials make their decisions, they ought to ensure that their reasoning takes into account evidence that has been made available to them about how well they and their decisions are currently meeting the standard of public reason. For, to the extent that their decision does not meet the standard of public reason, it may undermine the legitimacy of the

institutions involved. Furthermore, political officials should consider evidence about the likely effects that decisions will have on meeting the standard of public reason.

According to my Rawlsian framework, citizens' views within deliberative democratic institutions, such as citizens' assemblies, may count as evidence towards one policy option over another. However, this is not the only sort of information that should be taken into account. Some other sorts of information, which may be reliable indicators of citizens' views about governments' actions and their decisions, are studies and research done by social scientists, or reports by members of legislatures who have shown themselves to be well aware of their constituents' satisfaction with political institutions.[7]

This point brings to light a problem with Thompson's position on representation (which was adopted by organizers and the chair of the OCA). According to Thompson, the exclusion of citizens who belong to particular social groups in the OCA is unimportant for the purposes of electoral system review. Citizens from marginalized groups may well have agreed that being excluded from an assembly on electoral reform was not a major concern for them. However, as I have argued more generally, according to my conception of political justification, it is important to be aware of whether citizens agree with Thompson about this point. Insofar as they did not, that disagreement could undermine the legitimacy of the institutions involved with the OCA.

---

[7]It should be noted that the ability of these sources of evidence to improve the justification of a decision also depends on the political legitimacy of those institutions involved. The extent to which political officials should rely on academic institutions or researchers depends on the satisfaction of reasonable citizens with those institutions. If researchers or particular institutions have provided evidence or recommendations to political officials, but citizens do not perceive these sources as reliable and trustworthy, then this may compromise the ability of political officials to take these into account.

And I submit that even if citizens' views on electoral reform were unlikely to differ significantly from those citizens in the OCA, reasonable citizens who are typically marginalized in politics have another reason to take issue with being excluded.[8] For, as Thompson points out, being on the assembly has the potential to provide citizens with an opportunity to object to fundamental decisions about it, such as its mandate, or to suggest other issues about which citizens should have an opportunity to deliberate. However, I will argue that the structure of Gutmann and Thompson's theory undermines the possibility for non-members to raise such concerns.[9]

It may seem as though even if non-members were unable to express dissatisfaction with the assembly from within it, they could have done so through mechanisms such as the public consultation meetings. In reports on the special public consultation meetings that were held in Ontario, audience members did raise objections to the members, such as that they felt that other issues were of far greater concern than the electoral system. For example, they raised worries about inadequate representation of typically marginalized groups' interests in politics; the inability for certain groups, such as the poor and homeless, to meaningfully participate in politics; literacy and language barriers that pre-

---

[8]At this point, in the absence of empirical evidence to support that there were in fact reasonable citizens who belonged to marginalized groups, and were dissatisfied with the mandate of the OCA, I can do little more than speculate. But this does not weaken my point, which is that one should not stand on Thompson's reasoning that, e.g., reasonable citizens *should* not be concerned about certain aspects of representation, and take it for granted that they are not. An adequate theory for liberal democracies ought to be concerned with what reasonable people in fact think about issues such as representativeness in political institutions.

[9]This is not to say that I believe that it will be sufficient to include people from marginalized groups on the assembly, for them to be heard. This is a point I shall address below. For now the only argument I want to make is that Thompson's framework seems to make it necessary for people from marginalized groups to have a say about the decisions made within and about the institution.

vent some people's participation in politics and voting; and the lack of representation of "everyday people" in politics.(Clutterbuck, 2007, 3-3) And some remained unconvinced that electoral system reform was adequate to address these concerns. Accordingly, they insisted that organizers of the consultation meetings make a formal note of the other barriers to democratic participation, which were outside the scope of the OCA.(Clutterbuck, 2007, 3-3)

Thus, the public consultation meetings may seem to have afforded non-members meaningful opportunities to raise objections to the OCA. And the meetings were designed to fulfil deliberative democratic principles, such as allowing assembly members and non-members to exchange moral and respectful reasons about the electoral system and their concerns with it. However, as I alluded to in §5.3.4, the way that assembly members viewed audience members' input reflects another problem with relying on subsequent processes to revisit past decisions once within the deliberative democratic mechanism.

Because non-members had not gone through the process that assembly members had, e.g., learning about different electoral systems, and discussing different views with one another, assembly members tended to discount criticisms by the former. Indeed, assembly members reported that the public consultation meetings served to show them how much more than most assembly members knew about electoral systems, rather than raising points that could meaningfully inform the deliberations by the assembly.(Rose, 2007, 13) It seems that the less involved in the institution individuals are, the more their views are likely to be discounted[10] as not "deliberative enough" by those who

---

[10]In saying they are likely to be discounted, I mean that they may be dismissed altogether, or they may be given less weight by those who have been part of the other deliberative processes.

are responsible for making decisions within the institution.

Thus, the exclusion of marginalized groups is a problem for Thompson in light of one of the main reasons that he argues citizens ought to accept ordinary legislative mechanisms to initiate a deliberative democratic institution. According to Thompson, once inside that framework, citizens can then revisit prior decisions made by the ordinary legislative mechanisms. But if the initial decisions tend to result in the exclusion of certain groups, then reasonable citizens have good reason not to accept Thompson's argument to accept ordinary legislative mechanisms to initiate an assembly. It is likely to be one more political process in which marginalized groups are excluded and prevented from having a say, and their opportunities to raise their objections elsewhere are (by definition, as a marginalized group) almost nonexistent.

Contrary to Thompson's claim then, it seems unlikely that the structure of Gutmann's and his theory provides meaningful opportunities for those who are not included in the institution to challenge and initiate revisiting the initial, fundamental decisions such as the mandate, selection process, representativeness, etc. And if this is true, then Thompson's argument that there is good pragmatic reason for citizens to accept ordinary legislative mechanisms as a solution to the initiation and regress problems seems to fall. Those who are typically marginalized (and will most likely continue to be in such decisions) may well have good reason to reject such mechanisms as an adequate solution to the regress problem, barring other changes in the conditions of the democracy.

In contrast, the Rawlsian framework I have developed is meant to draw explicit attention and consideration to both the burdens of judgement and

the burdens of injustice as potential challenges for ordinary legislative mechanisms attempting to strengthen democracy. However, these two factors can and should be treated separately. If the burdens of injustice are weakening a democracy, e.g., unreasonable people are constraining decision-makers who are trying to strengthen democracy, then clearly this is a problem. But the problem is how to decrease the proportion of unreasonable people in the society, in order to strengthen the legitimacy of the democracy, not how to satisfy conflicting conceptions of the good.[11]

The question then becomes what to do about the prevalence of unreasonableness in the society, e.g., are there democratically legitimate ways to change people's conceptions of justice or conceptions of the good so that they are more reasonable? What is 'reasonable' here will be determined by what is in accordance with the public political conception of justice. That is, what the state may do to increase the prevalence of reasonableness, and what sort of reasonableness it may promote among unreasonable people, depend on what maintains a reasonable overlapping consensus that supports the constitutional essentials.

If, instead, the major challenge for strengthening a democracy is the burdens of judgement, then the state *is* obligated to attempt to make decisions that maintain the satisfaction of the people, given their conceptions of the

---

[11]As I argued for in §4.4, although unreasonable people's dissatisfaction with institutions does not count against their legitimacy, this is not to say that the state is permitted to do anything it likes to unreasonable people, or that their interests do not count. Unreasonable people are still persons, and are to be treated accordingly, i.e., with the same equal moral status owed to all persons. But because of their unreasonableness, their (dis)satisfaction with political institutions is not to count towards the justification of the state's decisions, or their legitimacy. I am very grateful to Charles Weijer for pointing out this important distinction.

good. However, institutions may sometimes make decisions that do not have popular support, or fall short of public reason at the time they are made. They may do so if there is evidence that reasonable people's opinions will change, and their decisions will meet the standard of public reason in time, or that reasonable people's dissatisfaction will be outweighed by other decisions that will be made in future.

These points open the door for ordinary legislative mechanisms to address the marginalization of social groups in democracies, but also illuminate the challenges for relying on them to do so. Longstanding institutions may be able to make a legitimate decision that is not well-supported by public reason if the reason it is not well-supported is the prevalence of unreasonableness. Or, they may make a decision that does not meet the standard of public reason at the time of the decision if, overall, the institutions involved have made or expect to make decisions that will maintain reasonable citizens' satisfaction.

An institution may maintain the satisfaction of reasonable citizens with it if, on the whole, it tends to make decisions that accord well enough with citizens' conceptions of justice for them to view the institution as legitimate. Even if an institution makes a single decision that a person deems to be unfair according to her conception of justice, the institution may demonstrate its fairness in other decisions – that is, it may show that it is not unfairly favouring or discriminating against any one group, or working to that group's (dis)advantage all of the time. This may give constituents reason to accept a single decision as obligatory even if it is contrary to individuals' egalitarian conceptions of justice.[12]

---

[12]I owe thanks to Richard Vernon for bringing this point out as a feature of my view.

But this view of legitimacy with respect to decisions, which gives some weight to citizens' prior experiences with the institution, works both ways. That is, if the number and importance of decisions that are *contrary* to citizens' conceptions of justice accumulate and threaten to outweigh those that are *consistent* with those conceptions of justice, it may become increasingly difficult for them to accept particular decisions that they disagree with as legitimate. In such cases, the institution may have to work quite hard to convince citizens that a particular decision ought to be accepted by them, in order to counter the weight of evidence that has led citizens to question the legitimacy of the institution.

As I mentioned earlier, there seemed to be evidence to suggest that this was the situation that the Ontario government was facing.[13] That is, prior to the announcement to hold the OCA about electoral reform, the legitimacy of the Ontario government had been weakened because a significant proportion of people seemed to doubt that it was striving to fulfil the standard of public reason. And a significant proportion of Ontarians seemed doubtful about whether electoral reform would be a meaningful change that would address their major concerns.(Cameron et al., 2003, 42) As my framework draws out, the government ought to have done more to be to convince people that electoral reform was significant for them, given the people's own comprehensive doctrines, which may have included the view that the government would not be a good judge of what was important to them.

Newly formed institutions, on the other hand, such as the OCA, will have neither a good history nor a bad one as a result of past decisions they have

---

[13]E.g., the surveys cited by Cameron et al. (2003, 42).

made. That is, citizens will not yet have evidence, in the form of other decisions it has made, to inform their judgements about whether they should accept any particular decisions that seem contrary to their conceptions of justice. Newly formed institutions may, however, "inherit" some amount of the progenitor institution's reputation. For example, a citizen's judgements about the Ontario government may influence those about the OCA or its decisions.

As with longstanding institutions that have consistently made decisions that are contrary to citizens' conceptions of justice, newly formed institutions may have to work harder than a longstanding institution with a "proven track record" to meet the standard of public reason. But the reason that a newly formed institution may have to work harder to convince people that they should accept objectionable decisions as just is different than before. It is not because previous experience has shown the institution to be unjust according to citizens' personal conceptions of justice. It is because they lack information in the form of prior decisions, to help them determine whether the institution is fair, but this is just one decision that is contrary to their personal conceptions of justice, or whether this is one unjust decision in a series of unjust decisions to come.[14] Thus, proponents of institutional reform will have to find alternative

---

[14]This may be a way of understanding why the processes through which constitutional reform takes place typically take so long to carry that out. The processes for undergoing constitutional reform, or constitutional conventions, are generally novel with respect to the citizenry, as are the possible outcomes. Thus, the extended period of time is needed to work out what outcome will be likely to be to the satisfaction of reasonable people, given their personal conceptions of justice. And in places where constitutional reform frequently takes place, it seems likely that the people's experiences to date with the reformatory institutions will have been negative. Otherwise, it seems unlikely that they would be undergoing such frequent constitutional reform. In these latter cases, successful constitutional reform – i.e., constitutional reform that results in a stable legitimate democracy – may take a long period of time because of the need to overcome people's distrust in the reform process itself, such that they will be likely to accept the results.

ways to convince citizens of the positive benefits they believe it will bring to them, if institutional reform is to meet the standard of public reason.

So, thus far, I have largely targeted Thompson's argument that accepting ordinary legislative mechanisms is pragmatically justified. I have challenged his claim that the people ought to accept ordinary legislative mechanisms to initiate deliberative democratic institutions because the benefits of entrusting the decision to ordinary legislative mechanisms will outweigh the costs of doing otherwise. And I have argued that there was evidence to suggest that a significant proportion of reasonable people disagreed with Thompson's arguments, and decisions that were made about the OCA. To the extent that this is true, on my view, the citizens' assembly on electoral reform was less justified.

6.5 The regulatory role of reasonable comprehensive doctrines

Thompson's normative line of reasoning to support his response to the regress and initiation problems is problematic as well. Thompson argues that the decision to hold a citizens' assembly about electoral reform is justified on normative grounds, since deliberative democratic institutions best fulfil the tenets of democracy. As Rawls (1997, 770n19) points out, and as I have drawn attention to before, one of the main differences between political liberalism and Gutmann and Thompson's theory is that the former depends on citizens' personal conceptions of justice overlapping in a way that supports a set of constitutional essentials, even though they conflict in many ways. The latter rests on citizens' acceptance of the comprehensive set of principles that Gutmann

and Thompson advance, which I outlined in Chapter 3.

This difference is exemplified in several of Thompson's arguments, which I presented in the previous chapter, including his view that electoral reform was an appropriate task to give to a citizens' assembly – i.e., citizens *should* want to make decisions about it for themselves because it has significant implications for their interests. Also, in his arguments about representation, he advances his view that non-members *should* be willing to see assembly members as enough like them to be trusted with designing an alternative system that other ordinary citizens could accept. According to Thompson, only "being Ontarian" matters to the issue of electoral reform. Other aspects of people's identities, e.g., their race, ethnicity, religion, geographic location, are not relevant to the question of which electoral system to prefer.

In contrast, according to my Rawlsian framework, any political decision or institutional arrangement is normatively justified only to the extent that reasonable citizens are satisfied with it. Thus, governments may construct democratically legitimate institutions, in which citizens do not (directly) make decisions that significantly affect them, such as government-appointed commissions. Their legitimacy depends on whether that arrangement is capable of maintaining a reasonable overlapping consensus.[15] For example, a government may appoint a commission to review and propose an alternative electoral sys-

---

[15]For an example, see the argument (summarized on pps. 1–2) by Hibbing and Theiss-Morse (2002), that while a significant proportion of American citizens want to be able to participate in politics when they feel they must, e.g., to hold decision-makers accountable for unfairly pursuing decisions in their own interests and at citizens' expense, in an ideal political system, much of the decision-making happens "off their radar" so to speak (hence, the book's title, *Stealth Democracy*. The authors argue that the drive behind much of grassroots activism today is, for many citizens, an unfortunate necessity in light of political officials' shortcomings, i.e., using their power and authority to make self-serving decisions that thwart the interests of others.

tem, or may even carry this task out itself.

To continue with the example of a commission, suppose that the government appointed one to review the electoral system, in spite of evidence that its members would be likely to make decisions that will leave the people dissatisfied with the commission and the government.[16] At the time it makes the decision, that evidence counts against its justification. However, as I argued in the previous section, the government may decide to go ahead and convene the commission anyways, in the belief that the cost to its legitimacy will be overturned or outweighed in future.

Contrary to Thompson's line of reasoning, the Ontario government may have justifiedly made the decision to hold an expert commission about electoral reform, to appoint the courts to decide the issue, or even to make the decision themselves. The justification for choosing any of these options, however, would depend on whether there was good reason to think that citizens would be satisfied with the outcome. And this is also likely to be affected by the process undertaken to make the decision.

Furthermore, it is important to note that the justification for using any decision-making process is likely to depend on a number of factors, including particular aspects of its design. For instance, although using an expert commission to choose an electoral system may be democratically justifiable, generally speaking, whether it is justified in particular cases will depend on, e.g., who is chosen for the commission and how, whether it uses a process that citizens recognize as addressing their concerns, etc. These things bear on

---

[16]For simplicity's sake, I only mention these two, but there may be other institutions that are implicated by the actions of the commission, e.g., if it is a group of academics, then the academic institutions associated with the commission.

the justification of the decision insofar as they may affect citizens' satisfaction with the institutions involved and the decisions they make. Thus, these and other identifiable factors that may affect citizens' satisfaction should be taken into account when determining what decision-making process to use and how to design it.[17]

So, on my view, in order to answer any questions about the justification of decisions, one needs to know about citizens' values and beliefs, and how they are likely to be affected with respect to the institutions involved. But also, one needs to continue to attend to citizens' views about the institutions involved. So, even if the Ontario government initially believed that its decisions would meet the standard of public reason, that assessment ought to have been checked throughout the OCA's decision-making process. And, as I indicated earlier in the chapter, it seems that there was evidence from the outset that suggested the decisions about the OCA were not meeting the standard of public reason.(Cameron et al., 2003; of Canada, 2002; Clutterbuck, 2007)

Gutmann and Thompson may argue that their theory accommodates this point, because of its commitment to the principle that decisions are to be open to revision. So, they may argue, it too allows for the justificatory status of decisions to change. However, my objection is that there is a tension in

---

[17]Here, I will not go into the question of how much time needs to pass before a warranted judgement can be made about a decision. This will, I think, depend on a number of complex factors. For instance, the reason that I believe it is warranted to pass judgement on the OCA now, rather than having to wait for a longer period of time, or having to add the caveat that any judgement may or is likely change, is in part because the OCA resulted in no action being taken. By contrast, if the process had resulted in reform, judgements about the justification for the OCA process and reform on its basis would have to be more tentative, and continue for longer, since citizens' satisfaction may change over time, depending on, e.g., results of future elections, citizens' satisfaction with those results, and their perceptions about the reform as a causal factor in their satisfaction.

Thompson's view about the *basis* for either assessing or reassessing decisions, which comes out in his defence of citizens' assemblies.

On some issues, it seems that Thompson's substantive commitments about what decisions ought to be made may conflict with those held by reasonable citizens. For example, reasonable people disagree with his view that, in principle, expert commissions ought to be rejected. Also, reasonable people disagree with his view of how representation in citizens' assemblies should be addressed. And reasonable people disagree about whether to require a supermajority in a referendum about reforming constitutional-level laws. However, not only does Thompson not provide a principled way of settling disagreement between the people, he does not provide a principled way of settling disagreement between his views and those of the general population about how best to fulfil the principles of democracy.

6.5.1   Self-interested reasons

Another issue that highlights the comprehensive nature of Thompson's view is the appropriate role of self-interested reasoning in politics. According to Thompson's account, the principles that reasons must be moral and respectful heavily constrain self-interested reasons from contaminating decision-making processes. As I discussed in §4.10, according to Gutmann and Thompson (2004, 86), one way of approaching disagreement in politics is to continue to deliberate in an effort to seek an economy of moral disagreement. That is, people are to try to find common ground between their views in a process that fulfils their principles, and to identify the remaining points of disagreement. What justifies decisions about which they agree is that it is reached in a process

that fulfils their principles.

On my view, however, what determines whether particular interests – self- or other-regarding – are permissible when determining political decisions is the standard of public reason. For example, many reasonable Canadians hold that the poorer health, lower social and economic status, poorer living conditions, etc. that many Aboriginal peoples in Canada suffer from are good grounds for political reform. It is entirely appropriate for Aboriginal peoples in Canada to argue that the connections between current political structures and the negative effects on their health are good reasons for political reform, even though they are self-interested reasons. The justificatory basis for accepting these self-interested reasons as admissible grounds for political reform depends on the support of reasonable people's conceptions of justice for doing so.[18]

Placing such strong priority on the principles of deliberative democracy, and to the exclusion of self-interest, to justify taking the position one does in politics encounters a number of problems. First, as Jane Mansbridge points out, it seems as though if all of the people involved are willing to accept a decision on the basis of their own self-interest, that would be good reason to take that decision. And the justification for doing so is not based on whether

---

[18]As I will argue below, it is important to distinguish between support for the judgement that there is something wrong with the political institutions with respect to some group of people in society, and judgements about what ought to be done about that problem, or where the source of the problem lies. Also, I wish to emphasize that I have not made any claims throughout about the proportion of Canadians who are reasonable with respect to Aboriginal peoples. And, to the extent that Canadians are unreasonable with respect to them, political institutions will be constrained in their ability to make just and justified decisions with respect to those people as well. Although I believe that the burdens of judgement are to some extent responsible for the continued injustice of contemporary Canadian institutions against Aboriginal peoples in Canada, I believe that the burdens of injustice, or the prevalence of unreasonableness towards Aboriginal peoples, also stymies efforts to address injustice against Aboriginal peoples in Canada.

the process used to arrive at it met Gutmann and Thompson's principles. In her words,

> In a primordial way, simply stating that something is in one's own interests *is* a justification. Imagine a deliberation in which each individual serially said, "This policy is in my (my group's) interests," and each identified the same policy. Further discussion involved only means. If no others were affected, the group would have discovered a common good. No one would have to make a further justification, because simply saying that the policy was in their interest would count as a justification. That the policy meets everyone's interest counts as a reason "in the desired sense." Indeed, it counts as the dispositive reason, none other being necessary.(Mansbridge, 2006, 126)

If everyone agreed with taking the same course of action on the basis that it served each of their own interests, I agree with Mansbridge; I can see no good reason not to follow through and take that action. And furthermore, I agree with her that a good reason for them to do so just is that it is in each person's interests. Furthermore, assuming that the interests that drive each party to agree with the policy are different, the common good that Mansbridge identifies in this example is analogous to the sort of agreement sought after in the reasonable overlapping consensus.

While this justification may be understood as primordial, it can, I think, be further supported by appeal to the concept of public reason. Settling a political decision on the basis of self-interest in this case would be justified because it seems likely that reasonable people (who are also necessarily rational) would agree with doing so. That is, it seems unlikely that, as a matter of fact, reasonable people would object to taking this decision.

On the other hand, if people's interests lead to conflict about political

decisions, Ian Shapiro raises the following problem for Gutmann and Thompson's insistence that the people continue to publicly deliberate about the issue. Shapiro (1999, 31) points out that, "People with opposed interests are not always aware of just how opposed those interests actually are. Deliberation can bring differences to the surfaces, widening the political divisions rather than narrowing them." The crux of Shapiro's challenge is that, contrary to what Gutmann and Thompson seem to suppose, public deliberation may not serve their goal to find an economy of moral disagreement. Instead of showing people how their interests converge in ways they did not realize, and closing the moral gap between their positions in politics, deliberative democratic mechanisms may bring to light more ways that their interests conflict than they were aware of before deliberations began.

The point I wish to draw from Shapiro's argument is not that public discourse in the political structure should be discouraged for the sake of limiting disagreement. Rather, Shapiro's argument is meant to provide a reason for why citizens may support alternative sorts of institutions to which Gutmann and Thompson (1996, 12,44–45) object, such as supreme courts. My argument agrees with Gutmann and Thompson's general point that supreme courts should not be seen as the sole site for deliberation in the political structure. But Shapiro's point suggests a democratic basis for endowing them with the task of making some particular sorts of decisions. The people may be satisfied with this arrangement because they recognize that continued public discourse is unlikely to bring convergence to people's positions in politics, at least not for the foreseeable future. In light of the likelihood that disagreement amongst the general citizenry will continue, citizens may support the use of other sorts

of institutions to make decisions about some things, such as allowing a small group of individuals to decide what laws should imply for people's freedom to do certain things. On my view, citizens' continued support for any kind of institution (in the sense modelled by wide reflective equilibrium) depends on the extent to which that institution demonstrates that it is meeting the standard of public reason.

One sort of self-interested reasoning that my account of political justification precludes, however, is that which supports institutions that systematically exploit certain groups. On my view, reasonable people cannot plausibly claim to regard others as their moral equals while simultaneously endorsing institutions and decisions that systematically perpetuate serious harms against certain social groups. For example, the gross disparities in the morbidity and mortality rates of Aboriginal peoples in Canada has been traced to injustices found in the basic structure, including political institutions.(MacKinnon, 2005; Romanow, 2002) Given that this connection has been established, reasonable people should accept that the political structure ought to be changed *somehow* to address this problem. Insofar as people reject this conclusion, they are demonstrating unreasonable views regarding Aboriginal peoples.

Of course, this raises the challenge of how decision-makers are to proceed in practice. A major criticism I have advanced against Gutmann and Thompson's theory is its inability to provide a way to make a decision in the face of reasonable disagreement. But it may seem as though my Rawlsian framework does no better on this score. For, the standard of public reason is unlikely to yield a singularly determinate outcome in answer to political issues either.

An important difference, however, is that although my theory may result

in multiple options being justified, the theory also provides a way of evaluating those options, and brings to light what should be taken into consideration when deciding which one of the range of options to pursue. In practice, decision-makers should choose from among the range of options available to them based upon the likely implications for the satisfaction of reasonable people with the institutions involved in the decision.

Also, they should bear in mind that any particular decision by an institution will be just one decision among many, and will be made as part of a system in which other institutions are making decisions as well. This is especially important to keep in mind when particular decisions are likely to have negative implications for a group of reasonable people who have been systematically disadvantaged by the institutions involved, and are deeply dissatisfied with those institutions as a result. Political officials may make unpopular decisions if they believe that the resulting dissatisfaction with the institution is likely to diminish in future. For example, the dissatisfaction may be offset by other decisions that it makes. Or the public may come to see the decision as a good one in time, because it sees that the consequences are not as bad as they thought they would be, and in fact, brings unanticipated advantages.

Although Thompson holds that decisions should be open to revision, the question remains of how to settle disagreements that are likely to persist between, e.g., the theorist and members of the general population. Thompson may admit that his views about, e.g., representativeness, or the suitability of other institutions to make the decision about electoral reform, are subject to the agreement of citizens in deliberative democratic institutions. But this fails to address the question of who is to have the final say in the matter if

disagreement continues, which is likely.[19]

As I have argued, a number of aspects of the OCA did not seem to address potential objections that reasonable citizens might have had to its design. My point in this chapter is not that officials must have fully convinced all reasonable citizens about every aspect of the OCA. My objection is to the lack of effort demonstrated by the government to address reasonable citizens' concerns about it. I contend that one of the main shortcomings of the OCA process was the government's failure to address Ontarians' dissatisfaction with the institutions – e.g., the premier and legislative bodies – who were involved with making the decisions, or Ontarians' dissatisfaction with the OCA.

Certainly, the OCA's decision was publicized as one that took into account non-members' views, e.g., the public was told that the decisions were made by citizens just like them, and were told that electoral reform could have significant implications for their concerns. But reasons were not given to address the scepticism that non-members may have had about these claims, or about the OCA more generally. In Rawlsian terms, convincing reasons were not provided to show non-members why they should accept the OCA's decision, given their own comprehensive doctrines, and past experiences, or lack thereof, with the institutions involved.

6.5.2   Public reason and representation

As my Rawlsian framework highlights, so long as citizens are reasonable – i.e., they have the two moral powers and are committed to fair terms of social co-

---

[19]The way that Thompson's arguments are presented seems to suggest that he should have the final say, but that seems contrary to the spirit of his theory.

operation when deciding questions about political institutions – what matters for the justification of a decision is the likely effects on their satisfaction with the institutions involved over time. Regardless of whether Thompson or even experts of the electoral system agreed with the design and outcome of the OCA, what ultimately counts for questions of legitimacy and justification is whether reasonable citizens thought the OCA members were truly "just like them" in the ways that citizens thought were relevant. Thus, if there is good reason to think that more than just provincial citizenship might bear on citizens' views about the legitimacy of the OCA, then this ought to be taken into account in decisions about the design and implementation of the assembly.

One of Thompson's reasons for sidestepping the issue of which groups should be ensured inclusion on the assembly is the thorniness of the question: "who is 'x' enough to count as a representative?"(Thompson, 2008, 43) I agree with Thompson that this may be an insurmountable issue for organizers of the assembly to adequately address. That is, it may well not be possible to resolve the issue of who should be included in the OCA in a way that fulfils the ideal of public reason enough to justify making any decision about that matter. Another way of putting the point is that any decision that may be made about representativeness would undermine legitimacy so much that this cannot be offset by other decisions, or with time.

Furthermore, I agree with Thompson that even if it were possible to adequately address the question of who to include, the challenge remains of how to ensure that members actually have meaningful opportunities to participate in the process. Although there may be great gains in understanding what affects people's willingness to voice their opinions in group interactions, how to

address these challenges fairly is less well worked out. Finally, as Thompson points out, it is difficult to ensure that so-called representatives participate in a way that can be considered to represent the interests of the group. Not only is this a pragmatic problem, but it is a conceptually thorny one, as well.

Many deliberative democratists turn to random selection processes to address the problem of representativeness. The process of random selection itself undisputedly precludes any bias on the part of those making the selections from contaminating the process. However, what matters is whether reasonable people believe that the selection process that is used is fair, according to their comprehensive doctrines and personal conceptions of justice.

Employing a random selection process may not convince reasonable people that the selection process was fair, or that they should accept its outcome as just. One reason it may not is that the random selection process, e.g., a lottery draw, may be embedded within a larger structure that fails to fulfil reasonable people's conceptions of justice. For example, advertising and recruitment strategies, and remuneration structures, which will affect the pool of people from whom the final group will be selected, may result in the unfair exclusion of certain groups. Thus, overall, the process to determine the members of the assembly may still unfairly discriminate against particular people, even if the specific mechanism used to select participants, e.g., a lottery draw, precludes any bias from contaminating that part of the overall process of appointing members.

If it is not possible (as Thompson himself suggests it may not be) to find a way to address the issue of representativeness that would satisfy the reasonable people in the society, one must accept that this will be a factor that

compromises the legitimacy of the institution and its outcome. In Rawlsian terms, the outcome of the assembly will be less likely to garner support that approximates a reasonable overlapping consensus, which is necessary to its legitimacy; and this may affect the legitimacy of any institution proposed on the basis of the outcome of the OCA.

6.6   The referendum and the constitutional essentials

Another important issue that arose in the process of designing the OCA was what threshold of support in a referendum should be required for the government to change the electoral system. Proponents of deliberative democracy, as well as electoral reform, argued that a simple majority should be sufficient to warrant the change. (See §5.3.5) One of the reasons behind this position seemed to be that when there is disagreement in politics, majoritarianism is the fairest way to proceed. Additionally, it would be undemocratic to effectively tie the hands of the people from reforming the structures that govern them.

However, according to the Rawlsian framework I have developed, the legitimacy of majoritarian institutions rests on the same basis as any others. That is, whether a majoritarian institute is legitimate depends on the degree of support by a reasonable overlapping consensus. Setting the threshold at a simple majority may have the support it needs to be legitimate at the time that the ruling is made, e.g., many reasonable citizens' conceptions of justice may support settling for a simple majority. But recall that I have argued for

the importance of considering whether decisions (are likely to) continue to be supported by public reason.

There is, I think, good reason to suppose that a prevalence of reasonable people in wide reflective equilibrium would be satisfied with requiring a super-majority before changing constitutional-level laws, in general. One reason is because of the relationship that I have argued exists between the obligatory force of political institutions and the reasonable overlapping consensus about the constitutional essentials. To make clear this relationship, I wish to first present a somewhat commonly held view about the purpose or function of constitutional laws, which I am rejecting.

As Waldron (1999, 257-260) outlines,[20] some hold that constitutional laws are meant to protect individuals' equality against violations either by other individuals, or the state. On this view, the primary value of having a constitution, and the reason to make it nearly impossible to change, is to ensure that people's fundamental rights cannot be easily written out of existence. That is, the constitutional essentials are meant to define the politico-legal structure in a way that protects individuals from state-sanctioned persecution.

As I argued in §4.9, on my Rawlsian view, the constitutional essentials do not, in themselves, bind anyone from violating individuals' rights. Written constitutions may make explicit, and perhaps symbolically demonstrate, certain commitments that "the people", as a matter of fact, hold, such as beliefs about the equality of persons regardless of their race, religion, gender, etc. And they may be seen as defining the roles that people are to have in a democracy,

---

[20]Although I am drawing on Waldron's elucidation of this view, I should make clear that he does not hold this view.

which is necessary for it to function well.[21] But to the extent that what is expressed in the constitutional essentials is not accepted by reasonable people in wide reflective equilibrium, the constitutional essentials have no power over political institutions. Indeed, political institutions will be precluded from fulfiling those principles and realizing those values in a way that may be called "democratic".

Rather than constraining politico-legal officials from making decisions that violate these principles, the constitutional essentials are better conceived of as identifying what must be true of the people in order for officials to make just decisions. The other function of the constitutional essentials is to define the mechanisms or processes that will be used to determine what these values and principles imply for particular political and legal decisions that must be made. Again, on my view, the obligatory force of these institutions depends on the degree of support they have from a reasonable overlapping consensus. That is, the constitutional essentials constrain individuals' behaviour – i.e., the decisions by political and legal officials – only insofar as the constitutional essentials continue to have the support of the people that approximates a reasonable overlapping consensus.

We may now return to the question of why one might think that public reason would support requiring a supermajority in a referendum before changing the constitutional essentials, such as the electoral system. It is not to make it all but impossible for any individual or the state to violate commitments that have been standing since some earlier point in time. It is in order to ensure,

---

[21]I owe this way of expressing the role that constitutional laws may have to Richard Vernon.

first, that there is sufficient support to maintain the authority of the institutions that are defined by the constitutional essentials and their decisions. A well-constructed referendum may provide a sense of to what extent a change to the constitutional essentials, e.g., those that define the electoral system, would garner support that approximates a reasonable overlapping consensus.

Second, requiring a supermajority may enhance the legitimacy of the standing institutions that are responsible for making and implementing the decision to change the structure, by making manifest that it is striving to make decisions that meet the standard of public reason. However, the mere fact that a supermajority supported a change to the constitutional essentials would not guarantee that it meets the standard of public reason sufficient to enact the change. For instance, if the outstanding minority consisted in reasonable people, and some proportion of the supermajority held unreasonable views about the minority, then not making the change would also be justified according to public reason.

The support of a supermajority in a referendum does not in itself ensure that the resultant institution will have legitimacy. However, it does go some way towards increasing the likelihood that reasonable people committed to fair terms of social cooperation will accept the institutions involved from within their own comprehensive doctrines.

6.7 Conclusion

I have argued that there are good reasons not to rely on deliberative democratic theories such as Gutmann and Thompson's as a foundation for strengthening

democracies. However, my arguments do not preclude any role for them in efforts to strengthen democracy. But the problems encountered in the OCA suggest some serious pitfalls that need to be avoided, in both theory and design. I have argued that my Rawlsian framework of political justification and legitimacy can provide some guidance in attempts to avoid those pitfalls.

Within the Rawlsian framework that I have developed, citizens' assemblies may prove useful for informing political officials' decisions in a way that strengthens their justification. For example, they may provide information to political officials about which particular courses of action citizens are likely to find acceptable from within their own comprehensive doctrines. Or they may affect citizens' views about the decisions that political officials make in a way that strengthens the justification of those decisions. However, deliberative democratic mechanisms do not give justificatory weight to any particular decision directly.

According to my Rawlsian view of political justification, determining whether a political decision would be or was justified requires knowing what would meet the standard of public reason. That is, it requires knowing the likely effects on reasonable citizens' satisfaction with the political institutions involved. As for the epistemic question of how to gauge the satisfaction of reasonable people in a society, I have suggested that this may be determined in practice in a variety of ways, not just through public discourse in deliberative democratic mechanisms.

Indeed, public discourse in institutions such as citizens' assemblies may lead one astray in accurately assessing this. Although I believe that attention should be given to people's expressed preferences, it is important to recognize

that what people say will vary depending on the context in which they express their views, e.g., what questions they have been asked, by whom, in what order, with what audience present, etc. And this must be taken into account in assessments of their likely reactions to different policy options.

In the case of the OCA, I have argued that there was information that should have been taken into account by the government in its decisions about the OCA, because it suggested challenges that would compromise the ability of the OCA to meet the standard of public reason. For example, reports were submitted by academics, members of the legislature, and a law commission, all of which suggested that many citizens were likely to be highly sceptical about the choice of the mandate for the OCA. And this was further supported in the views expressed by non-members in public consultation meetings. Thus, this should have suggested to the government that if undertaking electoral reform was to strengthen democracy in Ontario, more would need to be done to meet the standard of public reason.

I also wish to stress the difference between how my Rawlsian account, on the one hand, and Gutmann and Thompson's theory, on the other, may address the interests of marginalized groups. I have argued that Gutmann and Thompson's theory struggles with this issue, since their theory relies on participation in public discourse to justify political institutions and their decisions. Marginalized groups are unlikely to be selected to participate in deliberative democratic institutions, such as citizens' assemblies. And if people from marginalized groups are selected, they are likely to continue to be marginalized within the institution.

My Rawlsian framework highlights that institutions will be unable to ad-

dress marginalization until what is, on my account, the more basic issue is addressed: the members of marginalized groups must be recognized by the general citizenry as having equal moral status, and this must be acknowledged and reflected in political institutions and their decisions. This is not to deny that the design and creation of political institutions may go some way towards advancing the equal moral status of citizens. However, the legitimacy of institutions, and their ability to make just decisions, is constrained by the reasonableness of the people in society, including political officials.

Another way of modelling what justice requires with respect to marginalized groups is through the concept of the veil of ignorance. If a reasonable person adopted the veil, and imagined that she could be a member of a marginalized group for all she knows about herself, she would have good reason to choose to have the interests of such groups better represented in politics than is current practice. However, even if a significant proportion of reasonable people agree that the political structure is unjust with respect to certain people in the society, my framework reflects a further serious challenge for reform efforts: the burdens of judgement. Even reasonable people are likely to deeply and persistently disagree about what the state ought to do about any particular decision.

However, political institutions may still make justified decisions, and maintain their legitimacy in the face of reasonable disagreement. They may do so if they are able to make decisions that are conducive to the satisfaction of the reasonable people with the institutions involved, over time. After identifying and weighing different policy options in terms of what they imply for public reason, institutions will often be left with a range of justifiable options.

Although some may find the lack of a singularly determinate answer about how institutions should proceed to be a drawback, I see this as a virtue. It accurately reflects the extremely complex nature of political decision-making, and how that will affect the ability to make justified decisions. However, using the OCA as an example, I have offered ways to address this complexity in principle. Decision-makers are to do their best to determine what will meet the standard of public reason.[22] To the extent that they get this wrong, the justification of the decision, and the legitimacy of the institutions involved will be compromised.

In recent decades, governments have been turning to deliberative democratic mechanisms for a variety of reasons. In some cases, such as in Ontario, the express purpose has been to better engage the public in politics, and empower more ordinary citizens to have a say in important political decisions. To that end, the government convened an institution that I have argued was supported by the principles advanced by Gutmann and Thompson. I have set out to show that although deliberative democratic institutions such as citizens' assemblies may serve these aims, the connection to legitimacy is much less direct than deliberative democratists hold.

I agree with Gutmann and Thompson's diagnosis that political officials too often ignore the interests of citizens, and that in some democracies, there are serious shortcomings in the ability to hold political officials accountable for this. And I agree with them that democracies may be strengthened when po-

---

[22]Also, although I have not argued the point here, this suggests a deep connection between sources of evidence that political institutions are likely to need to make good decisions, and reasonable citizens' perceptions of those institutions. E.g., to the extent that governments' decisions may need to rely on the findings of academics working in universities, both of these institutions have good reason to try to maintain citizens' satisfaction with universities.

litical structures incorporate the ideal of deliberative democracy into decision-making. But how to incorporate the ideal of deliberation into politics democratically ultimately rests on a more fundamental ideal: public reason.

6.8   Summary overview

In my thesis, I have considered two responses to the problems of what it means for democratic institutions to have legitimacy, and how they may make justified decisions, given the pluralism of modern liberal democracies. One response that I examined is Rawls's constitutionalism; the other was Amy Gutmann and Dennis Thompson's deliberative democracy theory. While some view these two theories as compatible accounts of political justification, I have argued that there are fundamental differences between these two theories, and tried to identify the strengths and limitations of each, and draw out the importance of their differences for practice.

In the first chapter, I introduced the question that I address throughout my thesis: how is it possible to make justified political decisions in modern liberal democracies? Although it seems as though governments do so, the pluralism that characterizes modern liberal democracies raises a question about how they are to be directed by "the will of the people", when there is widespread disagreement among "the people" about what the government ought to do in politics. To define the scope of my argument, I outlined A.J. Simmons' framework of justification and legitimacy. This also served to delimit the assumptions that I could legitimately help myself to throughout my thesis. My arguments have been based on the assumption that, contrary to Simmons

and principled anarchists like him, it is possible for democratic institutions to be legitimate. Subsequent chapters have been meant to lay out how this is possible, and how political officials may maintain the legitimacy of democratic institutions.

In the second chapter, I examined a number of objections that Gutmann and Thompson raise against Rawls's theory. Many of these objections target the idealizations that they argue he makes, such as the veil of ignorance, original position, reasonable overlapping consensus, and public reason. Others also advance arguments that closely align with the concerns that Gutmann and Thompson raise, which I considered for the purposes of elucidating the challenges facing Rawls's theory.

At the end of Chapter 2, it appeared as though two main challenges undermine Rawls's theory. First, it seems unable to provide us with determinate answers about how to make political decisions, since it is based on unrealistic idealizations about consensus among the people, and their reasonableness. And the second worry was that the idealizations in his theory discourage critical scrutiny of the basic structures of society, and so make it difficult to identify how the current political structures could be reformed to make them more just.

In the third chapter, I presented the substantive principles that Gutmann and Thompson argue ought to justify political decisions, in light of the criticisms they raise against theories such as Rawls's. These include: that those in the process be committed to Gutmann and Thompson's conception of the principle of reciprocity; that the reasons exchanged in the decision-making process be moral and respectful; that decision-makers be held accountable for their decisions by those significantly affected by them; and that the reason-

giving process result in a decision that is binding at least for some period of time, although any decision ought to be open to being revisited in the future.

Besides outlining the substantive principles to which Gutmann and Thompson are committed, I presented the structure of their theory. They allow that the principles they advance may not all or always apply to particular decisions. However, decisions about which principles should govern a political decision-making process, and how they ought to do so, must ultimately be justified by a deliberative process that fulfils their principles, according to Gutmann and Thompson.

In Chapter 4, I examined two processes that were designed and implemented in a way that largely fulfil the principles of deliberative democracy that Gutmann and Thompson advance: the Ontario Citizens' Assembly (OCA), and the British Columbia Citizens' Assembly (BCCA), which were to review their provincial electoral systems. Thompson himself published a defence of the BCCA, arguing that citizens in a deliberative democratic institution – *viz.*, a citizens' assembly – rather than a committee of experts, legislators, or judges, ought to be given the opportunity to review and potentially recommend changes to the electoral system. Then, this electoral system should be voted on by the full electorate, in a referendum to be determined by simple majority.

According to Thompson, this process better fulfils the principles of deliberative democracy than do the other aforementioned political institutions. Thus, according to Thompson, a citizens' assembly followed by a referendum provides a better political basis for decisions about the electoral system. After presenting Thompson's arguments in support of the BCCA, I argued myself

that the OCA not only met the principles that Thompson advances, but served as a stronger case that illustrates the potential of the theory to ground justified decisions in politics.

In Chapters 5 and 6, however, I argued that Gutmann and Thompson's theory is not adequate as an account of political justification, because their principles do not, in themselves, provide the ideals at which democratic institutions should aim. The positive argument I made is that Rawls's theory of justification as he advances it in *Political Liberalism* provides us with the necessary concepts for determining when political decisions may be justified in modern liberal democracies. In addition to critically examining the principles of each theory, in the last two chapters I used the experiences of the OCA to illustrate the theoretical points that I make.

The conclusion that I have defended here is that, although the OCA was largely designed and implemented in accordance with the principles that Gutmann and Thompson advance, it illustrates that Gutmann and Thompson's theory has serious limitations. That is, I used the OCA to show the problems that arise by neglecting the standard of public reason as the ultimate grounding for political decisions. I concluded that while Gutmann and Thompson's theory is not equipped to be a basis of political justification in modern liberal democracies, fulfilling the ideal of deliberative democracy may serve to strengthen the justification of political decisions and the legitimacy of democratic institutions. It may do so insofar as is conducive to the satisfaction of reasonable citizens with the institutions and decisions they are making, over time. Grounding decisions about how to structure deliberative democratic institutions within Rawls's theory allows us to better understand what was

wrong with decisions that have been heavily criticized about the OCA, e.g., who was included in the process and how, and the length of time that was taken to engage with the public about the decision at hand. Furthermore, my alternative understanding of the theories is also meant to provide a better way of determining how similar mistakes may be avoided in the future.

Bibliography

Barber, B. (1984). *Strong Democracy*. Berkeley: University of California Press.

Cameron, D., C. Mulhern, and G. White (2003). Democracy in Ontario. *Ontario Panel on the Role of Government.¡ www. law-lib. utoronto. ca/investing/reports/rp35. pdf¿(25 October 2004)*.

Clutterbuck, P. (2007). Summary report on special outreach focus groups: Citizens' assembly on electoral reform. Technical report, Government Ontario.

Cohen, J. (2002). *Democracy*, Chapter Deliberation and democratic legitimacy. Malden, Massachusetts: Blackwell.

Gallagher, M. and P. Mitchell (2005). *The politics of electoral systems*. Oxford University Press.

Gallie, W. (1955). Essentially contested concepts. *Proceedings of the Aristotelian Society 56*, 167–198.

Gauthier, D. (1990). *Moral dealing: contract, ethics, and reason*. Cornell University.

Gutmann, A. and D. Thompson (1996). *Democracy and disagreement*. Cambridge: Harvard.

Gutmann, A. and D. Thompson (2004). *Why deliberative democracy?* Princeton: Princeton University Press.

Hampton, J. (1994). Democracy and the rule of law. In I. Shapiro (Ed.), *The Rule of Law*, Volume XXXVI of *Nomos*, pp. 13–45.

Hart, H. (1982). *The concept of law*. Oxford: Clarendon Press.

Hibbing, J. and E. Theiss-Morse (2002). *Stealth democracy: Americans' beliefs about how government should work*. Cambridge Univ Pr.

Lang, A. (2007). But is it for real? the british columbia citizens' assembly as a model of state-sponsored citizen empowerment. *Politics and Society 35*, 35–69.

LeDuc, L., H. Bastedo, and C. Baquero (2008). The Quiet Referendum: Why Electoral Reform Failed in Ontario. In *Prepared for the annual meeting of the Canadian Political Science Association. University of British Columbia, June.*

Levi, M. (1997). *Comparative politics: rationality, culture, and structure*, Volume 28, Chapter A model, a method, and a map: Rational choice in comparative and historical analysis, pp. 19–41. New York: Cambridge University Press.

Lundberg, T. C. (2007). Electoral systems in New Zealand, Britain, and Canada: A critical comparison. *Government and Opposition 42*(4), 471–490.

MacKinnon, M. (2005). A first nations voice in the present creates healing in the future. *Can J Public Health 96*(Suppl 1), S13–6.

Mansbridge, J. (2006). *Deliberative democracy and its discontents*, Chapter Conflict and self-interest in deliberation, pp. 107–132. Hampshire: Ashgate Pub Co.

Mill, J. S. (1991a). Considerations on representative government. In *On Liberty and other essays.* New York: Oxford University Press.

Mill, J. S. (1991b). On liberty. In *On Liberty and other essays.* New York: Oxford University Press.

Nussbaum, M. (2009). The capabilities of people with cognitive disabilities. *Metaphilosophy 40*(3-4), 331–351.

of Canada, L. C. (2002). Renewing democracy: Debating electoral reform in canada. Technical report, Law Commission of Canada.

Okin, S. M. (1987). Justice and gender. *Philosophy and Public Affairs 16*(1), 42–72.

Okin, S. M. (1999). *Justice, gender, and the family.* Basic Books.

on Electoral Reform, O. C. A. (2007). One ballot, two votes: A new way to vote in ontario. Publications Ontario.

on Governance, I. (2007). Citizen deliberative decision-making: Evaluation of the ontario citizens' assembly institute on governance. Technical report, Institute on Governance.

Paterson, L., A. Brown, J. Curtice, K. Hinds, D. McCrone, A. Park, K. Sproston, and P. Surridge (2001). *New Scotland, new politics?* Edinburgh University Press.

Pettit, P. (1999). *Republicanism: a theory of freedom and government.* Oxford University Press.

Rabinder, M. J. (2008). Descriptive representation in the British Columbia Citizens' Assembly. In M. E. Warren (Ed.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly.* Cambridge: Cambridge University Press.

Rawls, J. (1995). Political liberalism: A reply to Habermas. *The Journal of Philosophy 92*(3), 132–180.

Rawls, J. (1997). The idea of public reason revisited. *The University of Chicago Law Review 64*, 765–807.

Rawls, J. (2001). *Justice as fairness: A restatement.* Cambridge: Belknap Press.

Rawls, J. (2005). *Political liberalism.* Columbia Univ Press.

Romanow, R. (2002). Building on Values: The Future of Health Care in Canada (Romanow Report). *Saskatoon, SK: Commission on the Future of Health Care in Canada. Retrieved October 10*, 2005.

Rose, J. (2007). Putting the public back in public policy: The ontario citizens' assembly on electoral reform. *Canadian Parliamentary Review 30*(3), 9–16.

Secretariat, O. C. A. (2007). Democracy at work: The ontario citizens' assembly on electoral reform. Technical report, Ontario Citizens' Assembly.

Shapiro, I. (1999, New York). *Deliberative politics: Essays on democracy and disagreement*, Chapter Enough of deliberation: Politics is about interests and power, pp. 28–38. Oxford University Press.

Simmons, A. (1999). Justification and legitimacy. *Ethics 109*(4), 739–771.

Thompson, D. (2008). Who should govern who governs? In M. E. Warren and H. Pearse (Eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, pp. 20–49. Cambridge: Cambridge University Press.

Waldron, J. (1999). *Law and disagreement.* Oxford: Oxford University Press.

Young, I. M. (1990). *Justice and the politics of difference.* Princeton: Princeton University Press.

Vita

Angela White

- **Education**

  - **Ph.D. Thesis**. The University of Western Ontario, 2011. Supervisor: Michael Milde

  - **Doctor of Philosophy**. The University of Western Ontario, 2004 - Present.

  - **Master of Arts in Philosophy**, The University of Western Ontario, 2002 - 2004.

  - **Bachelor of Arts (Honours) in Philosophy**, Dalhousie University, 2000 - 2002.

  - **Bachelor of Science in Nursing**, Dalhousie University, 1998 - 2000. Completed 2 years before transferring into Philosophy.

- **Honours and Awards**

  - Rotman Institute of Science and Values Seed Grant: A Political Basis for Research Ethics Institutions Evaluating Randomized Clinical Trials. Supervisor: Charles Weijer, J.L. Rotman Institute of Science and Values, Department of Philosophy, University of Western Ontario, May 2009-August 2009.

  - Western Graduate Research Assistantship. Supervisor: Charles Weijer, J.L. Rotman Institute of Science and Values, Department of Philosophy, University of Western Ontario, 2007-present.

  - Strategic Training Initiatives for Research in the Reproductive Health Sciences. Supervisor: Jeffrey Nisker, Department of Obstetrics/Gynaecology/Oncology, University of Western Ontario, 2004-05.

  - Nova Scotia Health Research Foundation, Capacity-building support. Supervisor: Susan Sherwin, Philosophy Department, Dalhousie University, 2002.

  - Associated Medical Services, Inc. Undergraduate Studentship Award. Supervisor: Carolyn Ells, Bioethics Department, Dalhousie University, 2001.

- **Related Work Experience**

  - May 2009–August 2009. Position: Research Assistant. Supervisor: Charles Weijer, J.L. Rotman Institute of Science and Values, Department of Philosophy, University of Western Ontario Responsibilities: Developing political justification for using the concept of clinical 'equipoise' to determine whether randomized controlled trials are ethically permissible.

  - October 2008–Present. Position: Research Assistant. Supervisor: Charles Weijer, J.L. Rotman Institute of Science and Values, Department of Philosophy, University of Western Ontario. Responsibilities: Critical analysis of the politico-legal basis of deliberative democratic institutions such as citizens' assemblies, councils, and juries.

- **Publications**

  - Andrew D McRae, Charles Weijer, Ariella Binik, Angela White, Jeremy M Grimshaw, Robert Boruch, Jamie C Brehaut, Allan Donner, Martin P Eccles, Raphael Saginur, Merrick Zwarenstein, and Monica Taljaard. "Who is the research subject in cluster randomized trials in health research?" *Trials* 2011;12:183.

  - Andrew D McRae, Charles Weijer, Ariella Binik, Jeremy M Grimshaw, Robert Boruch, Jamie C Brehaut, Allan Donner, Martin P Eccles, Raphael Saginur, Angela White, and Monica Taljaard. "When is informed consent required in cluster randomized trials in health research?" *Trials* 2011;12:202.

  - Lisa Lee, Charles Heilig, and Angela White. "When is Conducting Public Health Surveillance Without Patient Consent Ethically Justified?" *American Journal of Public Health*. Accepted.