

# Equalizing Equals: Deliberation, Liberalism, and the Sites of Politics

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## **Abstract**

This essay examines two distinct political philosophical theories: liberalism and deliberative democracy. Its primary objective and contribution is the analysis of theoretical and practical differences between the liberal commitments of the American political philosopher, John Rawls, and deliberative democratic ones. In the case of liberalism, a general overview is provided along with an analysis of three distinct strains; namely, liberal egalitarianism, political liberalism, and liberal constitutionalism. These three comprise interrelated theoretical components of Rawls' work. With respect to deliberative democracy, this essay advances a novel formulation that also incorporates principles and definitions from Amy Gutmann, Dennis Thompson, and Jürgen Habermas. After analyzing Rawls' liberal model, as well as positing a deliberative democratic one, an argument is made in favor of deliberative democracy and against some features of Rawls' works. It is held that deliberative democratic procedures enhance equality and liberty by better realizing, in a just way, the interests of people and their claims about their common social world. One specific point of argument against Rawls' account is that it lacks explicit accommodation of ongoing democratic practices instituted by individuals for collective ends. This position is furthered through analysis of the place of moral conflicts and disagreement in Rawls' political conception of justice, and why his method of avoidance, formulation of neutrality, and public/non-public distinction should be replaced by deliberative democratic principles and methods. In this regard, this essay outlines the shortcomings and consequences of Rawls' liberal theories, and proposes more comprehensive and practicable deliberative refinements to them.

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# 1. INTRODUCTION: ARGUMENT, STRUCTURE, METHODOLOGY

## *1.1. Argument*

Assessing the work of John Rawls from a deliberative democratic perspective produces results that differ in seemingly slight ways. Sometimes razor thin distinctions appear because Rawls' theories came to incorporate fundamental criticisms leveled by deliberative democratic thinkers. Still, the differences remain important. Offering an analysis of the distinctions and disagreements between Rawls' work and deliberative democracy is the primary objective and contribution of this essay.

Classifying Rawls' thinking according to the argumentative and theoretical spaces that it inhabits assumes a prominent position in this work; however, a positive argument is made in favor of deliberative democracy and against some features of Rawls' theories. Liberalism is the primary doctrinal ground from which his arguments proceed. This term deserves explanation, and recognizing the differences between Rawls' liberal egalitarian orientation and the key characteristics of liberalism defined generally aids to clarify both of them.

Liberal egalitarian theorists do not share a singular, unitary vision, and while some of the internal distinctions of this approach will come under consideration, it suffices here to note that as a doctrine it encompasses a variety of conceptions from different thinkers. For Rawls, it is part and parcel of his political liberalism, which also incorporates commitments of liberal constitutionalism. This essay treats these theories in connection with each other, which conforms to Rawls' approach, but understanding the bonds between them does not preclude more extensive analyses of, and arguments against, certain aspects in relative isolation from others.

A common sense approach to defining the major commitments of liberalism as well as Rawls is to assess the distinction and tension between equality and liberty. Supplying methods, procedures, and normative ideals in order to balance these values, Rawls' liberal political theories confront what often times appear to be intractable problems. Rawls goes some way in striking a reasonable equilibrium between them. Nevertheless, it seems to me that his approach does not go far enough and alternative model can resolve some of the deeper problems that arise when trying to secure freedom and equality within actual societies.

Presenting the major claims of Rawls, liberalism, liberal egalitarianism, and liberal constitutionalism would go some way in clarifying what the equality-liberty distinction amounts to, but such a descriptive account on its own would do little to resolve tension between these values as produced by Rawls' approach. In this respect, I assert claims about how this division can be attenuated. My argument forwards a particular formulation of democracy, which itself necessitates explanation as well as justification.

The version of democracy that I advance is not novel in the sense that it issues from me alone, but I offer a particular formulation that utilizes and omits other deliberative conceptions of democracy. I will also underscore its relationship, which includes both continuities and discontinuities, to Rawls' claims. This adds to the descriptive objective of this essay and to an additional aim of illustrating why and how deliberative democracy is a viable means of increasing and protecting liberty and equality.

Deliberative democratic procedures as I conceive of them enhance equality and liberty by better accommodating, in a just way, the interests of people and their claims about their common social world. On this front, I find it more successful and practicable than John Rawls' liberal constitutionalism, which is a distinct formulation within his liberal egalitarian framework. At a

minimum, deliberative democracy entails reciprocity among parties engaged in decisions about substantive and procedural issues affecting their own collectivities. This accompanies the normative claim that democratic decision-making should be, or is best articulated as, something more than a mere aggregative mechanism for individual preferences. I will argue that even with updated formulations and provisions, Rawls misses this key insight in important ways.

I provide a few distinct but related arguments for deliberative democracy. One is that it has high degree of viability in actual circumstances. This is a limited claim that gains strength by comparison to Rawls' contractarian model. On this front, I will highlight a shortcoming in the implementation of Rawls' hypothetical model. Another argument is that the deliberative democratic model encourages innovation and development within political systems, which will produce optimal outcomes. This is in addition to the success that the deliberative model has in coping with moral conflicts generally. An understanding of why deliberation succeeds better is the net gain from this discussion.

A primary component of my argument for a deliberative model is that it has a strong potential to sustain the ongoing institutive capacities of collective choices in conjunction with the major institutions of society. This must be coupled its wide implementation in non-institutional and institutional spaces through sometimes very ordinary means. One justification I provide for deliberative democracy is normative. Here, the insight is that it makes a difference in morality not only that norms be correct, but also that they be our own.<sup>1</sup>

For democratic politics we ought to have laws and institutions that not only represent individuals' interests, but are also authored by these individuals through collective means for the

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<sup>1</sup> Pablo De Greiff, "Comment: Transitions to Democracy," *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Ed. Stephen Macedo. (Philadelphia: Pennsylvania UP, 2004), 125.

common good.<sup>2</sup> This can be taken further. Deliberative democracy offers a means of securing liberty and equality by respecting and admitting a wider range of subjects into non-institutional and institutional spaces than Rawls' theory does.

## ***1.2. Essay's Structure***

Before setting off into discussion, I want to outline the structure of the essay and its arguments. Chapter two defines liberalism by exacting the doctrine's core commitments and practices. The explanation of liberalism serves as baseline to which liberal egalitarianism can be compared and distinguished. The account of liberal egalitarianism in section two of the chapter highlights topics relevant to Rawls' conceptions and my arguments.

The third section of chapter two devotes space to an analysis of liberal egalitarianism, political liberalism, and liberal constitutionalism. In addition, I discuss liberal constitutionalism in its own right, and discuss its importance as an opposing vision of how best to order society. The explication of these terms clarifies terminology used throughout the essay. More importantly, it locates the relevant features and sources of argumentation against Rawls' theory, which will be considered in light of deliberative democracy.

Chapter three is turned over to a more nuanced definition of deliberation and its role within societies. This will not be an empirical account but rather a presentation of the normative underpinnings and the probable sites of deliberation. In section one, the constitutive traits of this view receive attention, with particular emphasis on deliberative democracy's basic commitments and the principle of reciprocity. This is a general overview that begins to outline its differences with liberal traits and specific characteristics of Rawls' theories. This part proceeds with an eye

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<sup>2</sup> Pablo De Greiff, "Comment: Transitions to Democracy," 125.

toward the most general aspects of deliberative values that attend to problems associated with distributions of power in society and protections of freedom.

Section two of the chapter specifically addresses the regulative framework for deliberation (both institutional and non-institutional) and the moral conflicts it is particularly well placed to contain and resolve. Although reference is made to Rawls' conceptions, the goal of this section is to provide a defensible account of deliberative democracy without entering into any full-blown arguments. Part three of chapter three offers an analysis of what I term the innovative facet of deliberative agreement. As I explain, innovation is linked with the transformative process of deliberation and consequent mutual agreements. Section four of chapter three assesses law and constitutions within the deliberative model and in juxtaposition with liberal constitutionalism.

Chapter four takes liberty and equality as its starting point and proceeds by teasing out their relationship as it appears in Rawls' work. This follows from the account of liberal egalitarianism, political liberalism, and most prominently liberal constitutionalism. The first section deepens chapter two's presentation of Rawls' theory and hones in on those points meriting revision. In this respect, I raise one argument against Rawls' account because it lacks explicit accommodation of ongoing deliberative practices instituted by individuals for collective ends. Part two of this chapter extends the argument by analyzing the kinds of considerations Rawls makes available to the public political realm, and why his method of avoidance should be replaced with deliberative democratic methods.

The third section of chapter four first recapitulates some of the steps of my argument. It then delves into an epistemic justification of deliberative democracy. When juxtaposed with the preceding Rawlsian formulations, this serves as one basis of my rebuttal of his nonpublic/public



distinction. This defense underscores the principles and operations of the deliberative conception as discussed in section three, as well as elevating them above Rawlsian arguments. This section also reviews and advances a normative justification of deliberation, which pertains most evidently to public justification and the validity of norms. It then ties this to the unique operations of the deliberative model.

Combined with the epistemic component, these justifications and the chapter's arguments illustrate the liberty and equality enhancing features of deliberation and why it is preferable to Rawls' account. These conclusions go hand-in-hand with the description and analysis from chapter three. It is worth noting here that the normative ideal I present incorporates features of Rawls' position. The point of this is that there is something of a reconciliation between my conception and Rawls' theory. Since it is a limited deployment of a normative feature of his argument, it should not be taken as a full-bodied endorsement. Chapter five concludes my essay with a short recapitulation of my arguments, Rawls' positions, and a consideration of deliberative democracy.

### ***1.3. Comment on methodology***

Methodologically, it should not seem odd that Rawls' work receives the most attention throughout this essay. Sympathetic thinkers whose accounts either interpret or expand on his work buttress my interpretation of his ideas. A depiction of primary commitments and arguments of liberalism and liberal egalitarianism serves to contextualize Rawls' thinking, concisely trace its roots, as well as prepare the ground for later considerations and discussions. The intent is to define accurately and systematically the central concerns of liberal political thinking confronted by deliberative democracy. In this regard, analysis of the justificatory grounds on which these theories rest can guide these interpretations, but does not aim towards a

survey of the history of liberal political philosophy. This is largely in keeping with an outlook of public justification, which means the use of reasoned argument that anticipates objections and counter-arguments, and confronts them with good reasons, as well as clearly and fairly presents the grounds on which arguments rest.<sup>3</sup>

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<sup>3</sup> Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990), 10.

## 2. LIBERAL POLITICAL THEORY—DEFINITIONS AND COMMITMENTS

### 2.1. *General account of liberalism*

In order to detail some of what I will argue against in Rawls' work, I want first to expose the foundational assumptions of liberalism and egalitarianism's relation to them. The variety of liberal theories poses difficulties to understanding liberalism as a general doctrine. One way of acknowledging this multiplicity is to speak about liberalisms as opposed to a single theory.<sup>4</sup> Jeremy Waldron asserts that liberalism and its representatives are better understood from a vantage point that takes the resemblances and overlap of ideas amongst each other as constitutive.<sup>5</sup> In this way, a general definition should reflect coinciding characteristics of thinkers whose conceptions might be at odds on other questions. Rather than survey all liberal claims, an impossible task here anyways, I want to note the crucial components of liberalism that are commonly held by an array of thinkers, and more specifically by John Rawls.

Liberalism advances certain core norms. Jean Hampton details what she holds to be five fundamental commitments: (1) "people in a political society must be free"; (2) "equality of the people" within a state; (3) "the state's role must be defined such that it enhances freedom and equality," and it has the best chance of doing so when organized as a democracy and by pursuing policies of toleration, freedom of conscience, and neutrality; (4) "any political society must be justified to the individuals who live within it"; (5) "reason is the tool by which the liberal state governs."<sup>6</sup> With qualification, these can be regarded as the most noticeable and unifying propositions of liberal political theory.

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<sup>4</sup> Jean Hampton, *Political Philosophy* (Boulder: Westview Press, 1998), 170.

<sup>5</sup> Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* 37, no. 147 (April. 1987), 128.

<sup>6</sup> Jean Hampton, *Political Philosophy*, 179-81.

The first commitment cited by Hampton, that of freedom of people within a political community, underwrites freedom of speech, religion, exercise of individual inclination, and so forth.<sup>7</sup> Hampton does not organize her list in rank order, and it is implausible that freedom (or liberty) alone stands as the preeminent ideal of liberalism.<sup>8</sup> If taken to extremes, the preference of liberty over equality or vice versa poses the distinct risk of moving a conception outside of liberal norms and into another set of theoretical commitments. Regardless of the arrangement or assertion, the attempt to weigh these ideals against one another leads to serious dilemmas. As some of the key practices of liberalism will reveal, there is not only an emphasis on equalizing political and social freedoms, but also economic ones.<sup>9</sup>

The state's role as a facilitator becomes of central importance when viewed as a means of enhancing freedom and equality. While variable depending on theorist, the key insight into this liberal norm is that states will play some role in the advancement of these ideals.<sup>10</sup> Proposing that the state can best secure the equality and/or freedom of its citizens by organizing at least some decision-making democratically, and acting in such ways that toleration and freedom of conscience are affirmed enlarges this claim. Here again, there is a balance between freedoms and the state's role as a facilitator, which should take a neutral stance regarding the particular ideals and beliefs of all of its citizens.<sup>11</sup>

The fourth point, that of collective justification, concerns the legitimacy of policy, institutions, and the state itself. One articulation of this, which has a variety of permutations, is that of personal consent as an originating act of political organization. Again, there are

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<sup>7</sup> Thomas Nagel, "Book Review: Libertarianism without Foundations," *The Yale Law Journal* 85, no 136 (1975), 136.

<sup>8</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard UP, 1985), 188-91.

<sup>9</sup> Nagel, "Book Review: Libertarianism without Foundations," 128.

<sup>10</sup> Ingo Pies, "Political Philosophy, Political Economy, and Political Liberalism" in *Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations*. Ed. Karl-Heinz Ladeur (Baden: Nomos Verl.-Ges., 1997), 83.

<sup>11</sup> Hampton, *Political Philosophy*, 180.

variations in voluntaristic or contractarian models. Here, I briefly note three primary forms: theories of actual obligation, wherein citizens at some point actually consented to be bound by laws and demands of a higher-level entity (i.e., state); theories of tacit consent, wherein persons residing within territorial or political boundaries accept, in spite of or without the actual execution of an original contract, the authority of the state and its directives; finally, hypothetical consent, wherein persons under ideal conditions would agree to the state if given an opportunity to do so, and by virtue of this hypothetically apparent consent are bound by the authority of the political entity.<sup>12</sup>

Although the consent tradition is an oft-present feature of liberal theory, it does not pervade the work of all liberal theorists.<sup>13</sup> Why social contract theory is noteworthy within this work is that John Rawls advances an argument associated with the hypothetical type. Beyond the consent tradition, the fourth commitment in Hampton's list also refers to non-consent based mechanisms by which the legitimacy of the state is protected. In this sense, the actions and decisions of a state, or more appropriately those of public officials in a representative system, would either be available for public review, comment, or submitted to a voting procedure that could, at some level, validate them. This is different from consent by virtue of the aim and scope of these mechanisms; they do not establish political obligation, but rather convey agreement of citizens to the activities of states. I want to flag the idea that validation can be obtained via such processes and note that it merits examination.

Reason stands as the fifth and final common trait amongst liberal thinkers. Notice that the commitment is to rationally motivated actions, arguments, and attitudes within the political

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<sup>12</sup> A. John Simmons, *Moral Principle and Political Obligation*, (Princeton: Princeton UP, 1979), 58-74.

<sup>13</sup> Simmons, 59.

realm.<sup>14</sup> Such reasonableness operates in light of diverse views regarding moral and religious matters. A political arena founded on this commitment can be, it is supposed, neutral to the private but nevertheless comprehensive moral outlook of citizens, whilst still embracing the pluralistic nature of the collectivity.

Joining these norms are practices affirmative of liberal norms such as “religious toleration, freedom of discussion, restrictions on police behavior, free elections, constitutional government based on a separation of powers, publicly inspectable state budgets to inhibit corruption, and economic policy committed to sustained growth on the basis of private ownership and freedom of contract.”<sup>15</sup> It is worth noting that this list does not perfectly mirror the actual activities of liberal democratic states, but rather indicates what a political system will include in some form if it conforms to the values of liberalism.

The relation between theory and practice here is one where the stipulated activities of states are not articulated in minutia, but would adhere in practice to basic theoretical constraints. In this sense, the distinction between liberal democracies and liberalism rests on the qualitative and quantitative assessment of the implementation of the practices and norms of liberal theory within particular countries or political communities. Taken together, the above norms and concomitant practices undergird liberal political theory. This brief sketch aids to orient discussion of the Rawlsian conception, and will help to distinguish a deliberative one.

## ***2.2. Liberal Egalitarianism and John Rawls***

Liberal egalitarianism addresses the cited norms in particular ways and incorporates each of them to varying degrees. Egalitarians pay particular attention to the entitlement and distribution of rights, freedoms, benefits and extra-personal objects among persons within a political

<sup>14</sup> Hampton, *Political Philosophy*, 181.

<sup>15</sup> Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge: Harvard UP, 1993), 3-4.

community.<sup>16</sup> That the aforementioned elements are interdependent is typically recognized,<sup>17</sup> but attempts to equalize distributions do not necessarily take an integrated approach (i.e., claims for economic redistribution do not necessarily aim at the enhancement of equality of opportunity, but as an incidental byproduct might achieve just that). Determining whether a theory is egalitarian can be accomplished by assessing its principles. As Joseph Raz writes, theories are “strictly egalitarian if they are dominated by strictly egalitarian principles.”<sup>18</sup>

Raz’s statement serves as a means of testing the degree or commitment to equality of a theory. As the matter of equality, its achievement, and its inhibitors prove to be of major concern to egalitarians, a companion question crops up; namely, equality of what? The list above underscores what remain the four sites of interest in distributive justice: political, legal, social, and economic equality.<sup>19</sup> Certainly, Raz’s test is of great use in understanding not only whether theories are egalitarian, but also whether their conclusions or proposals soundly achieve the desired enhancement of equality.

Given that two of the five liberal norms cited by Hampton refer to equality, it could seem that liberalism taken as a whole is egalitarian. However, this proposition could lead to a conclusion that all liberals are egalitarian, which defies plausibility. It is possible to point to liberal, but (largely) non-egalitarian theories (i.e., their asserted principles are not strictly egalitarian) to resolve the matter. Such is the case with certain right-wing liberal theories and

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<sup>16</sup> Eric Mack, “Right-Wing Liberalism, Left-Wing Liberalism, and the Self-Ownership Proviso” in *Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations*. Ed. Karl-Heinz Ladeur. (Baden: Nomos Verl.-Ges., 1997), 10-11; and G.A. Cohen, “On the Currency of Egalitarian Justice” *Ethics* 99, no. 4, (July 1989), 910.

<sup>17</sup> Ronald Dworkin, “What is Equality? Part 1: Equality and Welfare,” *Philosophy and Public Affairs* 10, no. 3 (Summer 1981), 186.

<sup>18</sup> Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), 233.

<sup>19</sup> Thomas Nagel, *Mortal Questions*, (Cambridge: Cambridge UP, 1979).

libertarianism, where protection of individual liberties surpasses any claim to equalization of benefits or resources within societies.<sup>20</sup>

The theory of interest here is that one formulated by John Rawls. The aspects of his approach that I want to consider are what I regard as rudimentary to further discussion. Introducing them has the effect of orientation, but it is not without its interpretative elements. Rawls' early theory of justice takes the basic structure of society as its subject.<sup>21</sup> The basic structure itself includes the major institutions of society, and how they distribute such things as social and economic advantages and fundamental rights to interested parties.<sup>22</sup> In the case of nation-states, such parties are defined as citizens, or those to whom the laws of the land apply. Rawls regards the basic structure as the necessary subject of justice because its influence and effects are so far-reaching and comprehensive.<sup>23</sup> For example, the starting point or life prospects of given individual will vary, at least in part, according to the way that major institutions distribute political, social, and economic advantages.<sup>24</sup> The inequalities within institutions can be mitigated, and the justice of a community will depend on the way in which rights and advantages are distributed.<sup>25</sup>

Although the justness of a society is linked to distribution, social cooperation remains necessary in order for the requirements of justice to arise at all. In this sense, there must be stable social cooperation in order for justice to be possible. The hallmarks and products of cooperation are coordination, stability, and social unity.<sup>26</sup> To this end, individuals within a given society must comply with the social scheme, and the scheme itself needs stabilizing forces that

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<sup>20</sup> The most famous libertarian account is Robert Nozick's *Anarchy, State, and Utopia*, (Oxford: Blackwell, 1974).

<sup>21</sup> Rawls, *A Theory of Justice*, 6.

<sup>22</sup> Rawls, *A Theory of Justice*, 6.

<sup>23</sup> Rawls, *A Theory of Justice*, 7.

<sup>24</sup> Rawls, *A Theory of Justice*, 7.

<sup>25</sup> Rawls, *A Theory of Justice*, 7.

<sup>26</sup> Rawls, *A Theory of Justice*, 5.



limit violations and obviate their growth in number.<sup>27</sup> What is notable is that without cooperation justice cannot engage at all. “Justice is the first virtue of social institutions,” as Rawls notes, but it requires cooperation and stability for its manifestation.<sup>28</sup>

It is through social cooperation and under conditions of fairness that the guiding principles of justice are (hypothetically) chosen. As noted above, these principles will assign the rights, duties, and benefits within a society.<sup>29</sup> Rational persons will decide which principles will regulate their community, and this is accomplished through a procedure that strips from contracting parties their knowledge of such things as social status and class position within the community.<sup>30</sup> The result of this initial situation—what is called the original position—is justice as fairness, or the first principles of a conception of justice decided under fair terms.<sup>31</sup> It is worth remembering that the original position is a thought experiment, or a hypothetical situation, by means of which sound principles can be discerned and articulated.

In light of the constraints on their knowledge of their social positions, Rawls hold that rational actors would choose a conception “that best instantiates the concept of justice” and that would benefit all persons in society.<sup>32</sup> The second part of the preceding statement pertains to the fact that rational persons would not opt for a conception that, if they were in a worse off position than others, would put them at greater disadvantage with respect to benefits, or one that would prevent them from increasing their potential for benefits.<sup>33</sup>

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<sup>27</sup> Rawls, *A Theory of Justice*, 7.

<sup>28</sup> Rawls, *A Theory of Justice*, 3 and 6.

<sup>29</sup> Rawls, *A Theory of Justice*, 10.

<sup>30</sup> Rawls, *A Theory of Justice*, 11.

<sup>31</sup> Rawls, *A Theory of Justice*, 12 and Hampton, *Political Philosophy*, 136.

<sup>32</sup> Hampton, *Political Philosophy*, 136 and Rawls, *A Theory of Justice*, 12.

<sup>33</sup> Rawls, *A Theory of Justice*, 12.

Given this arrangement, Rawls proposes two principles that would be most fair. The first states that “each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others.”<sup>34</sup> The second, known as the Difference Principle, goes as follows: Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage—and in particular, to the advantage of the least-well-off-persons, and (b) attached to the positions and offices open to all.<sup>35</sup> These two principles aim, then, to equalize the basic liberties of society, as well as distribute rewards so that they also benefit the least well off in society. In addition to the fairness of the decision procedure, his conception is justified because it, as Jean Hampton writes, “appropriately respects each person in a society . . . [and does not] penalize some people because they are less well endowed with talents, skills, or luck than other people.”<sup>36</sup>

Notice that the two principles divide the social structure into distinct parts: those that secure equal liberties and those that secure social and economic benefits.<sup>37</sup> This split means that the distributions of the two kinds of primary goods are assessed independently of each other. The result is indeterminate with respect to the degree of interaction between the spheres in which the primary goods are located.<sup>38</sup> It is a consequence of this separation that any assessment of the principles, their criteria of application, and the level of distributional equality delivered can also occur in isolation from the other. This signals a primary difficulty in determining society’s primary good dispensation as an aggregate of both spheres, but nevertheless allows for isolation

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<sup>34</sup> Rawls, *A Theory of Justice*, 60.

<sup>35</sup> Rawls, *A Theory of Justice*, 60.

<sup>36</sup> Hampton, *Political Philosophy*, 140.

<sup>37</sup> Rawls, *A Theory of Justice*, 61.

<sup>38</sup> Thomas W. Pogge, *Realizing Rawls*, (Ithaca: Cornell UP, 1989), 123.

and analysis of one type of primary goods to take place without directly considering the relationship of all at once.<sup>39</sup>

These principles remain relatively constant throughout Rawls' oeuvre, and they form the moral foundation for society's activities if adduced in a fair and rational way.<sup>40</sup> Nevertheless, Rawls' position changed in important respects, most notably as relates to pluralism and the role of moral ideals or conceptions of the good within the political realm. Whereas *A Theory of Justice* proposed certain ideals—autonomy and individuality—in order to regulate and govern society and much of life, Rawls' later works advanced a position that public political culture “should be as far as possible, independent of the opposing and conflicting religious and philosophical doctrines that citizens affirm.”<sup>41</sup>

The shift does not amount to a rejection on Rawls' part of his principles as they apply to moral theory.<sup>42</sup> The change reflects his view that the aim of political philosophy generally and his conception of justice as fairness specifically is “practical and not metaphysical or epistemological.”<sup>43</sup> In this regard, the conception that instantiates justice is not one based on a metaphysical or epistemological truth-claim, “but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons.”<sup>44</sup> Now, the development of political liberalism is something that must be noted for any number of reasons—fidelity to Rawls' theory, and so on—but its pertinence to this discussion, as will be seen in detail below, is revealed by apparent differences and accommodations of deliberative democracy.

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<sup>39</sup> Pogge, 123-4.

<sup>40</sup> The principles undergo reformulation, which appears in Rawls' 2001 work *Justice as Fairness: A Restatement*.

<sup>41</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1996), 9.

<sup>42</sup> Jean Hampton, “Should Political Philosophy Be Done without Metaphysics?” *Ethics* 99 (1989), 791.

<sup>43</sup> John Rawls, “Justice as Fairness: Political Not Metaphysical,” *Philosophy and Public Affairs* 14, no. 3 (Summer 1985), 230.

<sup>44</sup> Rawls, “Justice as Fairness: Political Not Metaphysical,” 230.

As a brief sketch of Rawls' theory, the above illustrates some primary commitments and assertions. The two principles indicate an egalitarian focus, or the desire for distributional equality of liberty and resources. The change that occurs because of Rawls' political liberalism has been intimated, but not explored in depth; however, its relevance to pluralistic societies and neutrality will be discussed below. Relevant to this chapter's objective, Rawls' theory embodies not only a liberal theory, but also one focused on the enhancement of equality and liberty. The ways in which Rawls' proposes to accomplish this is what is up for debate and what requires refinement.

### ***2.3. Three continuous liberal strains in the work of John Rawls***

Up until this point, this chapter has offered a definition of liberalism. From this more general view, the focus narrowed to bring out egalitarianism as conceived by Rawls. This took the form of a consideration of his two principles of justice and their applicability to political liberalism. Although much of this has been a brief sketch, I want to specify the relationship between theories. Filling out the connection between liberal egalitarianism, political liberalism, and liberal constitutionalism will clarify not only my argument, but also the use of terminology. Out of the three theories, liberal constitutionalism has yet to receive anything but a brief mention. Not only will its (Rawlsian) definition come to light, but its centrality to the deliberative argument will also become apparent.

Through his two principles of justice, Rawls' work has a strongly egalitarian sensibility. This, of course, holds for political liberalism as well. Following Joseph Raz's proposition, political liberalism's principles specify it as egalitarian. Its metaphysical neutrality in the political sphere was considered crucial to its separation from Rawls' earlier conceptions, but it is egalitarian by virtue of its principled assertions of equal entitlements and distributional

objectives (e.g., equalizing the best-off with the worse-off unless disparities can be justified on grounds that they aid the worse-off). The connection between those earlier formulations and political liberalism does not reflect an alteration of Rawls' egalitarian orientation as such, but the nature of the realm in which egalitarian principles would be effectuated. The point, then, is that political liberalism and egalitarianism when referring to Rawls' theory are manifestations of an equivalency. In this sense, political liberalism's underlying principles illustrate that as a non-comprehensive political doctrine its claims are egalitarian.

Political liberalism is egalitarian because of its principles, but what does liberal constitutionalism have to do with either? Liberal constitutionalism, in keeping with the discussed commitments, forwards liberal ideals of citizenship, virtue, and community as sustained by "the basic political commitment to public reasonableness."<sup>45</sup> This locates it within the liberal tradition, but does not come close to exhausting its definition. As political liberalism frames it, the means of reducing or effacing moral disagreement between persons within a political community necessitates a (state) framework of neutrality that withholds affirmation or rejection of various conceptions of the good, but nevertheless respects the pluralism within the political realm.

Liberal constitutionalism, as an aspect of Rawls' political liberal perspective, aims to affect fairness in decision-making by protecting individual rights, committing to the basic democratic value of political equality, and to "finding terms of cooperation that each citizen can accept."<sup>46</sup> Certain rights govern and safeguard the democratic process: those rights that are integral to democratic procedures (e.g., universal suffrage, voting equality, etc) and those external to the democratic process, but necessary for fairness, and those external to the

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<sup>45</sup> Macedo, 38.

<sup>46</sup> Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard UP, 1996), 26.

democratic process but not necessarily required for its fair functioning.<sup>47</sup> According to liberal constitutionalism, all of these kinds of rights have priority over democratic procedures, but the third kind—external but necessary for fairness—is geared towards their constraint by requiring just outcomes for the democratic process.<sup>48</sup>

The major background features of Rawls' theory—a well ordered society in which there is equal respect for all members and the two principles of justice, which aim towards basic liberties and equality—set liberal constitutionalism in an egalitarian model. Given Rawls' political liberalism and the associated importation of neutrality, liberal constitutionalism is both egalitarian and in conformity with political liberalism's key claims. There are qualifications to be appended to this. First and foremost is the scope of liberal constitutionalism. Among the four spheres of equality, political and legal are more properly the subjects of liberal constitutionalism. This does not mean that liberal constitutionalism is unconcerned with the other realms, but rather that it approaches them by reference to legal and political structures, procedures, and institutions.

The result of introducing liberal constitutionalism here does not derange the argument relative Rawls' liberal egalitarianism. In fact, it clarifies my claim. The outcome of this terminological distinction is that liberal egalitarianism as advanced by Rawls orients and underwrites political liberalism, which represents a shift from certain perspectives within *A Theory of Justice*. Rawls' version of liberal constitutionalism, while retaining certain common features with other liberal constitutionalists, is political liberal and egalitarian. The outcome of this classification is not only that Rawls' commitments are liberal and egalitarian, but also focused within the political process on rules and procedures that seek to advance justice.

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<sup>47</sup> Gutmann and Thompson, 33.

<sup>48</sup> Gutmann and Thompson, 27.

### 3. DELIBERATIVE DEMOCRACY—DEFINITIONS AND COMMITMENTS

#### 3.1. *General account and the principle of reciprocity*

Deliberative conceptions of democracy hold that legitimate use of state power should be grounded in “free public reasoning among equals.”<sup>49</sup> This contrasts with a common operationalization of democracy that involves periodic elections, which satisfy a rudimentary sense of self-governance so long as these elections are not marked by obvious and serious forms of manipulation or abuse.<sup>50</sup> One way in which deliberation can be characterized is in contrast with this basic view. Hannah Arendt offers some insight into what a minimal vision might entail: “the public realm has been obscured and the world become so dubious that people have ceased to ask any more of politics than that it show due consideration for their vital interests and personal liberty.”<sup>51</sup> A political domain of the sort she refers to certainly does not offer many opportunities, use of public reason, or the chance for society members to author their own rules and visions of a common social world.

The view does not need to be so dim in order to recommend the ideal of deliberative democracy and its equalizing protections. Problems abound in well-ordered societies, and although they might not undermine the fundamentals of a reasonable conception of justice outright, they might nevertheless violate basic principles of fairness. More than anything, this is relative to those democratic societies that understand democracy as “a procedure of preference aggregation (with some side constraints).”<sup>52</sup> Such anemic conceptions stand in stark contrast with deliberative ones.

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<sup>49</sup> Georgia Warnke, “Interpretative Democracy,” *Graduate Faculty Journal* 26, no.1 (2005), 47.

<sup>50</sup> Pablo De Greiff, “Comment: Transitions to Democracy,” 125.

<sup>51</sup> Hannah Arendt, *Men in Dark Times*, (New York: Harcourt Brace, 1993), 11.

<sup>52</sup> Pablo De Greiff, “Deliberation and Hispanic Representation,” in *Hispanics/Latinos in the United States: Ethnicity, Race, and Rights*, Eds. Jorge J.E. Gracia and Pablo De Greiff, (New York: Routledge, 2000), 236.

Deliberation serves as a method and procedure within the political domain. It provides community members with an opportunity to participate and persuade others, which is done through the advancement of reasons that are held to be true. These reasons are not necessarily acceptable to others, and can be countered with a different, compelling set of reasons. This process is transformative to the interests, views, and arguments made by deliberators.<sup>53</sup> In this respect, the conception takes individual preference as non-fixed inputs that, through the process of deliberation, can and do become outputs with content unlike their originals.

In the preceding way, commitments of participants might look very different after engaging in deliberation, and these are not to be focused exclusively on “specific policies but also on formal and informal democratic decision-making procedures and over values worthy of constitutional protection themselves.”<sup>54</sup> At least in part, the widened purview of content available for direct revision by participants—informal, formal, and constitutional matters—together with the intrinsic feature of revisability distinguishes deliberation from the balancing of preferences that often times occurs through voting in liberal democratic models.

The aim to which deliberation strives is consensus. The process is underwritten by a view that moral disagreement within society can be handled constructively by deliberation about institutional and non-institutional matters. Resultant consensus is a product of this. Even though it is orientated towards outcomes, deliberation requires a framework of fairness and equality. In addition, the inclusion of contributors’ perspectives is available to all who participate, but their reasons will not necessarily appear as outputs.<sup>55</sup> The process itself fosters and potentially deepens cooperative attitudes and actions. This has bearing on the role of representatives within a democracy that takes deliberative principles and norms as fundamental. Deliberated

<sup>53</sup> Christiano, “Freedom, Consensus, and Equality in Collective Decision-Making,” 162.

<sup>54</sup> Frank Cunningham, *Theories of Democracy: A Critical Introduction*, (New York: Routledge, 2002), 170.

<sup>55</sup> De Greiff, “Deliberation and Hispanic Representation,” 236.



conclusions do not simply follow from governmental activities and are then received by citizens as reasons that they can accept.<sup>56</sup> Not only do citizens craft and confront policies with each other—horizontal deliberation—they also do so with representative officials—vertical deliberation. It is important to recognize that cooperation in these senses entails a non-specialization of deliberative operations. Finally, this contrasts with Rawls’ conception.

Such cooperation is not just an ethos; it can be formulated through the principle of reciprocity as well. As Amy Gutmann and Dennis Thompson articulate it, a principle of reciprocity “requires reasons that can be justified to all parties who are motivated to find fair terms of social cooperation.”<sup>57</sup> Reciprocity does not require that the ideal aim of mutual agreement on specific subject matters always be achieved, but rather that as a basic feature and a possible resolution participants are willing to agree that cooperation and respect will serve as a (temporary at least) stopping point to deliberation. This principle remains fundamental to deliberation because it is able to sustain unresolved disagreement by proposing a reasonable solution that at a minimum mitigates conflicts, and ideally will result in the adjustment and retooling of original commitments so that there is agreement.<sup>58</sup>

It might seem that this principle limits the possibility of the inclusion of certain anti-deliberative viewpoints. This is taken as something of a paradox to this process, which is similar to the liberal’s paradox of toleration. The brute articulation of the latter is that the only attitudes that cannot be tolerated within liberal political societies and theories are those that are intolerant. The deliberative paradox is similar in that those beliefs and worldviews that reject deliberation

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<sup>56</sup> Gutmann and Thompson, 354.

<sup>57</sup> Gutmann and Thompson, 65.

<sup>58</sup> Cunningham, 170.

cannot be included, lest the outcome be the dissolution of deliberative democratic options.<sup>59</sup> Underlying this view is the claim that the theory “presupposes some philosophically foundational theory of ethics by reference to which guidelines for deliberation should take place.”<sup>60</sup>

This is a problem that I do not claim to fully resolve here, but there are two points that begin to untangle the putative paradox. First, as was indicated above, deliberative practices do not require or entail that the reasons given by people are to be accepted or sustained. Clearly, moral differences do not easily resolve themselves by submission to one or another viewpoint point on the part of those actively engaged in debate. However, the process does demand that participant’s perspectives be respected.<sup>61</sup> The availability of forums for deliberation, which as with other aspects is a part of fairness in the process, requires the toleration of varying perspectives. Second, deliberative democratic practices “are only appropriate among those who are prepared to reason together in the right spirit.”<sup>62</sup> This results in a couple of insights: (a) even those whose views are anti-deliberative still adhere to the rules and principles underlying the activity by advancing them within deliberative settings; (b) those with anti-deliberative viewpoints can be effectively addressed and afforded the same freedoms and equality as other participants through deliberative practices.<sup>63</sup>

### ***3.2. Moral conflicts and deliberation***

Both the deliberative framework and the value of deliberation necessitate further clarification. Here, I want to treat them in a bit more depth and with an eye towards the next chapter’s

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<sup>59</sup> Carol Gould, “Democracy and Diversity: Representing Differences,” in *Democracy and Difference: Changing Boundaries of the Political*, Ed. Seyla Benhabib (Princeton: Princeton UP, 1996), 178.

<sup>60</sup> Cunningham, 170.

<sup>61</sup> James Bohman, “Deliberative Toleration,” *Political Theory* 31, no. 6 (December 2003), 764.

<sup>62</sup> Cunningham, 170.

<sup>63</sup> This is somewhat similar to Gutmann and Thompson’s view that persons who “reject the aims of finding fair terms for social cooperation” cannot be reached and are disallowed from participation (*Democracy and Disagreement*, 55).

arguments. Assertions regarding deliberation's ability to confer freedom and equality among society's members require an explanation of those principles and processes that secure these values.

In addition to the principle of reciprocity, which at a minimum demands a willingness to accommodate perspectives, there are other principles that underpin the deliberative perspective. Notice that revisions to these principles can occur, and that their actual manifestations can vary. First, there is the principle of publicity. This refers to the public character of deliberation. This does not require governmental structures, but does mean that deliberative acts are necessarily collective, even if between only two people.<sup>64</sup> Second, there is basic opportunity. This provides that the distribution of political power, and with this the ability to decide on matters of economic distributions, is equally available. Deliberation necessitates a high degree of equalization in order to accommodate and grant access to all citizens.<sup>65</sup> Third in the list is basic liberty. As with basic opportunity, this equalizes power. This principle also entails the rejection of policies that would compel acceptance through coercion and without deliberation.<sup>66</sup>

Even taking into account these operative principles of deliberative democracy, there is still a basic question about why we should favor deliberation, which is a moral response, for handling (collective) moral conflicts. Narrowing the focus a bit more, we should query deliberation's authority in the democratic process and what rationale can be provided for its efficacy and legitimacy. Here again, Amy Gutmann and Dennis Thompson provide an account of the ways in which deliberation handles primary sources of moral conflict, and what these sources are.

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<sup>64</sup> Bohman, 764

<sup>65</sup> Gutmann and Thompson, 355.

<sup>66</sup> Gutmann and Thompson, 354-5.

The first reason, a correlate of the first source of moral conflict, is that deliberation adds legitimacy to choices made under circumstances of scarcity. The insight is that even if some citizens do not receive what they want, considered choices regarding distribution that are made by citizens whose perspectives are considered regardless of wealth, social status, or power, will have greater moral justification.<sup>67</sup> Justification and legitimacy do not alleviate deprivation, but they do make possible further genuinely cooperative efforts to secure more of that substance or intangible that is in deficit. If inequality within a society is an unavoidable consequence of circumstances, then an equal say in crafting a moral consensus offers an equitable procedure to those who will potentially be affected.<sup>68</sup>

A second component that heightens deliberation's worth is its success in leading participants away from their own, private partialities towards views held by others. In this respect, registering others views and claims alters what sometimes seems to be a fixed feature of political decision-making: actions based on considerations of power, whose consolidation is permissible under rules or because of conditions within society. Altering this dynamic, which addresses limited generosity as a source of moral conflicts, potentially rebuts unequal procedures and decisions made on the basis of concentrations of status, wealth, and power.<sup>69</sup>

Another origin of conflict, incompatible moral values, can be lessened by deliberative procedures. The underlying idea is that deliberation brings together a range of persons with moral views and reasons that can be better understood, confronted, and settled by exchange of ideas and attempts to diminish conflict.<sup>70</sup> It bears iteration that this requires at least some degree

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<sup>67</sup> Gutmann and Thompson, 42.

<sup>68</sup> Gutmann and Thompson, 42.

<sup>69</sup> Gutmann and Thompson, 42.

<sup>70</sup> Gutmann and Thompson, 43.

of willingness or striving on the part of deliberators in order to recognize potential sites of commensurability between respective moral convictions.

A final matter that deliberation addresses is the incomplete understanding that accompanies and distinguishes moral conflict in politics.<sup>71</sup> Exchanges between deliberators enable reasons rather than preferences to be communicated in such a way that the potential for fuller understanding increases. For instance, participants must display a baseline reciprocal perspective, but this does not exclude the possibility that deliberators hold fixed ideas and attitudes about the opinions and reasons of others. By encouraging exchange, considerations that might have been unavailable, or the cause of fixed ideas, can be brought to the open. These can fill-in anemic and uninformed conceptions.

These features combine to produce a means by which the protection for liberty, compatible with others, as well as equality can flourish. This is in addition to the orientation towards outcomes that are enacted not by aggregation of preferences, but by consensus. Certainly, they must conform to (moral) principles that are just and fair. The point, then, is that deliberation supersedes private interests. The particular manifestation and abiding principles are revisable, but the central objectives and formulations of deliberation remain. The process itself is a collective one.

Even by taking these factors into consideration, deliberative democratic procedures do not automatically produce perfect equality and boundless freedom, but the value and process of deliberation calibrate its outcomes towards those that are collectively justifiable, liberty enhancing, and protective of equality. Samuel Freeman stresses this point: that citizens “can and should be morally motivated by justice or the common good and have a willingness to abide by (perhaps even participate in) democratic decisions regarding these values” does not on its own

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<sup>71</sup> Gutmann and Thompson, 43.

speak to any liberty and equality enhancing features.<sup>72</sup> Further, such motivations can produce highly indeterminate outcomes. The deliberative democratic model requires a fair procedural framework, decided upon by deliberators, in conjunction with the principle of reciprocity and, at least, something resembling the three others. These assurances make possible the enhancement and protection of liberty and equality.

### ***3.3. Innovation and deliberation***

Although the procedures and protections offered by the deliberative model can at least deliver an effective means of ensuring freedom and equality, I want to turn to another aspect of outcomes and processes—innovation. As with the definitional boundaries and the values of deliberation discussed thus far, further exploration of a general feature of deliberation's outcomes will make sense of the beneficial products of disagreement. This outcome, however, demonstrates something of a unique feature of deliberative procedures, while still capable of incorporating fairness and justice into the overall model. This is in addition to the increased responsiveness of the institutional structure.

Innovation can be understood an outcome produced by deliberation. There is a strong connection between the transformative process referred to above and innovation. The primary distinction to be drawn between the two is that innovation is a beneficial outcome of the transformation of interests. The transformation of interests alters personal wants and needs into public, collective ones. Innovation is the result of the transformation itself, which represents a different and often new formulation that agreement enabled. Deliberation, then, is a transformative process whose outcome is innovative.

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<sup>72</sup> Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment," *Philosophy and Public Affairs* 29, no. 4 (Autumn 2000), 380.

The capacity of individuals to enter into collective debate about such things as policies and procedures does not on its face necessitate that the content or shape of either will undergo alteration. However, deliberation develops a social world and operation that takes the moral views of participants and their conclusive agreements about collective actions as central. Two sources of moral conflict—incompatible moral values and incomplete understanding of moral disputes—undergird innovation. As will be seen in more detail in chapter four, unlike Rawls’ liberal constitutional model embedded within political liberalism, which politicizes values and maintains a stronger divide between comprehensive moral views and the political realm, innovation as an outcome of deliberation and consensus integrates the two.<sup>73</sup>

One way of understanding deliberation is as a give-and-take process. Unless the reasons for the adoption of a policy or procedure are collectively accepted outright without discussion or debate, it involves a dialogic activity where an argument-counterargument pattern prevails. The rules guiding exchanges, while revisable, must offer protections to basic liberties so that all interested parties have opportunities to be heard and respected. As indicated, this does not suppose a utopian circumstance where all deliberators embrace the reasons offered by others, and the cooperative venture itself does not preclude divisions. Not only can this potential for change affect the operations of any given deliberative event, it influences the system over longer periods of time. This is a characteristic distinction between the means by which public decisions are made; it is innovative in that it can provoke unanticipated outcome arrived at by the combination of disparate inputs.

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<sup>73</sup> Pies, 97.

### ***3.4. Law, deliberation, and liberal constitutionalism***

As has been presented, deliberative democracy has a strong feature of participation. The effect this has on a society's legal structure is seemingly no different than that of parliaments or legislatures within representative systems. One key distinction is the scope of practices that do not fall within a specifically institutional realm. Law has a particular objective within the deliberative model. Its emphasis is on the institutionalization of deliberation. There remain many sites of deliberation and modes of agreement that, so long as they conform to basic precepts and rules of deliberation, should be recognized as binding, even if they do not neatly fit into a differentiated sphere of government. In this sense, institutionalization and constitutional enshrinement would aim towards protecting these numerically lesser activities. This takes community-based and generally more limited consensus, with respect to number of participants and more particularistic subject matters, to be valid expressions meriting institutional recognition and acceptance.

One way of thinking about these non-institutional acts is by analogy to private ordering. Private ordering is "the process of setting up of social norms by parties involved in the regulated activity (in some manner), and not by the State."<sup>74</sup> The important point is that the regulations that apply to non-institutional deliberative acts are the same that obtain in specifically institutional settings. Further, private deliberation and any resulting agreements would have the force of public acts in light of their conformity with deliberative rules, but their application would be limited to the parties involved. A meaningful divide appears between liberal constitutionalism and deliberative democracy on this point. If we extract from the private

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<sup>74</sup> Michael Birnhack, "Principle of Private Ordering," ISOC (February 2004).



ordering analogy those features that are unique to the deliberative conception, it is the function and role of constitutions that distinguishes them.

Whereas law as a means of regulation of interests and competition is a dominant component of a liberal conception, the deliberative one holds that the “prime function of constitutions is to institutionalize the conditions for deliberative communication.”<sup>75</sup> Here, I take deliberative communication to be that which occurs between individuals within diverse settings, from institutional spaces to less formal, non-institutional ones, and is the operative mode of the social world. Deliberative communication entails procedural fairness—for example, permissibility of expression, equalizations of power, and sustaining the conditions for communication—but it receives sanction from a constitutional framework geared towards wide dispersal throughout a society, without respect to, or respectful of, institutional versus non-institutional environments.

This formulation of communication necessitates deliberative solutions, not unilateral non-associative ones. They are a key part of social life understood more generally than exclusively institutional. Further, communication conceived in this way consists of collective, rule-bound acts that are non-isolatable; it can pervade all aspects of the social world without respect to institutional apparatus. Deliberation is an *integrated* feature of any legal structure of society (i.e., enforcement, interpretation, execution). Immediately, this would seem to produce no net difference from the liberal constitutional model; however, the commitment resituates the legal structure within the political realm, and aims specifically at enshrining and defending deliberation throughout society.

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<sup>75</sup> Jürgen Habermas as paraphrased in Cunningham, 170.

Integration can be understood relative to the content and construction of constitutional versus ordinary law in the liberal constitutional order. Jonathan Macey describes this distinction as follows:

Constitutional laws emanate from a different source than ordinary laws. Constitutional laws, which establish the institutions of government and provide the ground rules for making the other laws that govern society, grow not out of long-term customary dealings, but out of episodic negotiation processes. More importantly, the incentive structure that characterizes ordinary lawmaking is different during times of constitutional creation. This is because rent-seeking is a negative-sum game. People, even those belonging to powerful interest groups, generally lose more than they gain from the rent-seeking activity that characterizes ordinary politics.<sup>76</sup>

The sources and features of these distinctions dissolve to the extent that deliberation and its underlying principles serve as a basis for law creation, which demands that reason-giving practices pervade both constitutional and ordinary law. In this respect, constitutional law's formation through "episodic negotiation processes" and ordinary law's customary sources, as well as its incentive structure, become deliberative. As a point of reference, this is much closer to the negotiation processes of constitutional law.

In light of this, the judiciary's operation and objective becomes a part of deliberation in a different way. As liberal constitutionalism has it, judiciaries are most concerned with determinations about whether or in what ways the actions and laws pertaining to and affirmative of constitutional norms are adhered to and fulfilled. In a society based on deliberative values and practices, and derived from deliberation, public policy emanating from judges as well as legislators "should give reasons based on principles that reflect these values."<sup>77</sup> Those matters pertaining to specific individuals and communities, which would not be pertinent at a higher or

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<sup>76</sup> Jonathan Macey, "Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules," *Cornell Law Review* 82 (July 1997), 1144.

<sup>77</sup> Gutmann and Thompson, 358.

more general societal level, would nevertheless be very much a part of the deliberative constitutional framework.

By virtue of this, laws made at a different, institutional level encompass the deliberative acts of society's members without respect to number or source (i.e., institutional or not) and can be considered by all. This returns to an earlier point; namely, an altered relationship between representatives and citizens. Here, the same premise holds: there is an interaction between public officials' reasons and those put forward by citizens. Such interaction is not reducible to interest groups, lobbying, rent-seeking, or other like arrangements. All people have opportunities to deliberate about similar if not the same issues, and all have liberty enough to (at least) attempt revisions and provide reasons for disagreement.

## 4. DISAGREEMENT, PROTECTIONS, DEMOCRACY

### *4.1. Liberty, equality, and the public/nonpublic distinction*

Having analyzed some relevant features of liberal theories and deliberative democracy, it is time to face John Rawls' work in hopes of illustrating its need for refinement. In one way, Rawls' theory succeeds only as long as moral disagreements are relegated to a nonpublic realm, which is separate from politics and absents comprehensive moral outlooks of citizens. Given the discussion in the above chapter, this is an evident departure from the deliberative model, whose operations and outcomes can have specifically moral content. The first inroad into understanding the shortcomings in Rawls' work, and the ways that deliberation addresses such matters more effectively, is through a consideration of liberty and equality. This is followed by a discussion of the places of democracy and decision-making within Rawls' theory, which are insufficiently detailed and in need of enlargement.

If we return to Rawls' first principle of justice, it becomes possible to see an important relationship. His principle is that equal basic liberties are rightfully extended to all persons within a political community. This speaks to the equalization of political liberty, freedom of speech, the right to be free from arbitrary arrest as defined by the rule of law, and so on.<sup>78</sup> The means by which such liberties are equalized and enshrined would occur within the basic structure of society. This requires conformity with just principles in order to instantiate a just institutional order (i.e., a fulfillment and adherence to those practices that realize principles of justice), which is in turn bound by the very rules it protects.

Liberty and equality must be safeguarded by fair procedural rules and enforcement. Under ideal conditions, these are calibrated to equalize the dispensation of liberties. In addition,

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<sup>78</sup> Rawls, *A Theory of Justice*, 53.

they require substantive realization in order to establish rightly equal conditions. The preceding statement can be understood by use of example: A country's constitution (i.e., binding formal instrument detailing the guiding principles, laws, and activities of a nation-state) might grant all adults the right to vote, and it might guarantee the right to a jury trial, and further it might detail the protections against a caste system, but unless there are actual means and effective implementation of these terms, equality will remain limited or non-existent.<sup>79</sup>

The discussion cannot mistake the nature of liberty and equality under ideal conditions and the actual implementation of a theory. Rawls' political conception of justice uncovers those principles that might produce "not a minimal state but an 'optimal' state, i.e. a state subject to constitutional rules that effectively guarantee the political support of the citizens' interests."<sup>80</sup> In spite of this, the conditions of such a conception are distinct from a working political community; they reflect a proposal based on a thought experiment where principles are decided upon by individual rational actors under conditions of fairness, but separate from competing worldviews.

The first phase of Rawls' approach presents a normative ideal of a well-ordered society where the principles of justice would fulfill those criteria capable of seeing through the ideal. Next, there is the deployment of a hypothetical device, the original position, by means of which the principles of justice are reflected upon and chosen by rational actors.<sup>81</sup> This phase elucidates the content of those principles that would be accepted by citizens within a well-ordered society. The two principles would be acceptable to all and could establish a just society, at least as Rawls' claim goes.

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<sup>79</sup> Nagel, *Mortal Questions*, 106.

<sup>80</sup> Pies, 98.

<sup>81</sup> Pies, 86.

So far, this process is hypothetical (i.e., a means by which citizens can determine the justice of society and can cross check their individual “notions of morality and their appropriateness as political guidelines for institutional design”).<sup>82</sup> The additional feature, which was mentioned above, of political liberalism goes beyond postulating a conception that could succeed with respect to justice, but could continue to deliver stable social cooperation. This formulation would not enter the fray about what particular moral doctrine society should preference, but rather detach itself from the moral debate in order to establish a space of basic agreement or overlapping consensus.<sup>83</sup> This is held up as a practicable solution that obviates moral disagreements by finding those grounds on which persons within a pluralistic society can assent.<sup>84</sup>

The principles of justice would activate by means of agreement amongst a society’s members—a democratic process. The format of this, however, is the first point of criticism that I want to level at Rawls’ theory. The overlapping consensus model seems intuitively well attuned to guiding pluralism towards agreement and the resolution of conflicts. Pluralism is not only a permanent feature, but the liberal ideal of toleration, the major institutions of society, and liberal constitutionalism itself, deepen and promote it as a cultural fact.<sup>85</sup> Rawls’ suggestion that a political conception of justice can reduce tensions holds that individuals first reflect separately from each other and thus not in a collective, public forum.<sup>86</sup> This is one clear indication of what involvement entails. In addition, Rawls advocates for the conveyance of individuals’ preferences through public representatives or via voting.<sup>87</sup> The public means by which community members’

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<sup>82</sup> Pies, 88.

<sup>83</sup> Rawls, *Justice as Fairness* (1985), 248.

<sup>84</sup> John Rawls, “The Idea of an Overlapping Consensus” in *John Rawls: Collected Papers*. Ed. Samuel Freeman (Cambridge: Harvard UP, 1999), 421.

<sup>85</sup> Bohman, 759.

<sup>86</sup> Rawls, *Justice as Fairness: A Restatement*, 21.

<sup>87</sup> Gutmann and Thompson, 37.

comprehensive and non-comprehensive perspectives can be actually aired are insufficiently detailed by Rawls.

In part, the above claim rests on the idea that deliberative democracy betters Rawls' liberal constitutionalist stance on both how and why people engage in democratic procedures. Most evident in Rawls' work is an emphasis on majoritarian procedures that serve as a basis of the ideal of a well-ordered society:

Some form of majority rule is justified as the best way available of insuring just and effective legislation. It is compatible with equal liberty and possesses a certain naturalness; for if minority rule is allowed, there is no obvious criterion to select which one is to decide and equality is violated.<sup>88</sup>

Majoritarianism can ensure equality and liberty, but Rawls conception fails to specify what form it should take.<sup>89</sup> It is not that Rawls explanation would need to provide an empirical description of the intricate details of electoral procedures, formulas, or like issues. Further, a broad level of generality or applicability can remain whilst still detailing the requisite means of protection under a majoritarian system.<sup>90</sup> What plagues Rawls' account is a deeper ambiguity.

Given that majoritarianism is not by default unequal, the problem that arises in Rawls' case is that the form of majority rule is not definitely specified. This is not to say that Rawls' steers clear of system design. The emphasis that he places on representative institutions such as legislatures and (by extension of the term representative) judicial organs delineates a clear area of interest and focus. Not only do judicial actions and legislative ones serve as a keystone for the advancement of the principles of justice as conceived by Rawls, they are also (ideally) constrained by these principles. In this way he claims, the majority respects minority positions. These mechanisms do not seem odd given the overall emphasis placed on the primary

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<sup>88</sup> Rawls, *A Theory of Justice*, 356.

<sup>89</sup> For a discussion of the equality of majoritarian mechanisms see Thomas Christiano, "Political Equality" in *Majorities and Minorities*. Eds. John W. Chapman and Alan Wertheimer. New York: NYU Press, 1990.

<sup>90</sup>

institutions of society, but Rawls forwards an additional idea that is quite a bit closer to deliberation as presented in chapter three.

The similarity between deliberative democratic commitments and those of Rawls appears at the level of acknowledging the role that citizens can play within a political community. About this, Rawls writes that “a political conception is at best but a guiding framework of deliberation and reflection which helps us reach political agreement on at least the constitutional elements.”<sup>91</sup> However, the resemblance between the two theories ends where Rawls’ commitment to specifying the means by which citizens might actually deliberate stops. In this respect, he stipulates that discussion about principles can occur but his focus remains elsewhere; namely, the identification of the principles themselves and justifying them. The identification and acceptance of principles is neither simple nor brief; however, a robust and just democracy requires a design that extends beyond Rawls’ limited confirmation of deliberation. Collective deliberative action is essential to a well-ordered society, but Rawls’ individualistic emphasis bars him from formulating it as such.<sup>92</sup>

If we take stock of the implications of Rawls’ omission, it is hard to see how liberty and equality are affected at this level. In this respect, additional critical components need to be added to illustrate how deliberative democracy succeeds where Rawls stops. Certainly, no fatal blow has been dealt, but as a first step it is important to recognize that deliberation as a means of collective justification respects freedom and equality, and does so with a high-degree of collective justification. The interactions between citizens and institutions, as well as citizens with each other are important. Rawls posits deliberation but reneges on its implementation, which points to a larger problem as well as a reason why he cannot offer it as a full-bodied

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<sup>91</sup> Rawls, “The Idea of an Overlapping Consensus,” 438.

<sup>92</sup> Gutmann and Thompson, 37.



feature in his theory. The next section continues to consider the absence of overt deliberative design in Rawls' theory, but also seeks to understand why he failed to provide such details.

#### ***4.2. Individual versus collective decision-making***

Political liberalism restricts what should otherwise be included in public discussions, decision-making, and potentially policies. The force of the problem is felt by considering what topics Rawls makes available for consideration within the political realm. From the deliberative standpoint, the various conceptions of the good that prove prickly constitute a substantial set of issues that require acknowledgement and discussion. At a very general level, confronting moral conflicts requires a commitment not to group or individual interests, but to collective efforts geared towards common agreement. In opposition to Rawls view, this means the modification of a public versus nonpublic distinction, with attendant forms of public and nonpublic reason. With this dichotomy, the cause of Rawls' limited endorsement becomes clear and his stultifying commitments rise up.

Rawls' view is that even if moral worldviews of citizens have an effect and importance within society at large, the public realm is to remain free of them. As Rawls puts it, this does not mean that comprehensive doctrines:

Cannot be introduced in public reason. People are in general free to do this . . . Nevertheless, though we can introduce our comprehensive doctrine, the duty of civility requires us in due course to make our case for the legislation and public policies we support in terms of public reasons, or the political values covered by the political conception of justice.<sup>93</sup>

This represents what Rawls calls the "wide view of public reason."<sup>94</sup> It amounts to a major concession to the deliberative democratic approach; however, the description of the forums of public deliberation, as discussed above, are neither made explicit nor affirmed by clear

<sup>93</sup> Rawls, *Justice as Fairness: A Restatement*, 90.

<sup>94</sup> Rawls, *Justice as Fairness: A Restatement*, 90n12.

provisions. Moral doctrines have a place and role for citizens in a nonpublic sphere, Rawls says, and they might even make an appearance in considerations about policies, but they are not to form the reasons for their justification or legitimacy.

It is useful to understand what public reason means, and whether comprehensive moral matters should be removed from the political agenda as suggested by the preceding quotation. Rawls describes his notion of taking certain matters off the political agenda as one where some issues are “no longer regarded as proper subjects for political decision by majority or other plurality voting” because (1) they are sources of conflicts and (2) they are unreasonable.<sup>95</sup> This claim is followed by an assertion that controversial issues will remain. Two examples of unreasonable practices are slavery and serfdom, which can be omitted permanently by constitutional rules protecting equal liberty.<sup>96</sup> The odious and violative nature of such arrangements makes them obvious examples.

Avoiding grave conflicts arises from an empirical and intuitive consideration that is sourced back to the Wars of Religion. The consequences of civil war are such that averting them maintains greater social unity. This is an evident outcome, but important because it serves as a partial justification for the method of avoidance. What is not so clear, besides the proffered cases of slavery and serfdom, is what might cause such conflict and how to determine subject matters worth avoidance. Again, Rawls returns to those comprehensive moral doctrines that provoke profound controversies.<sup>97</sup> The result of omission is to diminish the ability to decide what counts as conflict producing or too prone to conflict.

Another component of avoidance is what Rawls regards as a fact of social life and society. About this, Rawls writes: “No society can include within itself all forms of life. We

<sup>95</sup> Rawls, “The Idea of an Overlapping Consensus,” 435n22.

<sup>96</sup> Rawls, “The Idea of an Overlapping Consensus,” 435n22.

<sup>97</sup> Rawls, “The Idea of an Overlapping Consensus,” 435n22.

may lament the limited space, as it were, of social worlds . . . and we may regret some of the inevitable effects on our culture and social structure.”<sup>98</sup> Whether society is incapable of including all forms of life, understood as citizens’ beliefs, is a matter for empirical investigation, but even if it is accepted as a descriptive fact, which it perhaps should be, there is a need for a strong justification of the method that Rawls advocates. So far, it combines averting conflicts, unreasonableness of doctrines, and the fact of pluralism is too vast and deep to incorporate.

The need for such defense arises because Rawls’ theory ultimately restricts the ability to establish the common good, whereas deliberation would face competing morals claims throughout and seek agreement. There are two background principles justifying my claim regarding the common good and deliberative democracy’s capacity to better register varying conceptions, and consequently bolster freedom. The first is that society and public decisions cease to be collectively justifiable when conflictual matters are made less available to society’s members for their consideration.

The second principle is that decisions about the common good for society involve not just substantive considerations, but procedural ones as well. Thomas Christiano describes this as follows: “deciding and acting in accordance with the common good not only involves obedience to the rule which is for the common good but also consists in determining what that rule is.”<sup>99</sup> Perhaps Rawls is correct in advancing his claim that avoidance reduces conflict, even if the seeming dubiousness of his use of historical examples alone raises flags, but this does not alter what seems to be the truncation of decision-making mechanisms available for securing agreement about what to conceptions to obviate.

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<sup>98</sup> Rawls, *A Theory of Justice*, 265.

<sup>99</sup> Christiano, “Freedom, Consensus, and Equality in Collective Decision-Making,” 162.

Rawls' theory prefers the establishment of procedural and constitutional rules at an institutional level to induce equality and liberty. As illustrated, this is founded on considerations by individuals and seemingly on their deliberative practices, but his theory narrows the focus of deliberation so as to efface moral conflict in his defined public realm. Effacement and removal are different from accommodation and transformation. Here, Rawls holds that moral conflicts are not supposed to reach a structural, institutional level, but remain on a cultural one.

This last point is witnessed by Rawls' model of the individual's role basic principle decision-making. Individuals reflect separately from others, and from such contemplation they derive and justify the conception of justice with which they agree.<sup>100</sup> This is an important component of Rawls' theory. Not only does it embody the basic feature of individual liberty, but it does so by making the individual's reasons the primary source of validation of principles and norms; however, this conflicts with deliberative practices in some noticeable ways. For deliberative democracy, individuals might have distinct perspectives on moral matters, but deliberation harmonizes these, at least by reciprocal respect and tolerance, through collective not individual actions.

The effect of this division touches on a premise of democratic theory that Rawls' political liberalism preempts. Turning to Christiano again, he explains:

The premise asserts an intrinsic connection between the common good and democratic participation. It does not merely assert that democratic participation is a reliable way of securing laws that accord with the common good . . . The notion of the common good is not defensible independently of the idea of democratic deliberation. The reason for this is the following. The common good is not understood as some function of interests and convictions which are given prior to democratic decision-making. Instead such decision-making has a transformative effect on those interests.<sup>101</sup>

<sup>100</sup> Rawls, *Justice as Fairness: A Restatement*, 23.

<sup>101</sup> Christiano, "Freedom, Consensus, and Equality in Collective Decision-Making," 162.

The deficit of forums for deliberation is a major shortcoming. The practical orientation of Rawls' political conception of justice lacks inclusion of a clear means to work out conflicts in spite of his formal moves towards deliberation. The claim does not apply to Rawls' entire framework, but rather the absence of environments for public discussion in an ongoing democratic society, and the associated transformative effects. This absence of deliberative opportunities stymies a practical basis for determining society's values, institutions, and processes. The inclusion of competing worldviews, if conducted according to respectful conditions, does not mean irreconcilable conflict.

The contrast Rawls' invokes between public and non-public, which is not the same as an oft-held division between public and private, helps to explain how the distinction between comprehensive versus non-comprehensive views plays out in Rawls.<sup>102</sup> As Evan Charney explains, various components of Rawls' theory—political conception of justice, political virtues and values, modes of reason appropriate to the public sphere, and so on—depend on this public/non-public distinction.<sup>103</sup> Nonpublic is used to delimit a set of associational relations and groups with which individuals are involved. One descriptor that Rawls relies on is 'social unions,' which does not indicate the necessary strength of the bonds between group participants, but the location within the larger society of these groups—social and cultural.

Rawls details not only the societal placement of these nonpublic groups, but offers something of a taxonomy of the varieties as well. So, the voluntary associations of civil society like universities and churches fit into the nonpublic category. There is a connection between nonpublic groups and nonpublic uses of reason. By this, Charney writes that Rawls "intends the social uses of . . . [that are] simply the various forms of reasoning, whatever they may be, that

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<sup>102</sup> Evan Charney, "Political Liberalism, Deliberative Democracy, and the Public Sphere," *The American Political Science Review* 92, no. 1 (March 1998), 98.

<sup>103</sup> Charney, 98.

characterize associations within civil society.”<sup>104</sup> It is the reason of the background culture, which is different from public political culture.<sup>105</sup> The discussion thus far indicates that political culture is devoid of the comprehensive morals doctrines that would be found within this nonpublic sphere.

Parallel with the public category is public reason, which has been discussed to a limited extent. Unlike the sectarian type of the nonpublic realm, public reason according to Rawls is or should be seen as reliable on its own terms. Here, Rawls refers to the ability of such reasoning to be publicly accepted because its guidelines are set by “fundamental intuitive ideas latent in the shared public culture,” and its role as a collective method that protects rules and liberties, which conforms to the first principle of justice. Rawls notes that “in justice as fairness, then, the guidelines of public reason and the principles of justice have essentially the same grounds.”<sup>106</sup> Public reason is a normative ideal.

Notice that even though public reason’s designated role is to protect rules and liberties, it largely fixes them relative to conceptions of the good, and deliberation about such conceptions located in nonpublic spheres are kept from the actual operations of political culture. Given deliberative democracy’s ability to transform moral disagreements, we can see how Rawls’ notion severely and unnecessarily restricts public forums for input where comprehensive doctrines are allowed. Still, he regards the judiciary as the supreme spot of assessment and deliberation. There is also the role of political officials in their official capacities, political parties, acts of the executive, and citizens when they take part in public activities and vote on matters about “constitutional essentials and matters of basic justice.”<sup>107</sup> This modification does

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<sup>104</sup> Charney, 98.

<sup>105</sup> Rawls, *Political Liberalism*, 220.

<sup>106</sup> Rawls, *Political Liberalism*, 225-6.

<sup>107</sup> John Rawls as quoted in Charney, 98.

not change the baseline feature of Rawls' political conception; namely, when deciding about matters of justice, the common good, as well as policies and rules for their implementation, the moral commitments of individuals are underrepresented and underdetermined.

As noted above, Rawls justifies this exclusion on grounds of conflict avoidance and reasonableness, but does not preclude that controversial issues will reach the public realm. As a means of preventing or reducing high-level conflicts, it is questionable whether the proposal succeeds. The principles of justice are advanced so as to guide society. They have a precedential role in this respect, but the fairness that they aim to realize comes at the expense of resolving indeterminate problems of justice through articulated, robust democratic means. Reducing or preventing high-level conflict is certainly not the only reason for Rawls' method of avoidance, but in order to fulfill the demands of diverse populations in democratic forums so that their roles were more participatory, his conception of toleration or neutrality would have to undergo revision. Such change, however, would have a repercussive effect throughout his whole theory. It would change the nature of the enterprise, not just procedural changes but substantive ones too.

#### ***4.3. Neutrality and the justifications of deliberative democracy***

The protection of basic liberties for all entails a claim of equality. It also potentially guards liberty against intrusion. One way that pluralistic political societies avoid infringement is by neutrality. A summary definition from Will Kymlicka presents neutrality as the view that "the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the

good can be pursued.”<sup>108</sup> This encapsulates some of the features of Rawls’ political conception, but I want to outline why neutrality does not have to reject the inclusion of considerations about conceptions of the good in order to meet its definitional criteria.

The balance of liberty with equality must involve an engagement with others who maintain conceptions at variance with our own, but whose perspectives are not barred from consideration because they are based on moral conceptions of the world. A feature connected to neutrality is toleration. For Rawls, toleration amounts to noninterference (understood as a part of the public/nonpublic division).<sup>109</sup> The intended effect of noninterference is to reduce moral conflicts between individuals by omitting their political significance, which ultimately abstracts (moral) content and largely leaves only formal protections. The kind of tolerance that deliberation forwards allows for persons’ perspectives to enter debates, even if their reasons are not finally incorporated or sustained. This is not to say that political significance is determined by moral content alone, but that the acceptance and toleration of conflicting perspectives is a given in politics. Disqualification of reasons in a pluralistic polity, one result of Rawls’ noninterference, “threatens the public character of political communication in which reasons are considered on their own merits.”<sup>110</sup>

Moral deliberation can enlarge Rawls’ conception; it would also diminish any bright line separation of public and nonpublic reason. This is defensible on the grounds that moral disagreements are productive if set in a framework of deliberation. The outcome hinted at is that deliberative democracy fosters a better balance between liberty and equality, but how? Deliberation has a specific framework that is itself submitted to deliberative procedures. It is worth taking Thomas Christiano seriously when he points out that democratic choices are made

<sup>108</sup> Will Kymlicka, “Liberal Individualism and Liberal Neutrality,” *Ethics* 99, no. 4 (July 1989), 883.

<sup>109</sup> Bohman, “Deliberative Toleration,” 759.

<sup>110</sup> Bohman, “Deliberative Toleration,” 764.



on “a collective level when there is serious disagreement. Hence they have to do with what should be done, and how to do it.”<sup>111</sup> By my estimation, this leads to a conclusion that moral disagreement is part of the description of democracy and it should not be excluded. However, this is the case only as long as access to forums where conditions of fairness, with requisite respect for freedom to participate and equal access to it, are upheld.

The matter goes further when it is set against the epistemic justification of deliberative democracy. The procedure allows for the authorship of those rules and conceptions that will be implemented at an institutional level, where the institutional level itself is identical, at least in many of its forms, with the forums of participation. Pablo De Greiff explains this justification as follows: “allowing citizens to participate in the formulation and the implementation of the laws they live by increases the possibility that those laws will capture and satisfy the citizens’ own interests.”<sup>112</sup> This is applicable both to moral and political norms and, as De Greiff writes, “it is reasonable to assume that a norm that gains the rational and free assent of those who are affected by it is a valid norm.”<sup>113</sup> Now, the defense of participation is not open-ended, it requires a (deliberative) framework bound by procedural fairness; furthermore, it needs to be able to halt those views that would violate fairness. There needs to be a standard of correctness that prevents abrogation of liberties and preserves equality.

To claim that a norm gains validity from collective assent alone fails on grounds that even if a majority of people agree to it, such widespread assent does not change the content or validity of the norm itself (i.e., a bad law is a bad law no matter how many people accept it). The protections offered by the deliberative conception must be underpinned by a relevant

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<sup>111</sup> Thomas Christiano, “Review of *Deliberative Democracy and beyond: Liberals, Critics, Contestations* by John Dryzek,” *The Philosophical Quarterly* 52, no. 207, (April 2002), 279.

<sup>112</sup> De Greiff, “Comment: Transitions to Democracy,” 125.

<sup>113</sup> De Greiff, “Comment: Transitions to Democracy,” 125.

standard of correctness, which should not undermine equal opportunity. In spite of this, Rawls' disqualification of certain reasons should be understood as an abrogation of equal opportunity. This fixity of procedural rules, even when operating under conditions of fairness, diminishes the degree to which citizens can meaningfully participate in democratic development of society. In this respect, rules and principles might fairly adduce the ways in which society should operate, but they can feasibly provoke a sense in those people who must live by them that they are not of their making, and not valid on that account.

The connection between exclusion of individuals and the exclusion of reasons is a direct one: persons have worldviews and the isolation of these to nonpublic domains results in an attenuated political process in a democratic society. By contrast, deliberation is not an activity that merely involves people in public debate, but involves reasons and conceptions they hold. In this sense, it is robust with respect to the role and constitution of persons.

The need for inclusion of persons with their concomitant reasons and worldviews is that "others are in an even worse position than each of us is to know what is best for us."<sup>114</sup> This does not mean that what is best for us is unchangeable, but that its determination should include us. This is a position that Rawls also advances. His formulation is that people view themselves as free in that they regard themselves as "self-originating sources of valid claims." In this sense, persons take their claims and conceptions as having weight and importance on their own, and that is distinct from duties or obligations of the political conception of justice. It is important to see what effect this has within Rawls' work, in addition to its impact on deliberative conceptions. Persons' perspectives have baseline relevance precisely because they issue from persons.

The relevance bar might seem low, but it is founded on the premise that we know better about what is best for us than others do. However, it embodies a prior premise of collective

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<sup>114</sup> De Greiff, "Comment: Transitions to Democracy," 125.

justifiability, which is seen in liberal commitments. The effect of this justification on deliberative operations at a general level is to confer legitimacy. Legitimacy arises from procedures available under non-ideal conditions, at least as the deliberative model has it. For citizens to actually think of themselves as free, their political roles cannot be reduced to a mere fulfillment of duties or obligations to a state. Rawls affirms this, but does not specify how deliberation within society operates. This lessens the plausibility of his claims that deliberation is a key element within his conception. This is in addition to any substantive limits on what is permissible within the public political realm. So, Rawls might feign towards deliberation, but does not advance it in strong ways.

The prevention of high-level conflicts might seem to carry the day as a basis for sequestering moral conceptions to the nonpublic realm, but this does not illustrate why, given the proper framework, deliberation cannot succeed and encompass varying conceptions of the good. The conceptions of the good are political to the extent that they lead to outcomes that are publicly available. Deliberation makes them political by incorporating them into just such a space. A rational standard of correctness, which is the background condition to the fair deliberative process, produces results that maintain unity. This holds even if the invocation of a reciprocal solution is required (i.e., an agreement among parties that they will live with difference but still cooperate).

Disagreement within a deliberative framework can lead to consensus. The airing of competing worldviews better instantiates the basic liberties to which Rawls' principles aim. In this respect, deliberation provides a venue where the substantive inputs by all are respected enough to be duly considered. This does not mean that the content of these reasons and worldviews will be adopted or affirmed, but that free exercise of reason giving and decision-

making is fundamental to the achievement and realization of basic liberties. They are, in a sense, the stuff of basic liberties. This claim does not go so far as to find deficiency in the basic liberties that Rawls' theory requires equality for, but rather forwards the claim that the way in which Rawls structures the protection of liberties does not succeed in non-ideal circumstances. In large measure, this shortcoming is a product of Rawls' omission of a description or argument about public forums.

If taken from this perspective, all things considered, deliberation has a greater equality and liberty enhancing method than Rawls' political conception of justice and its embedded method of avoidance. This is not to cast aside Rawls' theory in total. What the deliberative conception proposes is that emphasis shifts from a non-comprehensive perspective, to one that accommodates worldviews in a fair structure. The purpose is not to derail the principles of justice, but to allow them to be engaged actively by citizens and changed if so decided. The paucity of deliberative democratic forums in Rawls' vision affects the degree to which active engagement can occur. With the addition of a framework for public deliberation, with requisite and explicit accommodation for competing moral claims, Rawls' work would better succeed at fulfilling its objectives.

## 5. CONCLUDING REMARKS

What follows from my defense of deliberative democracy is not a statement regarding its perfection, but rather its adeptness at transforming what would otherwise remain a set of deep divides within society. This differs markedly from a political conception geared towards the establishment of a just basic structure, which is attained under ideal conditions, and comes at the cost of inclusion of comprehensive worldviews. In this sense, what is practicable is not founded on a thought experiment, but rather mutual agreement through deliberation of individuals about moral views, institutions, and relations of a very real, pertinent kind.

The other practicable success of deliberation is relative to Rawls' lack of explicit indication of the consistent equality and liberty enhancing democratic operations within a society. It is important to note that the value of deliberative democracy in handling moral conflicts will stem from its actual manifestations and implementation. The forms that deliberation will take depend on a variety of empirical and historical factors. As is clear, these have not been the focus of this essay. In defining and defending deliberation, and considering liberalism, liberal constitutionalism and egalitarianism, the primary concern remained outlining those theoretical features that hold out better relative to liberal theories. This precedes any analysis that contends with those other non-theoretical factors.

To review the justifications of deliberation as presented above, I discuss epistemic and normative grounds for deliberative democracy. These are part and parcel of basic principles that embody and protect deliberation. Cooperative attitudes do not immediately rid us of divisions or perspectives built on private interests, but they do refocus them towards common good. The result is innovation—a product of the transformation of individual interests into collective ones. This is not simple and requires a higher level of participation than would be seen through

representation and voting alone. Mutual agreement and transformation in this sense do not have fixed inputs or entirely predictable outputs. In addition, this process illustrates a distinct way of handling preferences, which is neither aggregative nor majoritarian.

Decisions about the common good are not set at an exclusively institutional level. They find expression there, but the forms that they take are interactive in relevantly different ways. This is in addition to other important institutionalization efforts within the legal structure. However, deliberation at all levels of manifestation, whether government, daily-life, or others, is not simply a structural (institutional) feature, it is a cultural (non-institutional) one too. This came out in the discussion, but is worth iteration. Any sharp division between public and nonpublic, between officials and citizens, or between permissible and impermissible subjects of disagreement, fail to account for a deeper integration of individual interests and beliefs within collective ones. In this sense, a strong structure/culture divide would reproduce a dichotomy antithetical to deliberation.

In this spirit, the means by which a balance of liberty and equality is achieved does not arrive by taking disagreements off the agenda. The advancement of the method of avoidance relies ultimately on an argument that seeks equilibrium between these liberty and equality in an atomizing manner (i.e., by delimiting a much narrower political realm without tolerances for simmering moral conflicts). Here, the importance of reciprocity appears in force: it is a means by which even the most disintegrative arguments can result in cooperation and basic agreements.

I will end by restating that deliberative democracy is a viable means of enhancing and protecting equality and liberty. It is so by virtue of a combination of factors. The first, which is not exclusive to deliberation, is the underlying commitment to equality of opportunity and liberties as well as publicity. Next, also not exclusive to deliberation, is the respect of liberties of

others. The protection of these, that is also their enhancement, is a process that takes rights seriously and that respects the actual disagreements. Again, the viability of the theory is that it takes the beliefs, concepts, and desires of individuals in real situations, with an explicit procedure, and finds a common ground in practical terms. There is something more; namely, one dominant group does not control the realization of a political system. In this regard, all people for whom a society is relevant and whose interests are intimately linked to and become collective ones, craft and formulate the politics and culture of society.

Deliberation can accomplish these things. It overcomes the limitations that I find in Rawls' account, but does not regard the remainder as unimportant. It registers much of what Rawls' has worked out, but faces the dilemmas that persist. In a strong sense, it holds out the possibility that people—equals, as a normative descriptor—can be equal, and that major social, economic, and political inequities can be equalized through collective deliberative action and mutual agreement.

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