

**Democracy after Deliberation:
Bridging the Constitutional Economics/Deliberative Democracy
Divide**

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ABSTRACT

This dissertation addresses a debate about the proper relationship between democratic theory and institutions. The debate has been waged between two rival approaches: on the one side is an aggregative and economic theory of democracy, known as constitutional economics, and on the other side is deliberative democracy. The two sides endorse starkly different positions on the issue of what makes a democracy legitimate and stable within an institutional setting. Constitutional economists model political agents in the same way that neoclassical economists model economic agents, that is, as self-regarding, rational maximizers; so that evaluations of democratic legitimacy and stability depend on the extent to which the design of institutional rules and practices maximize individual utility by promoting efficient schemes of collective choice. Deliberative democrats, on the other hand, understand political agents as communicative reason-giving subjects who justify their preferences and positions on issues that jointly affect them in a process of consensus-directed discourse, or deliberation; so that evaluations of democratic legitimacy and order depend on the degree to which institutional norms and practices promote deliberation and draw upon deliberated public judgment.

I argue that despite the numerous incompatibilities between constitutional economics and deliberative democracy--which amount to a 'deep divide'--an opportunity to produce a genuine synthesis of the two approaches arises inasmuch as it is possible to overcome several points of opposition in their separate research programmes. The central thesis of the dissertation is that it is possible to construct a bridge spanning the divide between constitutional economists and deliberative democrats, and that Dewey and Bentley's transactional view can facilitate this bridge-building project. Pursuant to this end, the points of opposition between the

research programmes are mediated by way of five concepts which, on balance, favor deliberative democracy and its feasible institutionalization. In charting a transactional middle way between the two programmes, deliberative institutional designers should be empowered to achieve two objectives: (i) to integrate deliberative practices into new and existing democratic institutions and (ii) to heed the critical insights and caveats of constitutional economists, who have identified genuine limitations to realizing the deliberative ideal in modern constitutional democracies.

ACKNOWLEDGMENTS

This doctoral dissertation began as something quite different than I had ever predicted it would become. Based on a simple idea about John Dewey's legacy for deliberative democratic theory, it has since developed into a work that explores how Dewey and Arthur F. Bentley's transactional approach, as formulated in their collaborative work *Knowing and the Known*, can mediate a recent debate between deliberative democrats and constitutional economists. Since its modest beginnings, many people have influenced the genesis of the work and for this they deserve thanks. These people include the students in my two seminar courses in spring 2006 at Western State College, Scott R. Bowman at California State University Los Angeles, Frank X. Ryan at Kent State University, Elias Khalil at Monash University and Dan Palmer, a scholar of the transactional approach in New Zealand.

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CHAPTER 1

INTRODUCTION

This dissertation addresses a debate about the proper relationship between democratic theory and institutions. The debate has been waged between two rival approaches: on the one side is an aggregative and economic theory of democracy, known as constitutional economics, and on the other side is deliberative democracy. The two sides endorse two starkly different positions on the issue of what makes a democracy legitimate and stable within an institutional setting. They address questions of leading importance in democratic theory and, more generally, political philosophy,¹ such as: Should a theory of democracy justify existing institutional arrangements? And ought it rule out *prima facie* non-democratic practices and institutions? Conversely, should the design of stable political institutions reflect the tenets of a particular democratic theory? Or is any form of democracy, as Sheldon Wolin (1996:37) claims, “inherently unstable”? While each side acknowledges the significance of procedural norms or rules, popular agreement or consent and protected minority rights or entitlements, their accounts of how these factors affect democratic legitimacy and institutional stability diverge on many counts.

I argue that despite the numerous incompatibilities between constitutional economics and deliberative democracy--which amount to what I call the ‘deep divide’ or simply the ‘divide’--an opportunity to produce a genuine synthesis of the two approaches arises inasmuch as it is possible to overcome several tensions in their separate research programmes. The causes of disagreement between constitutional economists and deliberative democrats can be traced to their respective assumptions and methodologies. Institutional or constitutional economists

model political agents in the same way that neoclassical economists model economic agents, that is, as self-regarding, rational maximizers; so that evaluations of democratic legitimacy and stability depend on the extent to which the design of institutional rules and practices--particularly those chosen within a constitutional context--maximize individual utility by promoting efficient schemes of collective choice.² It is in this spirit that John Dryzek (200:31) calls the constitutional economist's account "politics as strategic interaction," and the institutionally-oriented economist Douglass North (1990:3) defines an institution as "the humanly devised constraints that shape [that] interaction."

Central to constitutional economics is the theory of rational choice, which transfers the micro-economic model of *homo economicus*--a rational actor maximizing a utility function relative to set of incentives--to non-economic and particularly political spheres of activity.³ Deliberative democrats, on the other hand, understand political agents as communicative reason-giving subjects who justify their preferences and positions on issues that jointly affect them in a process of consensus-directed discourse, or deliberation; so that evaluations of democratic legitimacy and order depend on the degree to which institutional norms and practices promote deliberation and draw upon deliberated public judgment (Cohen 1997:72; Gutmann and Thompson 1996:1; Dryzek 2001:51; Benhabib 1994:27).

In the last fifteen years, democratic theory has undergone a deliberative revolution. In what John Dryzek (2000:1) terms the "deliberative turn," many democratic theorists and practitioners have shifted their models of democratic legitimacy to account for "the ability or opportunity to participate in effective deliberation on the part of those subject to collective decisions." This deliberative turn or revolution has in large part been motivated by the need to create either a complementary or an alternative model to purely aggregative models of democracy, which reduce democratic decision-making to registering privately formed

preferences through majoritarian voting procedures (Miller 1989:254-5; Warren 1992:8; O'Neil 2002:249; Freeman 2000:372). As the proto-deliberative democrat John Dewey contends, "what is more significant [than the sanctity of majority rule] is that counting of heads [or aggregation through elections] compels prior recourse to methods of discussion, consultation and persuasion [so that] . . . it never is *merely* majority rule" (LW 2:365; Habermas 1996a:304).

One of the core commitments of deliberative democratic theory is what I will refer to as the 'public justification tenet.' It states that in order for a political decision to be democratic and legitimate, the views and interests expressed in it must withstand the test of deliberation, wherein each participant publicly justifies his position and preferences to his fellow deliberators (Habermas 1979:178; Macedo 1991:303; Cohen 1997:72). In other words, through the process of discussing and contesting each other's claims, deliberators face the prospect of arriving at qualitatively improved or enlightened collective choices.⁴ As a corollary to this tenet, citizens of a deliberative democracy must be capable of changing their own and other citizens' preferences about issues; meaning that, when subject to the test of public justification, the outcomes one prefers are presumed to be negotiable and open to transformation (Barber 1994:136; Fishkin 1991:36; Mansbridge 1992:36). Even if preferences do not submit to the transformative effects of discourse, participants may still be more sympathetic to accepting the decision if they feel that their voice has been heard (Shapiro 2000:4). Also, deliberation may constitute a search for right solutions to shared problems (sometimes referred to as its 'epistemic' function), promoting creative inquiry, problem-solving and conflict mediation. The more regularly citizens engage in this process of discussion, justification and inquiry, the greater the likelihood that they will develop a habit of deliberating. "This habit-forming quality of deliberation," Burkhalter et al. (2002:415) report, "makes participants more likely to view the deliberative model as appropriate [or legitimate] in future political encounters." Consequently, for the deliberative democrat,

simply aggregating citizens' stable and privately-formed preferences is insufficient for establishing the legitimacy of a collective decision (Elster 1998c:8). Legitimacy demands an additional component to choice: deliberation.

Unfortunately, deliberative democrats have run afoul of institutionally-oriented economists in their efforts to institutionalize the deliberative ideal. As deliberative democracy has "come of age," its proponents have pressed beyond the stage of developing theoretical models of ideal discourse (with accompanying counterfactual conditions) to designing (and in some cases, testing) institutions that embody an attainable ideal--in what Bohman (1998:401) calls "the 'working theory' stage." Where constitutional economists and deliberative democrats disagree is on the question of what conditions are necessary for a democracy and its institutions to be legitimate and stable. For instance, many constitutional economists dispute the public justification tenet of deliberative democratic theory. On an empirical level, they reject the deliberative democrat's argument that given enough time and participation, discourse will always improve the quality of collective decisions (Suchanek 2004; Weinberger 1999). Moreover, the fitness of deliberation for producing quality decisions may be tied to specific psychological dispositions or character types, to particular numbers of deliberators and to a discrete time horizon (Kurrild-Klitgaard 2004:13). Lastly, and also on an empirical level, many constitutional economists question whether widespread discursive activity can give normative legitimacy to democratic political arrangements if it cannot, in the first place, feasibly resolve problems of resource scarcity and strategic action, such as logrolling and rent seeking behaviour (Gauthier 1993:315; Tullock and Krueger 1974; Sullivan 2004).

In response, deliberative democrats have deployed at least two strategies. First, some assume a defensive posture and reposition their research to address the practical obstacles to institutionalizing deliberation in existing democracies (such as strategic action and resource

scarcity).⁵ The second strategy deliberative democrats adopt is an offensive one, contesting the adequacy of specific tenets of the constitutional economics programme.⁶ For instance, some deliberative democrats have argued that the paradigmatic product of a political choice situation for constitutional economists, i.e. a constitution, is not a requirement for democratic legitimacy and institutional stability (Dryzek 2004a). Others dispute the way in which constitutional economists define preferences and alternatives as given and external (or exogenous) to choice situations, rather than as dynamic and chosen internal (or endogenous) to the choice situation (Sunstein 1991:3; Dryzek 2000:46). And still others have attacked the *homo economicus* and rational choice assumptions shared by neoclassical economics and constitutional economics (Green and Shapiro 1994). Some claim that deductions about political phenomena from these assumptions fail to explain increased frequencies of non-strategic cooperation among individuals in political institutions and prisoners' dilemma situations (Dryzek 1992:410; Shapiro 2006).

The debate between constitutional economists and deliberative democrats is not one that admits of easy solution. Indeed, the difficult task of mediating the debate will require recourse to a long-neglected approach that effectively sheds light on several questionable points in their root assumptions and resolves problematic tensions between the operative methodologies of the two research programmes. This approach was invented by Arthur F. Bentley and John Dewey in their collaborative work *Knowing and the Known* (1945) and termed the "transactional view."⁷ I argue that through a careful analysis of these questionable assumptions and resolution of their methodological tensions it is possible to bridge the deep divide between constitutional economics and deliberative democracy.

The Debate and the Divide

Before proceeding to a review of the literature on the debate between constitutional economists and deliberative democrats, I give a brief account of how democratic theory relates

to features of democratic institutions. Indeed, this dissertation is entitled “Democracy after Deliberation” to highlight two possibilities: one, that the deliberative democratic ideal has the potential to transform actual democracies, their institutions and practices; and two, that the extant conditions within these democracies and their decision-making procedures have the potential to transform the deliberative ideal into an improved ideal. Both possibilities must be considered, I argue, if any investigation of the relationship between deliberative democratic theory and institutions is to be fruitful.

In the second sub-section of the present chapter, I identify the origins of the debate in the social choice critique of liberal democracy. The final sub-section focuses on the divisive debate that has arisen between constitutional economists and deliberative democrats, particularly as it has grown out of their respective responses to the social choice critique.

Democratic Theory and Institutions

In order to understand the relationship between democratic theory and institutions, it is helpful to introduce a distinction between the reality and the ideality of democracy. Besides referring to a discrete set or system of real institutions that are familiar within the West--such as free elections, competitive political parties and freedom of speech--democracy also denotes those ideals that underlie and warrant the system.⁸ The relationship between real and ideal democracy, however, is not one of direct correspondence. Although those who embrace contrasting ideals may envision different ways of forming or reforming institutions, it is quite often the case that an identical system of institutions will be warranted from contrasting perspectives and for different reasons. Consequently, having a theory of democratic institutions means both defining the kinds of institutions that the theory allows for as well as normatively justifying the existence and legitimacy of those same institutions.

Many liberal democrats embrace the institution of elections governed by one-person-one-vote and a majority decision rule. They justify the institution on the grounds that the fairest and most efficient way to make collective decisions is to aggregate preferences, count each person's individual preferences with equal weight and demonstrate a popular mandate through a clear majority (fifty-percent plus one) of supporters (Freeman 2000:172). However, the institution and the ideals that support the institution are not without their weaknesses--as social choice theorists, among others, have carefully pointed out.⁹

The Social Choice Critique of Majority Rule

Social choice theorists Duncan Black (1948, 1958) and Kenneth Arrow (1951) posed the following questions: How do preference orderings generate voting outcomes (Black)? Is it possible to aggregate individual orderings into a collective ordering that satisfies a set of criteria for social rationality (Arrow)?¹⁰ In the course of answering these questions, both researchers uncovered the phenomenon of majority cycling or intransitive social preference orderings. The phenomenon is most clearly illustrated in a decision-making situation involving three persons (1, 2 and 3) who choose among three alternatives (A, B and C). Suppose that voter 1 prefers alternative A to B to C; voter 2 favors B to C to A; and voter 3 desires C to A to B. In this situation, when put to a pairwise series of votes decided by majority rule, A will win against B, then B will defeat C, but finally C will overcome A.¹¹ No alternative will prevail in terms of commanding a majority of votes over every other option; or stated differently, every alternative will be overcome by at least one of the competitive alternatives in a head-to-head vote.

There are at least three difficulties with majority cycling, or what is more commonly referred to as "the paradox of voting."¹² The first difficulty, specified by Arrow (1951) in his now-famous impossibility theorem, is that majority cycling leads to irrational collective behaviour. As a condition for individual decisions to be rational, preference orderings should be

transitive, i.e. if A is preferred to B and B to C, then A is preferred to C. Likewise, if collective decisions are rational, social preference orderings too should display transitivity. However, majority decision-making procedures can potentially result in intransitive social preference orderings, which thereby violate the rationality condition, as Arrow points out: “the method . . . for passing from individual to collective tastes fails to satisfy the condition of rationality, as we ordinarily understand it” (3). A second difficulty is that of incoherence. As the pairing of alternatives periodically shifts, so does the preferred social preference ordering (Riker and Ordeshook 1973:84ff). The majority-decided status quo, A, can become C (as C is preferred to A), then B (as B is preferred to C) and return to A (as A is preferred to B); a cycle that will repeat itself indefinitely unless individual preferences change or some institution imposes a decision. In the case that a non-representative institution decides the outcome, then a minority group controlling the institution frustrates a majority disposed to another outcome. Lastly, the difficulty of arbitrariness occurs in any voting system which involves a series of head-to-head votes, such as an amendment process (Frolich and Oppenheimer 1978:17ff). The victor in such a series of matches normally constitutes what is called a ‘Condorcet winner.’

Duncan Black (1948) also wished to salvage the majority-voting rule as a legitimate tool for arriving at collective decisions. In his research, he found that so long as the alternatives in the group choice situation are arrayed along a single issue dimension, each voter’s preferences display “single-peakedness” and consequently the threat of majority cycling is dispelled. Single-peakedness occurs when voters orient their understanding of the issue in the same way, or conceive the different positions on the issue in a single dimension space. For instance, hypothetically, all voters might choose a member of Parliament or of the House of Representatives on the basis of the single dimension of moral character. Black (1958) termed the tendency for preferences to form a peak at a single preferred option when spread along such

a continuum the “median voter theorem.”¹³ However, Black’s single-peakedness requirement can also exclude reasonable preference orderings when more than one issue dimension is at stake. So, once collective decisions implicate more than one issue dimension, majority cycling takes place even if every voter’s preferences reveal single-peakedness over each dimension taken separately.¹⁴

So, despite Black’s attempt to preserve majority decision-making through the concept of single-peakedness, the principle of majority rule still appears fundamentally flawed due to its instability. For given the threat of majority cycling and the reality that citizens will understand issues along multiple dimensions, a majority decision rule cannot guarantee a single unique collective outcome. Therefore, not only is majority rule prone to engendering incoherent, irrational and arbitrary results, but it also cannot be relied upon in reaching a point of equilibrium in political decision-making, and particularly one that reflects a stable majority will. “It appears that we have unwittingly created a machinery,” Friedrich Hayek (1979:6) observes, “which makes it possible to claim the sanction of an alleged majority for measures which are not in fact desired by a majority.”

The Divide

Both constitutional economics and deliberative democracy offer possible solutions to the problem of majority cycling. However, the differences in their proposals give rise to a heated debate. Deliberative democrats offer the solution that deliberation alters individual preferences or restructures preference orderings so as to produce collectively transitive and single-peaked rankings of alternatives. In plain terms, people are expected to revise or even formulate their preferences through public debate, and not independently of it. Constitutional economists, on the other hand, believe that either majority cycling is a desirable feature of a constitutional democracy or that it is undesirable yet controllable. In the case that it is desirable, majority

cycling prevents a recalcitrant and tyrannical majority from forming. In the alternative case that it is undesirable, constitutional economists recommend strategic behavior, such as log-rolling or vote-trading, to induce single-peaked collective outcomes. In short, they opt for forms of political bargaining among independently arrived at interests or preferences--not (or so deliberative theorists would say) collectively reasoned views.

For deliberative democrats, preferences may shift through the process of deliberation. The public justification tenet holds that legitimacy attaches to collective choice outcomes only after they are subject to and survive the test of fair and reasoned deliberation. According to Joshua Cohen (1997:77, 100), this feature of deliberation both limits the kinds of reasons that can be offered and, in some (but not all) cases, induces preference transformation. When faced with the need to justify their positions, participants in a deliberative forum may alter their views. As a result, the preference profiles of deliberators may exhibit sufficient consensus (or popularity) that they coalesce around a single ranking--sometimes called the satisfaction of a 'popularity condition--and thereby avert a majority cycle.'¹⁵

By means of deliberation, it is also possible to narrow the domain of possible alternatives or preference orderings--often termed the satisfaction of an 'exclusion condition'--and so prevent the formation of a majority cycle. More specifically, deliberators can eliminate some options or orderings of preferences because they are irrational, irrelevant, immoral or egoistic.¹⁶ Therefore, deliberative democrats overcome the social choice critique by rejecting the rational choice assumption that preferences are fixed and highlighting the deliberative effect of domain limitation.¹⁷

Besides decreasing the number of alternatives and preference orderings, deliberation can also produce single-peakedness by either reducing the number of issue dimensions or separating a complex issue with several dimensions into two or more simple issues with a single dimension

(through a process known as ‘disaggregation’). In order to reduce the quantity of issue dimensions, deliberators may persuade each other that an issue dimension is immoral, irrational, irrelevant or egoistic—not unlike the process of domain limitation. If the separate outcomes of each disaggregated vote are single-peaked, then the deliberative mechanism has once again overcome the social choice critique and the problem of majority cycling. Or has it?

Constitutional economists disagree with deliberative democrats on the issue of whether deliberation resolves the problem of majority cycling. However, before investigating the reasons for their disagreement, a look at the constitutional economics response to the social choice critique is in order. James Buchanan (1987a) entered into the debate with social choice theorists, advancing the thesis that majority cycling is desirable. If in multiple consecutive votes different coalitions of members form winning majorities, then would not this outcome be preferred to the opposite outcome: viz. a single permanent majority coalition that wins every vote? Given that every vote decided by majority rule has a single unique outcome, it follows that the majority would consistently (and tyrannically) impose its collective will over the outvoted minority (176). Such a result could not be stable or democratic.¹⁸ If, on the other hand, citizens expect that in one election they will be members of adversarial factions while in the next they might be part of the same faction (or friendly factions), then they will be more likely to temper any abusive treatment of each other (Bailey 1970:129). So, majority cycling permits members of the present minority to become members of a future majority, and the members of the present majority to transform into a future minority, in a rotating process sometimes referred to as the “consolation effect” (Offe 1985:263-4).

Nevertheless, constitutional economists find majority cycling objectionable for two reasons. First, in any particular cycle there will be losers and winners. If members of a minority consistently lose, then the choice situation’s constraints are inefficient as measured against the

economist's criterion of Pareto-superiority, that is, that no losers and only winners result (Buchanan 1964:106). Another practice of constitutional economists is to treat unanimity rather than majority rule as the base-line for determining the fairness and efficiency of a decision rule for constitutional agreement. Since the choice occurs at the level of constitutional politics, an internal constraint is imposed through the selection of a decision-making rule to govern ordinary politics--or what some constitutional economists call "choosing how to choose" (Barbera and Jackson 2004). And given that the outcome of negotiations determines the framework of constitutional rules, the stakes become substantially higher for selecting a decision-making rule in a constitutional convention as compared to other choice situations (Buchanan and Tullock 1962:81-83). So the closer the constitutional decision rule is to unanimity (including various kinds of super-majorities), the more likely the outcome will be to their mutual advantage--meaning that there will be at least one winner and no losers (Pareto-optimality) and all agents in the choice situation will reap gains in excess of costs (cost-efficiency) (Barry 1984:583; Buchanan 2003:14). However, in non-constitutional choice situations, a unanimity rule proves impractical given that it tends to either produce a deadlock or a situation in which the minority holdout dictates the terms of the eventual decision. In both situations, decision-making costs increase dramatically (Buchanan and Tullock 1962:69; Gauthier 1993:324).

Similar to deliberative democrats, constitutional economists wish to guard against the dangers of majority cycling. However, they object to deliberative democrats' claims that deliberation will prevent intransitive social preference orderings through domain limitation and the reduction of issue dimensions. For instance, Knight and Johnson (1994:287-9) object that while deliberation might have the claimed effect, it can also potentially have the reverse effect, viz. increasing the number of viable alternatives, preference orderings and issue dimensions. The creative aspect of deliberation may lead participants to generate novel options, preference

profiles and issue dimensions. By the same token, the overall inclusivity of deliberative forums and the resulting confrontation between participants possessing different worldviews may intensify conflicts and polarize views, resulting in non-single-peaked outcomes. In other words, deliberative activity “need not issue in agreement’ or resolve conflicts; to the contrary, it might result in deeper disagreement or “even exacerbate conflict” (286). Constitutional economists also remain unconvinced that deliberation can guarantee protection from majority cycles through the disaggregation of complex issues. One ground for rejecting disaggregation as a suitable response to the threat of majority cycling is that some complex issues are not amenable to separation into discrete parts or dimensions (Buchanan 1987:189-90). Moreover, if individual agents are unwilling or unable to separate their preferences about multiple issue dimensions--such as when they perceive them to be interdependent--then they will not agree to disaggregate (Miller 1992:64). Lastly, deliberated decisions to disaggregate do not always stop majority cycles, for the decision can be blocked by other considerations. In particular, holding multiple votes on individual issue dimensions with large numbers of voters is rarely, if ever, feasible. Given the reality of resource scarcity and the expense of holding multiple large-scale elections, it is more likely that participants in small deliberative forums, rather than administrators of immense electoral contests, will favor the separation of a single vote (election) into multiple votes (elections).

So, whereas deliberative democrats see hope in discursive activity as a means for overcoming the threat of majority cycling, constitutional economists see failure. Conversely, whereas constitutional economists see majority cycling as desirable or find hope in strategic action (particularly when majority cycling results in inefficient or Pareto non-optimal outcomes), deliberative democrats see failure. Although these differences animate the disagreement between deliberative democrats and constitutional economists, the debate does not end there--

or so I argue. Instead, it signals a much deeper divide between constitutional economists and deliberative democrats in how they view the relationship between democratic theory and institutions, a divide that goes straight to their root assumptions and operative methodologies.

Three Faulty Bridges

As we have seen, both constitutional economists and deliberative democrats provide possible solutions to the problem of cyclical majorities or intransitive preference orderings. The most salient point at which the two sides diverge is on the issue of whether deliberation can enrich the outcome of democratic decision-making by transforming an agent's interests or preferences. Yet the disagreement also goes much deeper to their basic assumptions and methodological perspectives. The challenge of this dissertation is to bridge the divide between these two approaches and thereby demonstrate that a genuine synthesis of the constitutional economics and the deliberative democracy approaches can effectively address the issue of what makes a democracy legitimate and stable within an institutional setting.

In the literature from at least three fields--economics, political science, and philosophy--only three articles have been published attempting to bridge the divide, or to produce a successful synthesis, between the two approaches. While all three fail, they are important for the present project in that each reveals fruitful as well as faulty strategies toward bridging the divide. The primary failing of all three attempts is that they avoid a discussion of how constitutional economics could improve the deliberative ideal. None of these articles can provide an account of how deliberative democrats might heed the lessons of constitutional economists so as to render a richer account of deliberation's effects on democratic legitimacy and order. So, all three articles build faulty bridges across the divide for reasons that will be explored in more detail within the following three sub-sections (devoted to each of the three articles).

Bridge 1: Vanberg and Buchanan on Interests and Theories

The earliest attempt to bridge the divide occurs in a paper entitled “Interests and Theories in Constitutional Choice,” by two constitutional economists, Viktor Vanberg and James Buchanan (1989). The authors state that their objective in the piece is to produce a reconstruction of both accounts “that allows . . . [them] to integrate social contract and dialogue into a more fruitful approach to the analysis of constitutional choice processes than either one of the two perspectives provides on its own” (49). In other words, they aim to bridge the divide between constitutional economics and deliberative democracy, beginning with their respective accounts of agreement: (i) social contract and (ii) dialogue.¹⁹ Vanberg and Buchanan see aspects of the two accounts “naturally complementing each other” (50).

Economists typically distinguish between preferences which are represented as a utility function, such that the rational agent aims is to maximize some factor translated into utility, and constraints, which are limits on the behavior of rational agents such as the rules or design of a game. Preferences have a purely “subjective value” because they reflect an agent’s personal assessment of a choice situation (Ibid). However, preferences are not strictly confined to an evaluative dimension: “It [the term ‘preference’] is typically used in a way that blends evaluative and cognitive components, or, in other terms, that blends a person’s evaluations of--or interests in--potential outcomes of choice and his theories about the world, in particular his theories about what these outcomes are likely to be” (Ibid). The way in which a person selects an option in a choice situation is conditioned by his preferences, which can be unpacked into what results he desires or has an interest in (the evaluative dimension) as well as what results he believes or predicts will occur (the cognitive dimension). So the authors contend that two dimensions exist in every human choice: (i) an interest-component relative to the evaluative dimension and (ii) a theory-component relative to the cognitive dimension.

In differing contexts, choices will reflect different degrees of emphasis on the interest and theory components. For most consumer choices made in an economic market, the theory component will be weakest and the interest component strongest. Yet for choices within a constitutional context, as between alternative rules and systems of rules, the theory component will occupy a prominent role, since agents aim to formulate accurate predictions and theories about the consequences of choosing and instituting various arrangements of rules. In the context of a constitutional convention, Buchanan and Vanberg understand choices as directed towards the selection of “rules for a community or group” (51).

Constitutional choices reflect both the interests of the choosing agents and predictions about the operative qualities of constitutional rules. Here the authors use the expression “constitutional preferences” to denote “a person’s preferences over alternative rules or sets of rules, preferences that may be revealed in voting choices or in other ways” (52). Similar to preferences proper, constitutional preferences can be analyzed into two separate parts: (i) the constitutional theories, or belief-based predictions about the consequences or outcomes of instituting various schemes of rules, each of which can be determined to be true or false, and (ii) the constitutional interests, or subjective assessments of how the expected consequences or outcomes will affect you, which are not truth-functional.

According to the authors, the contractarian account of agreement emphasizes the interest-based component in constitutional choice. Social contract theorists focus on how a social contract or agreement can be arrived at between people with conflicting constitutional interests. John Rawls’ (1971) choice situation, as developed in his book *A Theory of Justice*, illustrates the contractarian account of agreement. In the original position, the expectation of agreement is confirmed, Vanberg and Buchanan (1989:52) contend, by “defining certain ‘ideal’ conditions under which constitutional choices are hypothetically made.” The veil of ignorance

constraint on the choice situation undermines the possibility that agents will know anything particular about how they will personally be affected by the selection of rules or principles. So the result of their ignorance of how outcomes will affect their interests is a species of impartiality in judging which rules or principles that will govern the basic structure of society would be the best for all citizens. With regard to the theoretical component, choosers in Rawls' original position have no informational constraints, for they are "perfectly knowledgeable about the working properties of alternative rules" (53).

The authors proceed to consider what possible tools may be used to engender agreement in actual rather than hypothetical constitutional choice situations. In such actual circumstances, people are rarely ignorant of what their constitutional interests are, and yet neither do they perfectly know what those interests are. So people in these situations are better described as being behind a "veil of uncertainty" rather than a veil of ignorance. This different kind of veil "prevents them [agents within the choice situation] from accurately anticipating the particular ways in which they will be affected by the prospective workings of alternative rules" (54). The veil of uncertainty has a variable thickness, depending on the particular conditions of the choice situation and the pedigree of the rules selected. As the veil thickens, the probability that the parties will reach agreement increases because they are less certain about how their specific interests will be harmed or benefited by particular arrangements of rules.²⁰ Moreover, they are more likely to reach a compromise in the process of choice and less likely to succumb to the practice of what is commonly termed 'rent-seeking.' In the economics literature, rent-seeking means to seek rents, or transfers of goods to a beneficiary, at the expense of someone other than the beneficiary (Tollison 2004). According to the rent-seeking argument, cooperative choices that would deliver benefits for all the affected parties are nearly impossible

given people's overweening concern for their own selfish interests and for strategically benefiting those interests at others' expense (Tullock 1980).

While the rent-seeking view is correct in recognizing practical obstacles to agreement, where it errs, claim Vanberg and Buchanan (1989:53), is in being so "overly pessimistic [as] to jump to the conclusion that, under real world conditions, genuine constitutional agreement is impossible" (53). On the contrary, agents to a constitutional convention will often seek stability, defined as "the viability of a constitutional arrangement over time," and fairness in the arrangement of rules (54).²¹ Moreover, reasonable people in a constitutional choice situation can become aware of the rent-seeking difficulty and then collectively work to bypass its threat (Buchanan 1980b). So, despite the negative conclusions reached by those who endorse or sympathize with the rent-seeking perspective, constitutional agreement does prove possible.

What the contractarian and dialogue notions of agreement have in common is that they both employ a procedural, rather than an outcome-oriented or results-centred standard of legitimacy. In both accounts of agreement, Vanberg and Buchanan (1989:56) note, legitimacy does not accrue to the outcome because it satisfies a set of pre-given criteria, e.g. "some predefined 'ideal system'." Instead, "a 'good' or 'proper' process is defined as one that assures fairness or impartiality in the rules that emerge" (Ibid). So, legitimate outcomes must arise out of the process itself, not from some source external to the process. According to the contractarian account, interests factor into the constitutional choice situation as basic or foundational inputs that are not subject to evaluation or analysis. Fairness reflects the voluntariness of agents in freely choosing certain constraints over others. The agents deem these constraints to be suitable for advancing their interests and, therefore, voluntarily consent to bind themselves through contract. So, according to the authors, contractarians stress a fair process of voluntary agreement that results from either the discovery of shared interests or,

where necessary, bargaining towards some compromise between opposed interests. In other words, “agreement is strictly viewed in a social contract dimension as defining what is mutually acceptable to voluntarily choosing persons” (57).

The dialogue notion of agreement, on the other hand, discounts bargaining and compromise, and instead emphasizes rational discussion and inquiry leading to choice. In Vanberg and Buchanan’s (1989:57) terms, the dialogue account gives a “more ‘objectivist’ or cognitive meaning” to preferences and preference transformation. Rather than treating preferences as subjectively basic (or foundational) units that are exogenous to the process of choice and thereby exempt from analysis, evaluation, and change, deliberative democrats see preferences as complex, analyzable, assessable and malleable units that are endogenous to the deliberative process. What sets the dialogue or discourse notion apart from the contractual notion is that agreement results from an inquiry or “discovery process, a process by which persons do not simply reach a compromise but ‘discover’ what—in some objective sense—is fair or just” (57). To recall, contractarians understand the terms of agreement, including their fairness and justice, as determined through the process of agreement itself, and not by some independent test; just the fact that they were agreed to is sufficient to validate the contractual instrument. In the dialogue account, agreement is instead qualified by an independent standard of justice or fairness, and evidence of this can be found in Habermas’ dialogue account.

Vanberg and Buchanan (1989) single out Jürgen Habermas’ theory of discourse ethics because of its claim that discourse validates normative judgments. In Habermas’ account, norms that legitimately guide a decision are those that reflect some generalizable interest among all the parties affected by the decision. An independent standard for evaluating the products of agreement, such as the rules of a constitution, is thereby established in several stages. First of all, Habermas distinguishes a discourse notion and a compromise notion of agreement. Then,

he puts emphasis on the stronger cognitive thrust of his own discourse notion, which does not evaluate the rationality of action in terms of the purely instrumental (or strategic) standard of whether it obtains agreement. Finally, he makes the argument that norms derive their validity on the basis of this richer cognitive content, so that they are on par with truth claims or judgments. Therefore, Habermas' independent criterion of validity is that the terms of agreement "deserve to be classified as 'equally good for everybody involved'" (58)--so that agreement alone is no longer sufficient.

Buchanan and Vanberg (1989:58) restate these conflicting accounts of agreement--(i) contract and (ii) dialogue--as the difference between "agreement as compromise versus agreement as truth-judgment," and frame the task for their paper as "exploring the potential for fruitful integration." They contend that by understanding the opposed accounts relative to the previous distinction between constitutional interests and constitutional theories, i.e. as analytically divisible categories within constitutional preferences and choices, then integrating the two accounts becomes possible. Disagreement in a constitutional choice situation implicates either or both (i) disagreements in subjective assessments of the rules and (ii) disagreements in estimations of how the same rules will function once instituted, or their operative qualities (59). Rational agents ought to be concerned with both the interest component and the theory component in constitutional rule-making, for both influence the consequences that flow from the types of procedural constraints that agents select in the choice situation. With respect to interests, greater uncertainty as to the consequences of rules tends to promote compromise and agreement; whereas with respect to theories, less uncertainty as to the consequences of rules made possible by greater information about the rules' operative qualities will facilitate consensus and agreement.

In the final analysis, the authors refuse to defend a role for deliberation when interests collide. If people share enough interests, then it is clearly possible for constitutional choice to become a process of discussion and search for ways to confirm or disconfirm the truth of theories about the consequences of rules. Otherwise, if the interests of the parties part ways, then the difference of interests must be settled by a means other than discourse. “At this level, the function of discussion, dialogue, reason,” Buchanan and Vanberg (1989:61) argue, “cannot be to generate agreement on the ‘correctness’ of alternative theories. Cooperation can replace conflict only if the differing interests, held with varying intensities by persons, can be traded-off or compromised, actually or symbolically, in a social contract.”

While Buchanan and Vanberg propose a middle way between the two approaches, they fail to give deliberative democracy a charitable interpretation. Instead of offering an account of how discourse transforms preferences, they only slightly qualify the assumption of stable preferences with the introduction of an independent theoretical component. The diminutive role of deliberation in democratic decision-making, on Vanberg and Buchanan’s account, cannot be overlooked. For only in the unrealistic case where interests are homogenous across the group of decision-makers does deliberation have any force in influencing the eventual decision. Otherwise, strategic action and compromise remain the dominant modes of interaction. So instead of giving deliberative democrats their full hearing, the authors assimilate the deliberative ideal to the assumptions and methodology of the constitutional economics research programme.

Bridge 2: Avio on the Agreement Theories of Buchanan and Habermas

In a later article responding to Buchanan and Vanberg’s paper, titled “Constitutional Contract and Discourse Ethics,” Kenneth Avio (1997:551) announces that “a harmonious alignment is unlikely” because of the “open hostility of the leading discourse theorist [i.e. Jürgen Habermas] to Hobbesian-inspired social contract theories.” Despite this bleak forecast, Avio’s article is

instructive because of the promising direction of its inquiry and the revealing character of its mistakes. Avio begins by outlining some of the central features held in common by constitutional contractarianism (which includes constitutional economics) and one particular conception of deliberative democracy: Jürgen Habermas' discourse ethics. These commonalities are as follows: (i) both give a procedural warrant for social norms; (ii) both begin with unanimity or consensus as the base-line condition for warranted decision outcomes; and (iii) both embrace the democratic idea (533).

Two tasks punctuate the paper: one, to determine whether the bridge that Buchanan and Vanberg try to build between deliberative democracy and constitutional economics is faithful to the central ideas of Habermas' discourse ethics; and, two, to propose some helpful guideposts in an on-going, productive dialogue between deliberative democrats and constitutional economists, even if a thorough-going synthesis of the two approaches proves impossible. As Avio (1997:534) observes, much of the disagreement between proponents of the two approaches could be explained in the lack of dialogue between them, their ignorance of each other's research programmes and the predictable misunderstandings that result.

Following Buchanan and Tullock (1962), constitutional economists began to analyze decision-making into two levels: (i) the ordinary politics or post-constitutional level, at which decisions are made by legislative assemblies, courts and citizens under an existing regime of constitutional rules, and (ii) the constitutional level, at which decisions are made about the rules that will govern ordinary politics.²² At whichever level choice takes place, political decision-making remains an exchange process--in what Buchanan (1989:24) calls the "politics-as-exchange model." Analogous to a contractual agreement, a constitutional agreement is assumed to secure 'gains of trade' for all parties, since everyone voluntarily chooses the rules that eventually constitute the social contract. In the constitution-making situation, Avio (1997:535)

points out, “substantive justice is defined by the parties themselves,” and not by some criterion independent of the choice of the parties to the agreement. Furthermore, Buchanan’s (1977:138) contractarian approach justifies leaving the status quo (ante) undisturbed on the ground that it is the only legitimate starting-point for reaching agreement. Otherwise, artificial alterations of the state of affairs prior to forming a constitution (or contract)--such as equalizing wealth, bargaining power or competence to negotiate--would arbitrarily impose on the agents a standard of fairness alien to the agreement.

The moral perspective for constitutional economists, Avio (1997:535) reminds us, derives from two intuitively appealing notions: (i) a veto right and (ii) the duty to keep promises. A right of veto has moral force because it “protects the autonomy of the individual,” allowing the individual to block the adoption of constitutional rules and norms averse to his interests (Ibid). The second notion that defines the moral perspective of constitutional economics is “the meta-norm of promise-keeping” (537). Contractees find themselves bound to fulfill the terms of agreement because of the normative convention of making and keeping reciprocal promises.²³ Buchanan contends that even with this higher-level norm in place, some independent means of enforcing the social (or constitutional) contract must exist in order to maintain order and legitimacy. Yet the problem with this contractarian account of morality and institutional design, Avio argues, is that it leads to an eternal regress of justification. For, the contract requires a prior agreement to give legitimacy to the rule of promise-keeping and this requires an agreement prior to the promise-keeping agreement, and so on and so forth (Ibid).

One constitutional economist, Geoffrey Brennan (1989:63), claims that authentic ethical discourse, in which politicians and citizens genuinely believe in the ethical principles they appeal to, can end the regress.²⁴ However, Vanberg and Brennan insist that, to the contrary, “when it comes to politics people can only disagree and at best merely reach expedient compromise [not

ethical consensus] over their different interests” (Dryzek 1992:407). Only strategic action, not ethical discourse (or communicative action), can consistently and realistically warrant agreement.

Habermas and Buchanan part ways on this issue of justification. For Habermas, reasons are required to establish consensus, while for Buchanan they are not. Avio (1997:546) contends that their disagreement can be traced back to the roots of their respective approaches in competing philosophical traditions. Buchanan allies himself with the empiricism and contractarianism of Thomas Hobbes.²⁵ Within this tradition, empirical evidence of consent is sufficient to establish a morally binding contract. Moreover, it is assumed that the choices of agents reflect self-regarding motives, such that to choose otherwise would “worsen their position . . . when compared to the status quo” (538). In contrast, Habermas embraces the moral philosophy of Immanuel Kant. In this tradition, good motives and reasons establish good actions, such that determining the normative validity of the agreement means that agents must publicly defend their choices with reasons (Kant 1964 [1785], 1965 [1797]). Therefore, discourse ethics is incompatible with Buchanan’s contractarianism for the simple reason that Habermas’ model of deliberation goes further than empirical evidence of agreement and assumptions about self-interest (the Hobbesian approach) in search of cognitively-rich reasons and other-regarding motives that altogether warrant agreement (the Kantian approach).

Vanberg and Buchanan’s odd blending of constitutional contractarianism with discourse ethics plainly misinterprets the core of Habermas’ theory. According to Avio (1997:539), the authors misunderstand the theory as introducing an “informational aspect into the notion of agreement [in preferences]” as distinguished from the stable interest-based component posited by rational choice theorists and neoclassical economists. Consequently, what results is a simple model that attempts, but fails, to incorporate strategic and deliberative activity: “to the extent disagreement reflects different interests, compromise is necessary; to the extent disagreement is

over constitutional theories, discourse potentially plays a role” (540). However, the synthesis proves unsuccessful for several reasons: (i) it is highly improbable that agents will adopt anything resembling the perspective of Habermasian agents working towards mutual understanding, for with any opaqueness in the veil of uncertainty they will quickly switch to strategic bargaining; (ii) consensus becomes less likely in Vanberg and Buchanan’s account, yet more probable in Habermas’ account, as agents garner greater theoretical understanding of the consequences of instituting different constitutional norms and rules; and (iii) an unacceptable “trade-off” results from Vanberg and Buchanan’s proposed synthesis (540). In this trade-off, contractees either choose behind a thicker veil with a greater chance of agreement and consequently less stability (because of the greater likelihood that their interests will eventually be frustrated), or a thinner veil that decreases the likelihood of agreement but eventually produces greater institutional order (since it is more likely that the agents will understand the consequences of their choices).

Avio correctly locates the source of disagreement between Vanberg and Buchanan and Habermas in their respective assumptions. According to Habermas’ universalization principle--an elaboration of Immanuel Kant’s (1965 [1797]:23-4) categorical imperative--normative validity only accrues to those decisions and outcomes that all parties affected by the decision can accept after reasoned deliberation. Also at the core of Habermas’ (1993:49) theory is the American pragmatist G.H. Mead’s (1934) notion of ideal role-taking, which models individuals as imaginatively other-regarding agents. However, these inspirations or assumptions of Habermas’ theory prove antithetical to an assumption central to constitutional economics: *homo economicus* or economic man. “Given the strategizing bent of *homo economicus* in accordance with Buchanan’s own theory,” Avio (1997:541) reasons, “it is questionable whether an open and truthful sharing of information on constitutional theories could be assumed, even if social stability would

thereby be enhanced.” So, the convergence of Habermas’ account with Buchanan and Vanberg’s account of agency by way, for instance, of an incentive for agents to self-interestedly seek mutual understanding and reasoned consensus, is unlikely. A genuine synthesis of constitutional contractarianism and discourse ethics is then probably impossible, Avio despairs, because “simultaneously accommodating both communicative and strategic action in one formal model may be impossible” (550ff). Therefore, Buchanan and Vanberg’s proposed synthesis proves incompatible with Habermas’s discourse ethics because of their contrastive root assumptions about human agency.

In the final analysis, Avio (1997) attempts to clarify the points of tension between Habermas and Buchanan’s accounts—and so, *a fortiori*, between their separate research programmes: deliberative democracy and constitutional economics. He does so by highlighting the disadvantages of both approaches. On the one hand, Habermas fails to spell out the practical limitations of reaching consensus and institutionalizing norms: “if Habermas wishes to retain the central role accorded to mutual expectations . . . he will have to admit the necessity, in some circumstances, for forms of compromise agreement in implementing norms” (548). To accomplish this end, he might incorporate guidelines for reasonable strategic action or fair dealing into his model. On the other hand, Buchanan’s theory suffers from its inability to consider the important issue of identity or character formation.²⁶ For in the Hobbesian state of nature, agents are self-seeking and instrumentally rational in their pursuit of a single pre-given end—self-preservation—unlike Habermas’ communicatively rational agents who seek mutual understanding about values and ends.

Avio (1997:551) concludes with a pessimistic appraisal of the prospects for a successful synthesis: “[A]ny attempt to blend constitutional contractarianism with discourse ethics in a manner faithful to the root theories is unlikely to succeed.” The lack of fit, he believes, is

reflected in their contrasting approaches to institutional design. Whereas Habermas focuses on producing the institutional conditions for distortion-free communication and other-regarding (or what he terms “communicative”) action, Buchanan is concerned solely with schemes of institutional rules that efficiently coordinate strategic action, generate constitutional agreement and prevent rent-seeking activity. Despite Avio’s conclusion, his article reveals a promising direction for combining constitutional economics with deliberative democracy, viz. investigating and ameliorating sources of incompatibility in their respective assumptions. He successfully identifies a key opposition between the two approaches: the strategic rationality of *homo economicus* versus the communicative or discursive rationality of the model deliberator. However, his analysis falters in (i) its failure to pursue a synthesis of these assumptions about human agency and (ii) its exclusive treatment of Jürgen Habermas’ discursive theory and consequent neglect of the many other formulations of the deliberative ideal. With regard to the former deficiency, the author of the next article makes a more ambitious effort to bridge the divide between *homo economicus* and the model deliberator. To address the latter shortcoming, I will present three stylized models of deliberative decision-making in chapter three. Each is roughly descriptive of the views of a deliberative democrat or a partnership of deliberative democrats, with only one of the three models representing Habermas’ discourse ethics.

Bridge 3: Van Aaken on Deliberative Institutional Economics

Finally, in a relatively recent piece entitled “Deliberative Institutional Economics, or Does Homo Oeconomicus Argue?,” Anne van Aaken (2004) provides the most optimistic account of how to bridge the divide, dramatically advancing the discussion by pinpointing a potential candidate for synthesis, which she labels “deliberative institutional economics.” Van Aaken begins by inventorying some of the devices for collective choice--deliberation, negotiation and aggregation--and the standards for evaluating them--efficiency, fairness, acceptance and

legitimacy. Deliberative democracy endorses the device of deliberation “as [a] means of achieving social coordination and legitimacy” (4). In contrast, constitutional economics focuses on bargaining and instrumentally rational choice. Similar to Avio, but even more explicitly, van Aaken focuses on the primary points of divergence between the two approaches in their “different assumptions regarding the circumstances in which people act for reasons and in what manner” (Ibid). Of particular importance, the author contends, is the assumption of *homo economicus*. She poses several questions for this model of human agency, such as: Does he deliberate? If so, does this influence his preferences, the way he thinks and the outcomes of his choices?

The objective of the article, van Aaken reminds the reader, is “to find points of contact, and features that are common to both Discourse Theory and New institutional/Constitutional Economics” (Ibid). So, the author proposes a “theoretical synthesis” termed “Deliberative Institutional Economics” (Ibid). Her thesis is that this account has more explanatory and normative value than either approach taken alone—showing how the discursive preconditions for democracy already exist and support the legitimacy of current institutional arrangements, found in, for instance, court hearings, administrative proceedings and democratic elections. At the core of constitutional economics is methodological individualism, viz. the assumption that individuals are instrumentally rational, have stable preferences and seek to maximize their utility gains when making choices under conditions of scarcity. The assumption of stable preferences has more methodological than empirical significance, for it “permits the empirical examination of behavioral changes with no need to discuss a change of preferences” (6). However, this model is not solely confined to economic behaviour; it also extends to political behaviour within an institutional setting—no longer resembling just an account of economic man, but also an

account of his close cousin, political man. Both model humans as rational creatures who are intimately cognizant of their preferences and interests.

Although constitutional economists identify consensus as the goal, they do not mean consensus in the same manner as deliberative democrats do, i.e. agreement by all those affected for the same reasons. Instead, unanimity replaces majority rule, van Aaken (2004:4) observes, as the standard “for assessing the substantive rightness of institutions,” but only because fairness and efficiency are assumed to converge (or that efficiency is constitutive of fairness) in this decision rule. When individuals make decisions, it is expected “that nobody would accept a worsening of his personal situation caused by rules, and that rules thought to improve it are considered efficient *if and because* they can produce *unanimity*” (6). Therefore, the only schemes of rules that are acceptable to the constitutional economist are those that promote Pareto-optimal outcomes.

Buchanan and Vanberg are singled out as exponents of the constitutional economics view, as evidenced in “Interest and Theories in Constitutional Choice” (1989), that pre-given preferences need not be assumed when decision-making occurs at the constitutional level. While the cognitive or theory-based elements of preferences are amenable to change through deliberation, the “interest components of preferences are thought to remain constant,” van Aaken (2004:7) notes, “which would exclude modification through discourse, and the question of *why* or *due to what processes* the interest component of people might change is disregarded.” Constitutional economists assume putative preferences and then design rules that both procedurally limit and accommodate those preferences in suitable outcomes. In other words, the assumption of stable preferences always prevails, even though it is conceded that the theory component can change through constitutional deliberation.

Agents in constitutional economics models aim to maximize their utility gains by making choices, so that evaluations of the efficiency of a given arrangement cannot be made except with reference to these individual choices. Rules, norms and constraints--including ethical ones--become efficient as well as legitimate insofar as they promote unanimous agreement among these agents. Where constitutional economists disagree is on the issue of what makes an agreement not legitimate. For Buchanan and Brennan, non-legitimacy attaches only to those agreements made under duress, fraud, or that violate "conditions of mutual tolerance and respect" that neither constitutional economist sufficiently clarifies (van Aaken 2004:8, quoted from Buchanan 1975:6). Yet, these non-legitimacy conditions do not include such elements as inequalities in financial fortunes, communicative competencies, bargaining power and any other status quo (ante) imbalances between the parties. Referring to Buchanan, Jules Coleman states that this disregard for "the [ex ante] fair distribution of holdings" constitutes "status quoism of the worst kind" (van Aaken 2004:8ff; quoted from Coleman 1990:146ff).

Vanberg (1994), on the other hand, defines the conditions of non-legitimacy more broadly, and in an Aristotelian fashion, as those that are not just coercive, but non-voluntary. However, conditions and limitations on agents that result from scarce resources do not count as coercive, van Aaken (2004:8) notes, as they are "simple facts of life" that "invariably force individuals to abandon one alternative if they choose the other (opportunity costs)." Vanberg comes face-to-face with an eternal regress of justification when he extends the notion of involuntariness to include violations of individual rights. He must appeal to those rights that are legitimately chosen because they result from an acceptable process of choice, and accept that process because it is legitimate according to some other past choice, and so on and so forth. However, he cannot seek recourse to a standard of rights, goodness or legitimacy external to the choice process itself, for this would constitute an unallowable option given the pure procedural

emphasis of constitutional economics. To end the regress, Vanberg opts for “a substantial criterion that may link up to a procedural one” (9), a cost avoidance standard, whereby if the costs of deciding not to agree are too great or artificially imposed (e.g. ‘your money or your life’), then the decision to exit the agreement constitutes an involuntary one

The “infinite regress of legitimacy,” as van Aaken (2004:8) calls it, infects any purely procedural standard that does not appeal to some substantive guidelines. Vanberg expresses the problem in his own variable-restricted standard: “To the extent that social processes are good, measured against some criterion X, the outcomes of those processes qualify as good” (Vanberg 1994:214)--the haunting question is, of course: How to define X? Whereas the author sees deliberative theory as providing a set of positive guidelines for discourse to attain legitimate outcomes, constitutional economists negatively define legitimacy, identifying the boundary line past which agreement is coercive or non-voluntary, and thus no longer legitimate. Consequently, van Aaken speculates, deliberative democratic theory might be capable of specifying Vanberg’s variable X and thereby freeing constitutional economics from its eternal regress of justification.

The theory of rational decision to which constitutional economists subscribe emphasizes the utility of decision outcomes, and thereby assumes that the anticipated or preferred utility for the outcome (often called the ‘decision utility’) corresponds to the actual utility derived from the outcome (the ‘experienced utility’). Constitutional economists employ both the model of a fully rational agent with perfect knowledge and the model of an agent with bounded rationality or imperfect knowledge about future contingencies. Research in behavioral economics, especially cognitive psychology, has begun to close the gap between models of human choice and empirical observations of actual human decision-making. The orthodox economic model assumes that preferences are formed exogenous (or external) to the choice situation in which

agents reveal them, so that when agents are provided with information about different options, the framing (“description and presentation”) of these options does not influence the agents’ eventual choices; preferences are stable and invariant across interactions. However, not only does the assumption of stable and exogenous preferences ignore framing effects, it is, moreover, thoroughly disingenuous to the phenomena of group decision-making, where communications between the participants in the choice situation directly affect how each perceives his or her own interests.

The utility that participants derive from the procedure is relative to certain reference points, such as background knowledge, experience, and psychological predispositions. So the environment of the choice decision (including constraints and incentives that define what economists call a ‘state’) no longer exclusively determines the outcome utility--now, the process does as well. According to van Aaken (2004:11), “the primary agents of utility are not states but events in a dynamic process.” If preferences are no longer stable reference points external (or exogenous) to the agreement process, then preferences become negotiable elements within (or endogenous to) the process itself. The author contends that the decision about where to situate a common reference point, e.g. a standard of fairness or feasibility, is “particularly crucial in negotiations and when seeking a consensus” (Ibid). Of course, the choice of reference point is also susceptible to strategic manipulation by self-interested actors, who aim to alter fellow actors’ preferences by cleverly framing the facts, issues and issue dimensions. Constitutional economists distinguish between actions and rules, as well as between the ordinary and constitutional levels of politics. The legitimacy, effectiveness and justice of legal rules are all tied to the costs of implementation and their compatibility with incentives for individual and collective action. Widespread compliance with legal rules depends on their legitimacy or

acceptance. Therefore, it is not feasible to constantly question and seek to change legal rules without threatening the legal system's stability.

Rather than rejecting deliberative theory altogether, van Aaken attempts to give an even-handed account of the theory by drawing attention to the centrality of communication and discursive rationality. The primary difference between economic theories employing the rational choice assumption and deliberative democratic theory is the contrasting way in which they treat preferences: "Unlike economics or, more generally, the rational choice paradigm," van Aaken (2004:14) acknowledges, "Discourse Theory is not concerned with the *aggregation* but rather the *transformation* of preferences through deliberative processes," processes which centre on the provision of reasons. Some deliberative theorists focus on the results or outcomes of deliberation (e.g. Stokes 1998), while most emphasize the process or procedure of deliberation (Cohen 1997, Benhabib 1994, Gambetta 1998). What differentiates deliberative democrats from constitutional economists is that the former believe that deliberation has the capacity to transform both the interest and the theory-based preferences (as Vanberg and Buchanan define them), while the latter conservatively insist that only those preferences with a theory component can be subject to revision. Van Aaken thinks that deliberative democrats have a more nuanced account of the interplay between the two kinds of preferences and the closely-related private and public accounts of the good. Private conceptions of the good are limited by a public conception of right that is perpetually open-ended and subject to reconsideration. "[N]o definition of the public good is given *ex ante*," van Aaken (2004:15) reports, "but [each conception] is left to the constantly reversible deliberative process." The process of deliberation has several distinctive features, including the setting of a deliberative meeting or forum (where participants discuss issues, conduct inquiry and collectively pool their expertise and judgment), the requirement that

communications are meaningful and attempt to appeal to generalizable interests, and the call for weighing claims based on reasons given in their defence--all of which are public.

Deliberative democrats offer not only a more public account of the good than constitutional economists, but also a more universal account of the procedure for obtaining legitimate results. In contrast to the constitutional economics approach, the deliberative approach does not distinguish between the level of actions and the level of rules, or ordinary politics and constitutional politics. Consequently, deliberative democrats never apply alternative rules or norms at different levels of choice, as constitutional economists do. Van Aaken (2004:17) contends that, "a deliberative process [is] suitable and advisable not only on the constitutional level but also for all levels of institutions." Deliberation is inclusive in another sense, "admitting deliberation at all levels" of government, including its executive and administrative centers, rather than restricting it to the legislative, judicial or plebiscitary forums (20). Besides its universal application, deliberation also has the advantage of substituting more other-regarding and public-spirited reasons for the egoistic and self-interested reasons that typically motivate individual choice. As a plausible consequence, this phenomenon minimizes the negative effects of strategic action, including advantage-taking and rent-seeking. Moreover, Frey and Kirchgassner (1993) argue that deliberation might cause agents to scrutinize meta-preferences (or their preferences for certain preferences, such as selfish, immoral or egoistic ones) and to reject those that would entail self-interested and strategic behaviour.

Similar to Avio, van Aaken (2004:16) identifies all deliberative or discourse theorists' accounts with Habermas' discourse ethics: "Discourse theory is primarily a theory of reasoning and accepts rules and value statements as correct and legitimate if consensus can be reached by following certain discourse rules (which make discourse 'non-authoritarian'), i.e. through an ideal speech situation." The author lists six requirements for claims in discourse that closely resemble

Habermas': (i) non-contradiction, (ii) ability to universalize or appeal to a wide audience, (iii) clarity, (iv) empirical accuracy, (v) sensitivity to outcomes and (vi) capacity to render a judgment. The goal of imposing these rules, she claims, is to produce an impartial judgment that takes into consideration the good of all parties affected by the eventual decision. Nevertheless, the discourse that perfectly conforms to these rules or norms remains unattainable because it serves as a regulative ideal, not an achievable benchmark, for actual discourses.

The author identifies the shortcoming of deliberative or discursive theory in its failure to acknowledge the phenomenon of scarcity of resources and the closely connected notion of opportunity costs. For instance, if a deliberative event must end prematurely because consensus cannot be reached or the opportunity costs to agents in terms of time and resources are too great, the decision is instead subjected to a majority vote. In this case, the legitimacy of the outcome appears to depend on the numerical advantage of the parties supporting it, not on the fact or quality of their previous deliberations. In spite of this appearance, many deliberative democrats maintain that even if the outcome is decided by a preference aggregation procedure, such as voting decided by majority rule, the quality of preferences and the resulting decision are improved by the preceding discussion between free and equal agents. In other words, aggregating deliberated preferences proves superior to aggregating non-deliberated preferences (Cohen 1997:75).

In an effort to blend deliberative or discursive theory with constitutional economics, van Aaken proposes a hybrid approach: deliberative institutional economics. Similar to Avio, she identifies the source of incompatibility in their respective root assumptions, particularly their contrasting models of human agency. *Homo economicus*, the model for constitutional economists, emphasizes strategic negotiation and interaction by agents wishing to maximize personal utility through preference satisfaction. Given this model of human agency, institutional designers

working in the constitutional economics programme focus on limiting the abuses of strategic action (for instance, curbing or eliminating the maltreatment of the minority by an entrenched majority) by recommending institutional decision-making rules that promote efficient and mutually advantageous collective decisions. Deliberative theorists offer a competing model of human agency, *homo communicans*, that is, the communicative agent who argues for positions concerning what is just or for the common good. The communicative agent aims to transform the preferences of other agents by the cogency of her reasons. Van Aaken's (2004:19) claim is that these two competing accounts of human agency are ultimately compatible, and that taken together they offer a more empirically accurate picture of human behavior than either taken singly: "For every *homo oeconomicus* there is, in the background, a *homo communicans* who in turn also has to make rational decisions. People normally use both strategies and thus there is the need of a behavioral model bringing both approaches together—a *homo rationalis communicans*."

Van Aaken argues that the primary difference between constitutional economists and deliberative theorists is that the former fix preferences as stable entities and permit variability only in the weaker theory-based aspect and solely in constitutional settings, while the latter allow for the free play of preferences in both the theory and interest-based aspects in all deliberative encounters. For constitutional economists, a constitutional choice situation consists of agents with putative preferences and a procedure for selecting rules based on those preferences. If the process of negotiation deadlocks because of minority holdouts, it is always a legitimate move, given that it is Pareto-optimal, to return to the status quo (*ante*). What Vanberg and Buchanan (1989) allow, in addition to strategic action, is discourse on the theory-based aspect of preferences, entailing inquiry, information-gathering and speculation about the consequences of implementing various arrangements of rules. However, the two constitutional economists dilute the power of deliberation in its impact on the interest-component of preferences, for only if all

agents' interests align perfectly (an unlikely outcome unless the group is fairly homogenous) is agreement in the theoretical aspect of their preferences decisive in determining the outcome. Not only does this militate against diversity and inclusivity in group decision-making, but it also effectively defeats the transformative effects of deliberation on preferences.

Both approaches, the author claims, share an emphasis on rationality understood in procedural rather than outcome-oriented terms. To emphasize their compatibility, the author draws attention to collaborative work by deliberative theorists and constitutional economists, such as Dryzek and List (2003). Both have attempted to defeat a common enemy: the social choice critique of majoritarian decision-making and the implications of Arrow's Impossibility Theorem. According to them, restricting the domain and restructuring preferences have become plausible ways for deliberation to stimulate single-peaked social preference orderings and thus to undermine the threat of majority cycling. However, the extent of this collaboration can easily be overstated, for the previously discussed debate and the deeper divide still obstruct friendly relations between advocates of the two approaches. Moreover, both approaches are cognitivist in that they require reasons to justify norms and rules. Yet this claim is more debatable, as interest-based preferences need no justification and are not subject to evaluation within the choice situation, according to constitutional economists. Avio, for instance, claims that constitutional economists are non-cognitivists. Both approaches likewise aim towards consensus on rules or norms, but where deliberative theorists base such consensus on the rational pursuit of a generalizable or universal interest, constitutional economists prefer schemes of incentives that create decision outcomes which are collectively advantageous.

With regard to legitimacy, both constitutional economists and deliberative theorists appreciate its importance, yet in different ways. The latter positively define the requirements for a consensus to be deemed legitimate, while the latter negatively determine the limits, or

incentive-inducing constraints, past which a decision would no longer pass the test of legitimacy. Since the legitimacy of rules depends on widespread acknowledgment that the procedures for choosing them are fair, the legitimacy of democratic institutions should then depend on close scrutiny of the conditions for collectively deciding on the content of those rules. For constitutional economists, scrutiny involves constitutional attention to creating incentive-based schemes which direct self-interested rational actors in ordinary politics to choose cooperative outcomes. Yet according to deliberative theorists, the process of communication and reason-giving preceding the decision already establishes the conditions for cooperation as well as the legitimacy of the eventual decision, whether or not it involves the selection of rules.

Deliberative theory and constitutional economics focus on different phases and aspects of the democratic decision-making procedure. Whereas constitutional economists stress external constraints (or incentive systems), deliberative theorists emphasize internal constraints (or norm-governed systems) instead. Deliberative democrats highlight the discursive conditions necessary for arriving at a common understanding of a generalizable interest (e.g. the common good, what justice requires). Constitutional economists, on the other hand, focus mainly on the decision rule itself (e.g. unanimity, super-majority or majority), the connected issues of resource scarcity and opportunity costs as well as ways to guard against the ill effects of strategic action (e.g. rent-seeking). Together, van Aaken (2004:26) claims, constitutional economists and deliberative democrats might offer a model of collective choice that is both “incentive-compatible and discourse-compatible.” If state institutions issue authoritative decisions using an efficient decision rule and also provide arguments to support them, then the practice is deliberative, incentive-compatible, and serves to promote democratic accountability by establishing a “functionally equivalent” principal-agent relationship, in which the principals (i.e., citizens) hold sway over the agents (i.e., politicians, administrators, judges) (22).

Constitutional economics and deliberative democratic theory are then, at least theoretically-speaking, compatible. Both *homo communicans* and *homo economicus* are models of rational agency, and should therefore easily integrate into a single model. “The theoretical deficit in Constitutional Economics,” according to van Aaken (2004:23), “was diagnosed in the fact that it presupposes the enlightened manner of individuals in choosing rules [in a constitutional choice situation], and does not account for the institutional necessities enabling the individuals to do so in reality.” Constitutional economists believe that choosers in a constitutional choice situation will behave in an enlightened and public-spirited way, prescribing institutionally efficient and fair constraints to govern ordinary post-constitutional politics. However, this already violates the self-interest postulate of *homo economicus*. So, van Aaken claims, it is here that “Discourse Theory can help to enhance legitimacy of consensus” by providing a unified account of human agency: *homo rationalis communicans* (Ibid). Van Aaken concludes that the deliberative institutional approach--a blending of constitutional economics and deliberative theory--can enlarge the notion of self-interest central to the methodological individualism of economics into a notion of enlightened self-interest central to deliberative politics.

So, by integrating the two approaches, two sets of possible constraints and incentives become tools for producing fair and efficient decisions: (i) rules that give compatible incentives for stimulating cooperation and (ii) discursive conditions that when met give reasons to accept the decision’s legitimacy. In the last section, van Aaken (2004:25-7) illustrates how deliberation has already been institutionalized in contemporary democratic states--although in admittedly less than ideal forms. For example, strategic action and differences in resources dictate many outcomes in the plebiscite-governed system of Swiss politics, yet “this [forum] is at least a discourse where each party can more or less enter its arguments” (25). Similar to Rawls and

Dworkin, she sees the courts as paragons of deliberative procedure because they are rule-governed and must provide reasons for their judgments: “The courts are . . . forced to weigh the arguments in their findings and substantiate their decisions” (26). Van Aaken (2004:25) also cites Ackerman and Fishkin’s (2002, 2004) proposal to publicly fund a day of deliberation “for gathering and exchanging views and information prior to important votes and elections.”

By combining both approaches, it is possible to answer both positive and normative questions about democratic choice, for, typically, positive (or empirical) issues imply normative issues, and vice versa. The feature common to both approaches, van Aaken (2004:27) argues, is that they are “procedural theories of rational decision.” The purpose of economics is mainly explanatory and predictive, and it therefore has a solid place within the social sciences.

Deliberative or discourse theory, on the other hand, provides a normative theory of democratic decision-making, but lacks a strong hold in the social sciences.²⁷ However, what she fails to note is that their accounts of rationality do not perfectly accord. Constitutional economists understand rationality in instrumental and non-cognitive terms, while deliberative democrats conceive it in non-instrumental and cognitive terms. Constitutional economists’ accounts of rationality are non-cognitivist in the sense that they do not allow the subjection of the core of agents’ preferences--particularly, the interest-component--to critical scrutiny, reasoned discussion and possible redetermination through collective interaction.

What then should our verdict be on van Aaken’s attempted blending of the two approaches? It deserves mixed reviews. Similar to Avio’s error, van Aaken treats Habermas’ theory as paradigmatic of deliberative democratic theory, and fails to make even a modest survey of the diverse field of democratic theorists. To her credit, she understands deliberation in a more expansive way than Vanberg and Buchanan do (i.e. as a means for supplying information), appreciating, in particular, how the provision of reasons increases a decision’s legitimacy. She is

also concerned with how constitutional economics, as an explanatory and predictive social science, might offer deliberative democrats greater rigor of analysis, particularly with its conceptual tools of incentive-compatibility, resource scarcity and opportunity costs. However, to van Aaken's detriment, she justifies the status quo institutional arrangements in most democratic states, claiming that they already pass deliberative muster. She therefore foregoes all opportunity to acknowledge the need for deliberative institutional reforms and experiments, which have become central features of the movement among deliberative theorists to institutionalize the deliberative ideal. In this way, she succumbs to the same "status quoism" which Coleman (1990:146ff) detects in Viktor Vanberg's analysis of constitutional choice.

Unfortunately, van Aaken only considers how deliberative theory may assist constitutional economists in resolving problems endemic to its modeling of choice situations. The point at which van Aaken sees a potential collaboration between constitutional economics and deliberative democracy is in the assistance deliberation may give collective actors in locating non-strategic or mutually advantageous reference points. Deliberation may help agents to relieve certain psychological anomalies, such as the "availability bias," which leads people to choose on the basis of scant evidence and to become overly optimistic about future events in the light of such limited support. Once assimilated to the constitutional economics approach, deliberation would help to mitigate the associated costs of these anomalies by producing incentives to learn to overcome them: "If deliberative processes could enhance the alleviation of anomalies," van Aaken (2004:12) suggests, "institutions should be so designed to allow for these processes." So, similar to the mistake of Vanberg and Buchanan, van Aaken assimilates deliberative democracy to the assumptions and methodology of the constitutional economics programme, attempting to demonstrate how deliberative theory can relieve its inadequacies, and unfortunately pays the price: an incomplete and biased synthesis of the two approaches.

Vision of a Transactional “Via Media”

The primary task of this dissertation is to combine the two competing approaches: on the one side, constitutional economics and, on the other side, deliberative democracy. Although some economists, particularly Vanberg, Buchanan and van Aaken, have attempted to assimilate deliberative democracy and its central activity, discourse or dialogue, to the assumptions and methodology of constitutional economics, none have so far considered how constitutional economics might improve deliberative democracy in the institutionalization or ‘working theory’ stage of its life-cycle. How can constitutional economists help deliberative democrats create institutions that “mirror” the deliberative ideal? Or, stated differently, how can the tools of constitutional economists assist researchers working in the deliberative democracy programme to model deliberative institutions that promote democratic legitimacy and stability without detracting from the core commitments of the deliberative democracy research programme? My central thesis is that it is possible to construct a bridge to span the constitutional economics and deliberative democracy divide. Vanberg and Buchanan have only made a scant attempt at this; Avio gestured to it, but then backed away; and van Aaken sought systematically to do so, but was unsuccessful. To accomplish the task of bridge-building, as none of these four theorists have, requires resolving certain deep conceptual dichotomies, theoretical oppositions or points of tension in the respective assumptions and methodologies of these two approaches. There are at least five significant dimensions of the deliberative process that democratic theorists are typically concerned with. They are (i) its economy or efficiency, (ii) its justice or fairness, (iii) its location and scope, (iv) its rationality (or the rationality of those who partake in it), and (v) its inclusivity or openness to difference. The present project is particularly concerned with these dimensions to the extent that they affect the stability of decision outcomes and, consequently, the stability of democratic institutions.

However, even this short list of deliberative dimensions is problematic, for it indicates deeper tensions in the deliberative democracy research programme. These dimensions taken alone strongly indicate the instrumental value of deliberation, yet neglect the intrinsic or expressive value of the activity. On the instrumental view, deliberation only has value to the extent that it achieves independent ends—in this case, democratic legitimacy and stability. In contrast, the expressive or intrinsic value of deliberation lies in its calling for conscientious citizenship, civic virtue, public-spiritedness and mutual respect among citizens (Button and Ryfe 2005:29-30; Gutmann and Thompson 2004:23). A similar tension resides in the interstices between theoretical and practical accounts of deliberative democracy. Even though stylized models and ideal procedures constitute theoretically attractive frameworks for deliberative democracy, their designers often ignore the practical consequences of their implementation, including the institutional constraints on actual democracies and the psychological demands that deliberation places on real citizens (Avio 1998, 2000; Bell 1999:70-1). Likewise, failure to consider the theoretical basis for deliberative practice and institutions amounts to an equally problematic deficit in any practical account of deliberative democracy in action.

Both of these tensions form part of the deep divide between constitutional economists and deliberative democrats. Constitutional economists criticize deliberative democracy on the ground that its proponents fail to corroborate their strong claims about deliberation's instrumental value and instead fall back on weak claims about its expressive value. Moreover, many constitutional economists find the stylized models and ideal procedures of deliberative democracy unconvincing and utopian. In order to adequately resolve these tensions and respond to the constitutional economists' critique, an improved account of deliberative democracy must foster continuity between the theory and practice, as well as the instrumental and intrinsic value, of deliberation.

For this very reason, Dewey and Bentley's transactional view provides the methodological center-piece of the present project. Its special vocation is to rework or reconstruct seemingly intractable conceptual dichotomies into functional wholes and to thereby combine otherwise incompatible methodological approaches. "Our own procedure is the transactional," Dewey and Bentley explain, "in which is asserted the right to see together extensionally and durationally, much that is talked about conventionally as if it were composed of irreconcilable separates" (LW 16:67). The goal is to overcome these persistent dichotomies or "irreconcilable separates" (including deliberation's instrumental versus intrinsic value, deliberative theory versus practice and models of strategic versus deliberative action) on the way to producing a genuine "via media" between the constitutional economics and deliberative democracy approaches. Given the tools offered by the transactional view, I argue, it is possible for an inquirer wielding the transactional approach to act as a "bridge-builder," spanning the deep divide between constitutional economics and deliberative democracy.

Outline of the Project

This dissertation is organized into six parts, not including the introduction. The first three parts are mainly devoted to exposition, while the last three emphasize analysis and argument. The first part, or second chapter, adumbrates the main elements of the methodology employed to bridge the divide between constitutional economics and deliberative democracy, viz. the transactional view. In chapter three, I present three stylized models of deliberative democratic decision-making, as they roughly correspond to the views of three deliberative theorists and partnerships of deliberative theorists: (i) Jürgen Habermas, (ii) Amy Gutmann and Dennis Thompson and, lastly, (iii) Bruce Ackerman and James Fishkin. In chapter four, I describe the public choice research programme, the basic commitments of the sub-programme constitutional economics, and the constitutional economics critique of deliberative democratic

theory. Chapter five is dedicated to reconstructing a related debate, introducing the transactional concept of public spirit, and justifying the claim that Dewey is a proto-deliberative democrat.

The penultimate part of the project, chapter six, frames the debate between constitutional economists and deliberative democrats in terms of five points of opposition. Since these sources of tension indicate what Dewey calls a felt difficulty, they invite inquiry and resolution. Each of these oppositions are addressed in turn with an eye toward determining the conditions for successfully institutionalizing the deliberative ideal and ultimately building a successful bridge that spans the divide between the two rival approaches. Pursuant to this end, I articulate five concepts to mediate the oppositions between the two programmes--concepts that should empower the institutional designer to make sound choices about how to feasibly institutionalize deliberative decision-making in a stable democratic polity. Consequently, these designers are able to chart a transactional middle way between the two research programmes, and thereby achieve two previously incompatible objectives: (i) to integrate deliberative practices into existing and new institutions and (ii) to heed the critical insights and caveats of constitutional economists, who have identified genuine limitations to realizing the deliberative ideal in modern constitutional democracies.

Finally, in the conclusion, I recast the debate in terms of a novel distinction and then consider two speculative questions: (i) How does deliberative democratic theory relate to institutional stability and order within democratic polities? (ii) Has democratic theory reached the end of its deliberative turn, and if so, then what comes next?

At this point, the project turns to an exposition of Dewey and Bentley's transactional view.

CHAPTER 2

DEWEY AND BENTLEY'S TRANSACTIONAL VIEW

John Dewey and Arthur F. Bentley's transactional view provides a set of tools for resolving tensions between otherwise incompatible methodological approaches in an array of disciplines. Disciplinary boundaries fade--or, as Bentley (1935:183) writes, "continents go, and the islands"--when subject to an approach that embraces systems theory, process philosophy and any genuine inter-disciplinary collaboration that emphasizes dynamic wholes rather than static parts. Let me first make the connection clear between the transactional view and the deep divide between deliberative democrats and constitutional economists.

As their debate over how to respond to the social choice critique shows, deliberative democracy and constitutional economics are two very different and often mutually hostile approaches within separate, yet overlapping, disciplines. Nevertheless, the sources of their apparent incompatibility can be traced to tensions in their root assumptions and operative methodologies--what I have referred to as the 'deep divide.' In order to produce a genuine synthesis of these approaches, their deep tensions must first be resolved. The divide between the two approaches goes as deep as their foundational assumptions about human agency and their methodologies for coordinating collective action. Constitutional economists understand humans as rational and self-interested utility-maximizers who select the most efficient means to achieve pre-given and stable ends, or preferences. Deliberative democrats, on the other hand, conceive individuals as empathetic communicators who reach shared understandings about ends and values which ultimately transform the preferences of their fellow deliberators through the force of persuasive reasons. While constitutional economists differentiate between the

constraints (and associated incentives) suitable for reaching agreement in constitutional as opposed to ordinary choice situations, deliberative democrats universalize the normative conditions for consensus-directed discourse.

Methodologically, the two approaches also diverge on the issue of how to generate legitimate consensus through democratic choice. Deliberative democrats focus on the normative conditions for a successful outcome-legitimizing discourse. Constitutional economists emphasize the modeling of constitutional constraints necessary to generate cooperative action. Without sufficient constraints on choice, agents will seek to strategically exploit the situation, engaging in rent-seeking behaviour that engenders inefficient decision-making outcomes. To prevent the deleterious consequences of strategic action, constitutional economists argue, decision-makers must exercise enlightened self-interest at the constitutional level of choice in designing higher rules of law that promote efficient schemes of collective action at the post-constitutional level of ordinary politics. While both deliberative democrats and constitutional economists take a procedural route towards justifying democratic institutions, they part company on the issue of whether constitutional rules or public discourse will warrant the outcomes of democratic choice. Consequently, each camp endorses a distinctly different account of how participants in group decision-making processes interact and how the choice situation's conditions structure the outcomes of their interactions. Part of this difficulty, I argue in chapter four, is that collective choice is improperly framed by both sides as an interaction, rather than a transaction.

The question arises, then: Does Dewey and Bentley's transactional view supply an approach capable of bridging the deep divide between constitutional economics and deliberative democracy? Should economists and political philosophers take the transactional approach

seriously? To answer the aforementioned questions requires an extended exposition of the central tenets of the transactional view.

What is the Transactional View?

While Dewey and Bentley refer to their approach as the transactional view, they also describe it, though less frequently, as the transactional *procedure, mode of presentation and method of observation*. The authoritative account of the transactional view can be found in Dewey and Bentley's collaborative work, *Knowing and the Known* (1949). In this book, Dewey and Bentley do not address issues and concerns directly related to politics--let alone speak to the matter of the proper relationship between democratic theory and institutions.¹ Yet transaction traces its roots back to Bentley's ground-breaking work on interest-group politics, *The Process of Government* (1908), and also finds expression in Dewey's book on democratic theory, *The Public and Its Problems* (1954 [1927]). The topics Dewey and Bentley treat in *Knowing and the Known* (hereafter *K & K*) include philosophy of language, process philosophy, logic, epistemology, scientific method, mathematics, dualistic thinking, naming--among many others. However, in the absence of any immediate application to political matters, it may be objected that the transactional view is irrelevant or unsuitable to that political purpose. In the penultimate section of this chapter, I respond to this objection by demonstrating that there is continuity between Dewey and Bentley's earlier political works and their later collaborative work, *K & K*.

Dewey and Bentley's *K & K* provides the mature expression of the transactional view as "the right to see together, extensionally and durationally, much that is talked about conventionally as if it were composed of irreconcilable separates" (LW 16:66). The task before us is to unpack this definition.

Assault on Dualisms

Of particular concern to Dewey and Bentley is how to dispel the influence of customarily fixed separations or dualisms on human thought and inquiry. Some examples of these dualisms, i.e., things traditionally seen apart or in separation, include: (i) stimulus and response, (ii) mind and body, (iii) organism and environment, (iv) nature and nurture, (v) word and thing, (vi) knower and thing known, (vii) individual and culture, (viii) subject and object, (ix) deduction and induction as well as (x) philosophy and common-sense. The dualism that concerned Dewey the most was between inner and outer, for this “division” he claimed, “[is] underling in a way all the others” (LW 16:408). Specifically, this dualism accounts for the “spectator view” of epistemology, in which human agents passively know external objects through inner representations, and the related “problem of the external world,” whereby the same agents cannot get outside of their heads or assume a God’s-eye view in order to verify the correspondence of their internal representations with the external or “real” objects.²

Prior to jointly authoring *K & K* with Bentley, Dewey had already established a reputation for what Morton White (1950:316) calls “hunting and shooting at dualisms.” In his autobiographical essay, “From Absolutism to Experimentalism,” Dewey attributes his long-time dedication to overcoming dualistic thinking to the “divisions and separations that were . . . a consequence of a heritage of New England culture, divisions by way of isolation of self from world, of soul from body, of nature from God” (LW 5:153). Yet his attacks on dualisms are no more a fetishistic interest than his concern with outlining the basic pattern of inquiry. Both contribute to an understanding of human activity as one of shifting priorities, between whole-splitting cognitive problem-solving and whole-producing enjoyment of non-cognitive experiences.

Bentley was impressed by Dewey's assault on dualisms. In their correspondence, Bentley remarks on how Dewey recognized the pernicious failure to see that the subject-object dualism had sundered the process of knowing in two irreconcilable parts: one, the knowing-subject and, two, the known-object (Ratner and Altman 1964:27). Historically, many philosophers--from Plato to Descartes to the Logical Positivists--have sought to permanently separate our shifting modes of experience into pre-given categories and types of reality, with which we have exclusively cognitive encounters.³ These philosophical dualisms, Dewey writes, are "a survival from a dualistic past--from a society which was dualistic practically and politically, drawing fixed lines between classes, and dualistic intellectually" (MW 1:310). Therefore, one of the key concerns of Dewey's philosophical project is to reject contemporary philosophical problems which are based upon faulty dualisms and are traceable to a dualistic past.⁴

Taking this project to heart, Bentley adopted the strategy of undermining dualisms in his own writings. According to Bentley, Dewey had sought to reunite subject and object with the observation "that subject and object are constructions of the primitive acts of knowledge" (DB:27-28). Anticipating the transactional view, Dewey conceived subject and object as temporal phases in a process: "The distinction of subject and object is not simultaneous but has reference to phases or stages in a series. The self, subject, individual, like organism, refers to just those factors in a moving and re-organizing function which at any point in the process immediately and directly determine the ongoing of the process" (MW 13:379). The transactional view dissolves problematic dualisms, such as subject-object, in two phases. The first phase reinterprets ontological separations as functional distinctions (e.g. subject-object, organism-environment, and postulation-observation). The second stage sees the distinguished items as complementary aspects or phases within more inclusive and dynamic wholes (e.g.

subject-object within experience, organism-environment within life-activity and postulation-observation within inquiry).

Self-action, Inter-action, Transaction

In order to fully understand the meaning of transaction, it is also necessary to understand what it is not. “We [Dewey and Bentley] believe that the tenor of our development will be grasped most readily when the distinction of the transactional from the inter-actional and the self-actional points of view is systematically borne in mind” (LW 16:4). As this statement makes clear, Dewey and Bentley modeled the transactional as an alternative to these two inferior approaches: the self-actional and the inter-actional views (Ryan 2004:23). In this section, I distinguish these three ways of conceiving action with the intention, in the next section, of contrasting interactional and transactional modes of inquiry.

Prior to adumbrating what Bentley and Dewey mean by self-action, inter-action and transaction, it first makes sense to examine the common element in all three terms: the word ‘action.’ According to Elias L. Khalil (2003:8), “Dewey and Bentley’s transactional view is not only a theory of inquiry, but also a theory of action.” For Dewey and Bentley, action is any thing or event that extends through time and space--what they term “durational-extensional subjectmatter” (LW 16:60). In other words, action encompasses any activity occurring in experience: the contemplation of a person, the growth of a tree, the fluttering wings of a hummingbird, all are equally instances of action. Self-action, inter-action and transaction constitute three modes of observing and explaining action, or three ways of looking at events in the cosmos of fact.

According to the self-action view, an activating force resides behind every action, impelling or causing it to happen. According to Bentley and Dewey, “[s]elf-action,” means “[p]re-scientific presentation in terms of presumptively independent ‘actors,’ ‘souls,’ ‘minds,’

‘selves’ or ‘forces,’ taken as activating events” (LW 16:70). Given a self-actional understanding of phenomena, a person’s contemplation of an object might result wholly from his or her will to contemplate or know.⁵ Likewise, for non-human organisms, such as a tree, growth occurs because of a Leibnizean entelechy or an Aristotelian telos; the fluttering wings of the hummingbird by instinct or spirit.

Action inevitably occurs within a specific environment or situation. “Situations,” on Bernstein’s (1961:8) reading of Dewey and Bentley, “are funded with the consequences of past experience and pregnant with new possibilities.” However, on a self-actional account, situations and their conditions remain irrelevant to the way in which the action manifests itself. Rather than actions conditioned by a situation or context, situational conditions are nothing but an airy medium through which the agent self-actuates. In physics, Dewey and Bentley illustrate self-action with Aristotle’s theory of the heavens, in which the stars are propelled in ways consistent with their internal essences (LW 16:04). But for Dewey and Bentley we must not accept the attribution of a force—whether causal, spiritual, motivational or other—to the actions of a single agent, without looking to the broader system of activity, the situational conditions and the communicated meanings that those actions implicate.

The sophistication of inter-action far eclipses that of self-action. Given an inter-actional view, the person who contemplates an object does so because a discrete environment-independent thinker and a separate thinker-independent environment come into contact. Also in inter-actional terms, the tree grows as a result of connections between internal factors (e.g., cells, roots, trunk, branches, and leaves) and external factors (e.g., earth, water, sunlight, carbon dioxide, and wind). And the hummingbird’s wings beat because of the interaction between the physical-chemical responses within the bird (optic nerves stimulated to trigger chemicals in the

brain that signal muscular movements in the wing) in response to an external stimulus, such as a fast-approaching predator.

Relative to the self-actional, the interactional is more recent and developed. While Aristotelian physics and Kantian meta-physics relied upon self-actional concepts, Galileo's concept of inertia and Newton's laws of mechanics are fully inter-actional. For instance, in the former case, Dewey and Bentley write:

. . . mass once in motion continues in motion in a straight line, if not interfered with by other moving masses. Its motion, in other words, is no longer supposed to be dependent on the continued push applied to it by an 'actor.' This discovery [by Galileo] was the needed foundation for the interactional development to come (LW 16:105).

In Galileo's discovery, the mass of the object and the acceleration resulting from movement along a plane (negative if inclined, positive if declined) interact to produce inertia. Likewise, the authors of *K & K* identify inter-action at work in Newton's physics:

For Newton it became the first law of motion [Galileo's law of inertia], leading, through a second law concerning direction and proportionality of force, to the third law, namely, that action and reaction are equal and opposed—in other words, to the establishment of the full inter-actional system of mechanics (LW 12:32).

Rather than attributing agency to a self-acting cause, inter-action attributes action to interactive relations between two or more separate elements.

Transaction

The last and most advanced approach to understanding action is transaction. "Transaction," Dewey and Bentley claim, "represents that late level of inquiry in which observation and presentation could be carried on without attribution of the aspects and phases of action to independent self-actors, or to independently inter-acting elements or relations" (LW 16:112).

The authors of *K & K* employ the prefix 'trans' in the sense of "across," "through" or "around"—not between, which is denoted by 'inter'. Within transaction, the emphasis remains

on observing a whole system of agency, on describing phases or aspects of acting without making a final attribution in terms of absolutes--for instance, independently existing elements, entities, essences or realities.

Importantly, in a transaction, the aspects or phases of action do not possess an existence independent of the process itself. Simply stated, they do not pre-exist the process of which they are a part, but instead function as integral units within the overall (trans)action. So, transaction sees together as dynamic aspects or phases what self-action and inter-action see apart as static elements or objects, either powered by self-acting or inter-acting forces. A transactional analysis of a person contemplating an object models the contemplator and the contemplated as inseparable aspects within a unitary transaction of contemplation or knowing. As Bentley (1954:301) explains in his book *Inquiry into Inquiries*, “a knowing that knows with nothing it knows, and a known that is known with nothing to know it, are wraiths from nowhere.”

Besides human agency, the transactional view can also account for the actions of non-human organisms. For instance, a transactional approach to understanding a tree-in-growth emphasizes how this organic tree-system extends through time and space, i.e. the dynamics of its life-cycle and how the roots, bark, branches, and leaves contribute to the system's viability. This understanding occurs not only on the level of unaided human perception, but also on the microscopic or cellular level, where photosynthesis allows the tree to convert light into energy. And the tree is also a part of a larger ecosystem in which it relies on other organisms and events (such as fires), while other organisms rely on it, for their continued survival. A hummingbird's beating wings implicate both inter-actional and transactional analyses of development. First, in the inter-actional mode, its chemico-physical response to external stimuli, which thereby stimulates wing movement, reflects the exigency for great speed in flight to escape predators. Second, in the transactional mode, an inquirer might also consider the particular species of

hummingbird and its long-term genotypic and phenotypic adaptations.⁶ These changes contribute to systemic extensional and durational outcomes, whether in the perpetuation of that species of hummingbirds, or in the substantial impacts those evolutionary changes have on the populations of hummingbirds and their predators.

In physics, Dewey and Bentley identify examples of transaction in Grover Maxwell's theory of electromagnetic fields and Albert Einstein's theory of relativity. Maxwell showed mathematically that an oscillating electric and magnetic field would perpetuate itself through space at the speed of light, so that light was, in fact, a form of electromagnetic radiation. Among other accomplishments, Einstein "brought space and time into the investigation as among the events investigated" (LW 16:106). Einstein and Maxwell's approaches typified transaction, according to the authors of *K & K*, by insisting on "the right to see in union what it becomes important to see in union" (LW 16:107).

In employing the transactional approach, four general guidelines should be followed: (i) begin with a unitary process or situation and distinguish it into phases or aspects; (ii) name each phase or aspect in a precise way; (iii) avoid reification or final attribution of qualities (such as reality, essence, entity) to objects; and (iv) discover through inquiry how each phase or aspect contributes to the overall system of which it is a part--in other words, how each precisely fulfills its function relative to the whole.

Inquiry

In *K & K*, Dewey and Bentley define the transactional approach as it operates in inquiry. In almost every sphere of life, humans inquire--meaning that they examine, search and investigate, trying to determine the conditions of a problem as well as the means by which to resolve it.⁷ "The existence of inquiries," Dewey claims in the *Logic*, "is not a matter of doubt. They enter into every area of life and into every aspect of every area" (LW 12:106).

Given the central place of inquiry in human life, Dewey and Bentley contend that it is crucial to understand what inquiry is--to conduct an inquiry *into* inquiry. Transaction enters into the inquiry process at both the first and last stages. In the first, inquirers must observe and define the problematic situation. And during the last, inquirers observe again, test and deliberately unify the analyzed situation back into an experienced whole. In Dewey and Bentley's words, transaction involves the "functional observation of the full system, actively necessary to inquiry at some stages, held in reserve at other stages" (LW 16:70).

In this section, it will be demonstrated that the most conventional approach--i.e. the interactional--suffers a serious flaw due to its excessive reliance on a host of unnecessary assumptions. I will then proceed to outline the transactional approach to inquiry in detail approximating Dewey's presentation in the "Patterns of Inquiry" chapter of *Logic: A Theory of Inquiry* (LW 12:103-123). In standard transactional style, Dewey distinguishes and relates several aspects of the process of inquiry, but never treats these aspects as irreconcilable separates.

Conventional Approaches

Conventional approaches to inquiry are based on a number of separations. At this point, I will review four of the most prominent separations associated with the interactional mode of activity.

Separation # 1: Inquirer/Reality. Probably the most prominent approach to understanding inquiry is based on a *correspondence* theory of truth. Here the idea is that inquiry is a search for a true description of the world. A description of the world is thought to be true when it *corresponds* to a Reality that is external to and independent of us. So there is a strict separation of observer and observed, knower and known, inquirer and inquired into. This approach sees inquiry as a one-way march towards the 'facts,' to the world 'as it really is' or the 'thing in itself.' Subjective biases are seen as an annoying veil between the inquirer and Reality.⁸

Separation # 2: True/False. Similar to the above separation, a related separation in conventional approaches to inquiry is that between true and false. The idea is that a given description of the world is one or the other--*either* it is true *or* it is false. This idea is captured in the logical law of excluded middle. In the *Metaphysics*, Aristotle (1960:84) formulated the law in the following terms: “every concept or thought is expressed either as an affirmation or a negation; this is clear from the definition of truth and falsity. When a proposition either asserts or denies, it says either what is true or what is false.” In other words, given a two-value logic, there is no third option, no penumbral area of uncertainty, when assessing the truth-value of a proposition. A description is true if it corresponds to the outside world. A description is false if it does not.

Separation # 3: Theory/Observation. Also common to conventional presentations of inquiry is a strict separation of theory and observation, the respective domains of the rational and the empirical. Here, theory is mental – it occurs in the human mind. Observation, on the other hand, is the relatively passive reception of the Reality outside the mind. It is made up of individual sensations the mind pieces together to form a representation or picture of the world. This way of dividing theory from observation has resulted in a long-standing conflict between proponents of rationalism, which stresses the priority of theory, and empiricism, which stresses the priority of observation, in figuring out what the world is really like. Both positions stem from the common starting point of taking theory and observation as separated.

Separation # 4: Induction/Deduction. A final aspect of conventional approaches to inquiry is a separation between *induction*, or reasoning from specific observations to general ideas, and *deduction*, or reasoning from general ideas to specific observations. Induction and deduction are presented as incompatible alternatives.

A Transactional Approach to Inquiry: Three Examples

Rather than relying on *a priori* notions about what inquiry is or is not, the transactional approach starts by observing actual instances of inquiry in the world. In the following three sub-sections, three examples, each progressively more complex, illustrate the pattern of inquiry.

Example # 1: A Key Loss. Making small talk at an afternoon garden party, a person unconsciously reaches into his pocket. In his pocket, his hand reaches the bottom, and then side to side. At this moment, it dawns on him that something is wrong. His keys, which he always keeps in his pocket, are missing. Having recognized the problem, an inquiry begins. After checking his other pockets, and the seat he had been sitting on, he pauses to reflect on where and when he and his keys might have parted company. His first idea is quickly dismissed: “Did I leave them at home?” – “No, because I drove here and must have used them to start the car.” Then a more viable hypothesis comes to mind: “Perhaps they fell from my pocket earlier when I was playing with the children in the backyard.” Walking over to take a look, he soon spots the keys lying in the grass. Breathing a sigh of relief, he re-pockets the keys, and returns to mingle.

Example # 2: Bubbles.

In washing tumblers in hot soapsuds and placing them mouth downward on a plate, bubbles appeared on the outside of the mouth of the tumblers. Why? The presence of bubbles suggests air, which I note must come from inside the tumbler. I see that the soapy water on the plate prevents escape of the air save as it may be caught in bubbles. But why should air leave the tumbler? There was no substance entering to force it out. It must have expanded. It expands by increase of heat or by decrease of pressure, or by both. Could the air have become heated after the tumbler was taken from the hot suds? Clearly not the air that was already entangled in the water. If heated air was the cause, cold air must have entered in transferring the tumblers from the suds to the plate. I test to see if this supposition is true by taking several more tumblers out. Some I shake so as to make sure of entrapping cold air in them. Some I take out holding mouth downward in order to prevent cold air from entering. Bubbles appear on the outside of every one of the former and on none of the latter. I must be right in my inference. Air from the outside must have been expanded

by the heat of the tumbler, which explains the appearance of the bubbles on the outside.⁹

Example # 3: Ioning the Periodic Table.

The Periodic Table of the elements represents the results of a vast cooperative endeavor by many inquirers in a number of fields and stretching over many decades. The discovery that some elements, though sharing an ideal atomic number, proved to have different atomic weights presented a major problem. An immediate, but unreflective, response might have been a proposal to set the Table aside. This response would have been most unwise, especially in view of the fact that the huge body of evidence on which the Table is based cannot simply be ignored, and, in addition, it exceeds in scope the evidence on which the source of the anomalies was based. The wiser course, the one in fact adopted, was to conjecture that other, as yet unknown, factors are at work and inquire further in the hope of modifying what is already known in a coherent way. As is now well known, the problem was resolved through the discovery of what were called “isotopes” or forms of the same element having different atomic weights. Thus the anomalies were resolved by the discovery of a new factor with the sacrifice of as little as possible of what was previously warranted.¹⁰

Dewey’s Definition of Inquiry

From the above examples, it can be seen that inquiry is a very broad class of human activity.

What do all inquiries, including the above examples, share in common? Dewey tentatively suggests that common to all inquiries, no matter how simple or sophisticated, is the “controlled or directed transformation of an indeterminate situation into a [determinate and unified] situation” (LW 12:55). As explained above, inquiry progresses from a situation that is *indeterminate* (confused and uncertain) to one that is *unified* (clear and coherent). Observational material and things, depending on what phase they are in (whether they are, for instance, being subject to inquiry or are the outputs of a process of previous inquiry) have a different significance: “As *undergoing* inquiry, the material has a different logical import from that which it has as the outcome of inquiry. In its first capacity and status, it will be called by the general name subject-matter . . . The name objects will be reserved for subject-matter so far as it has been produced and ordered in settled form by means of inquiry” (LW 12:122). In $K \not\sim K$, the

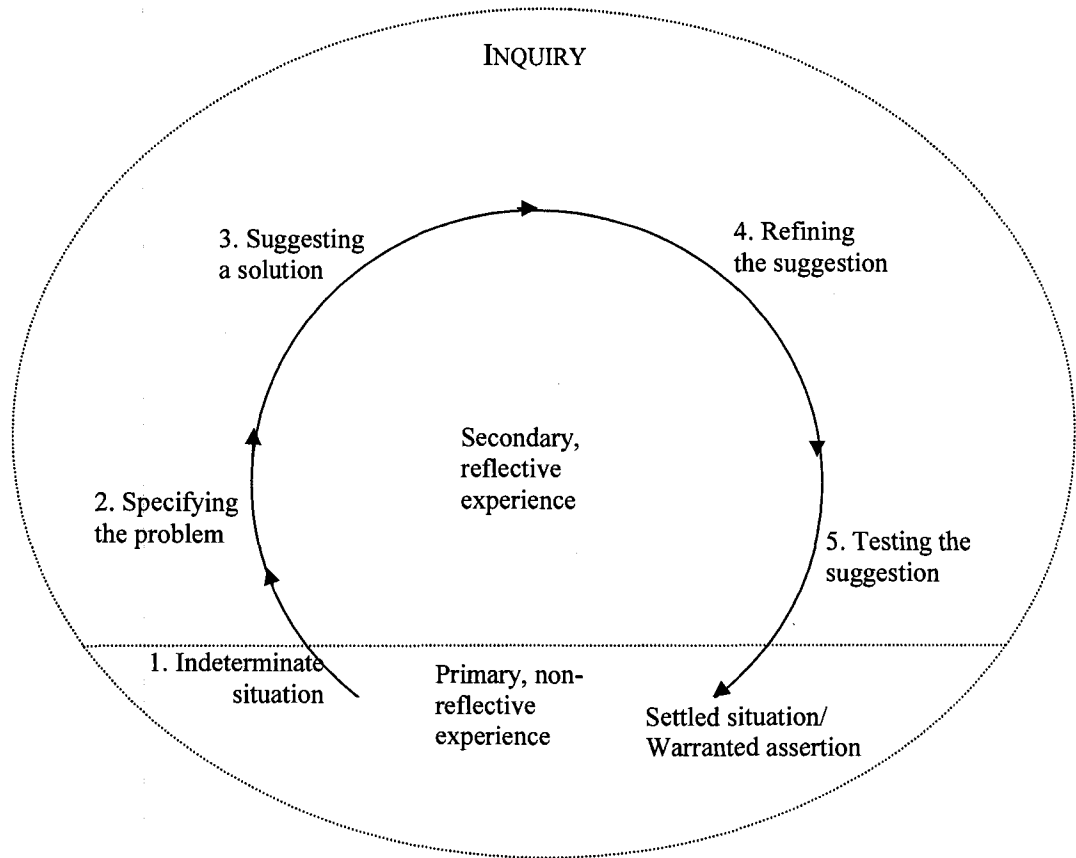
subtle difference is a change of terminology, wherein subject-matter becomes knowings undergoing inquiry, and knowns substitute for objects that have already underwent inquiry.

Within inquiry, Dewey differentiates and relates five distinct phases. Together, these phases form a circle or spiral, in which the products of past inquiries enter the background from which subsequent inquiries emerge.¹¹ Summarizing the circular movement of inquiry, Ryan (2004:17) notes that it begins with

. . . Dewey's problematic [or indeterminate] situation--shock or interruption that calls forth a hypothesis and implementing tools that diagnose the problem and then propose a solution. A hypothesis [or suggestion] is a sort of 'clutch' between imposed danger and instinctive reaction--it's smarter to lead with one's mind [by intellectually examining the consequences of acting on alternative plans of action] than one's chin [by blindly acting in order to discover the consequences]. The outcome of a successful hypothesis is an attained objective or object [a settled situation, warranted assertion or known]. In subsequently returning to and enriching primary experience, a settled object becomes a secure tool for the resolution of future problems.

Each phase moves the inquirer further along the circumference of the circle (**Figure 1** below represents Dewey's circle of inquiry). The outcome of each successful inquiry is that experience grows in ordered richness. In what Dewey calls "secondary experience," i.e. the process of inquiry (or knowing), successfully achieving objectives delivers settled objects (or knowns) to "primary experience," i.e. practical and everyday experience, enriching it with an ensemble of intelligent habits (LW 1:379; Ryan 1994; Fott 1998:40-1). Enriched primary experience--what Chandler (1977:51) terms the "alpha and omega of all theorizing"--also renders ideational tools available or "ready-to-hand" (Heidegger 1962) for use in subsequent inquiries (Ryan 2004:20). In chapter six, this distinction between primary and secondary experience will be revisited in an attempt to mediate a critical opposition between the assumptions of the constitutional economics and deliberative democracy research programmes.

Figure 1: Dewey's circle of inquiry.



The Five Phases of Inquiry

By progressing through these phases, and 'around' the circle, it is possible to discern what Dewey means when he claims that inquiry is a transformation of a confused and indeterminate situation into one that is determinate and unified. Before working through an exposition of the five phases, it is important to note that these phases Dewey identifies within inquiry are in no way discrete, static, or separate. They each represent functional discriminations made within a process of transformation from the indeterminate to the determinate. They may overlap or fuse into one another. Sometimes inquiry can circle back and forth between two phases before continuing. In this the phases of inquiry are like the various phases of a complex dance maneuver. For educational purposes we discriminate successive phases. We might even teach

them one at a time. But in the goal of instruction, the perfected maneuver, the phases are coordinated aspects of one flowing whole.

Phase 1: A Felt Difficulty or Indeterminate Situation. Before inquiry begins, there is a *felt difficulty*, also known as an *indeterminate situation*. What this means is that an interruption, hitch, or block in what we are habitually doing occurs. We sense a difficulty or disturbance in the situation.¹² In other words, something is wrong. The reason for this perplexing or confused situation is the discrepancy or conflict amongst its various elements. Things do not hang together right.

In the first example, there is a felt discrepancy between the established habit of feeling the keys in the pocket and the failure to feel them on this occasion. In the second example, someone is perplexed by a discrepancy between the behavior of the bubbles and their understanding of basic physical laws. In the third example, the discrepancy is between the established belief that atomic number determines atomic weight and the observation that some elements with the same atomic number in fact have different atomic weights.

Note that for Dewey, there is nothing cognitive or conscious about this initial phase of inquiry. It is simply a feeling that “something is not right here.” Not until Phase Two does the inquirer begin to consciously and reflectively clarify what that something is. This point is important, for it grounds inquiry in habitual activity, the disruption of which calls our cognitive and conscious resources into play, like firemen scrambling down the pole after the alarm sounds. There might not be much of a delay between the alarm and the firemen leaping into action, but the alarm sounded first.

Phase 2: Locating and Defining the Problem. Phase Two of the circle of inquiry takes us from a feeling that something is wrong to a specification of the problem we are dealing with. We locate and define the difficulty, we find out where it is and what it is. To paraphrase

Dewey, inquirers intellectualize a felt difficulty into a problem to be solved. During this phase, the inquirer selectively filters out what is relevant from what is not relevant; in effect, sorting the wheat (relevant factors) from the chaff (irrelevant factors). In medical circles and doctor's offices this phase is called *diagnosis*.

With this movement from an indeterminate situation to a problematic one, inquiry is well under way. For as in the saying "a question well put is half answered," a problem well specified is half solved; it sets out and defines the steps to be taken next. An accurately specified problem points us in the right direction, just as an inaccurately specified problem points us in the wrong direction, and can lead us on a wild goose chase. For this reason, it is important not to rush this phase, to define the problem too quickly and too carelessly.

With respect to the three examples, Phase 2 entails a move from the original felt, pre-conscious discrepancy to its conscious articulation: "I've lost my keys and need to find them," "How does the behavior of these bubbles fit with the laws of physics?" and "contrary to existing theory, we have elements of the same atomic number with different atomic weights – this will not do!"

Phase 3: A Suggested Solution. In Phase 3, having located and defined the difficulty, we now devise a way of dealing with it. In Dewey's words, "the situation in which the perplexity occurs calls up something not present to the senses" (MW 6:239). The lost keys calls up the suggestion that they were left at home; the soap bubbles calls up the law of expansion of bodies through heat (and their contraction through cold); the differently weighted elements call up the suggestion that some previously unobserved factor is responsible for the observed discrepancy. So Phase 3 gets the inquirer from a defined difficulty to a suggested solution. In doing so, it takes from the ground of actual observations (or facts) into the air of hypothetical possible solutions (or ideas). It moves from the perceptual to the conceptual, these two developing in

close, back-and-forth correspondence with each other. For Dewey, theory and observation are always intimately cooperating companions, and never conflicting or competing procedures.

Phase 4: Refining the Suggestion. In Phase 4 the inquirer refines and develops her initial suggestion, assessing its capacity to resolve the given situation, or what Dewey calls the suggestion's "functional fitness" (MW 3:177; LW 12:114). This entails reflecting on the implications of the suggestion; tracing its consequences; deriving specific experimental tests. It also means checking that her suggestion fits with the available facts, and whether it accommodates a "web" of related ideas about how the world works.¹³ In doing so, the inquirer might discover that her initially plausible hypothesis is unfit and in need of modification or even absurd and unsalvageable.

Such was the case in the first example, where the initial suggestion that the keys were left at home was dismissed when found inconsistent with the fact that the keys were used to drive to the party. Having rejected the initial suggestion, the inquiry returned to Phase 3 and a new and more plausible suggestion that the keys were lost when playing on the grass. The second suggestion had more functional fitness than the first. In the second example, the initial suggestion was refined into the suggestion that cold air entered the glasses in their motion from the suds to the plate, and the possibility of testing this by comparing tumblers in which cold air can and cannot enter. In the third example, the initial suggestion that some additional but as yet unobserved factor was present was developed into specific experimental hypotheses about where and how to look, with what apparatus, using what procedures, and so on.

Phase 5: Testing the Suggestion. The final step of inquiry for Dewey is some kind of experimental corroboration, or verification, of the conjectural idea. Just as inquiry began with observation (aimed at defining the difficulty), inquiry ends with observation (designed to test the value of a hypothesized solution).

In our first example of inquiry, Phase 5 was the simple experiment of going and looking for the keys at the site where they were hypothesized to have fallen out. The sighting and retrieval of the keys brought the inquiry to a successful conclusion. Our problem was solved and we could get on with our life. In the second example the experiment was that of trying out and seeing that tumblers that had cold air prevented from entering did not produce bubbles. Thus the hypothesis was corroborated and the inquiry at an end. In the third example, the prediction that if we look in such and such a way, we will see a previously unobserved factor, was verified with the observation and naming of ions, and the subsequent demonstration that they explained the original discrepancy. The discovery of ions successfully resolved the original difficulty and transformed all the relevant observations into aspects of a unified whole. Inquiry once again reaches a successful outcome.

The Outcome of Inquiry

It was mentioned above that inquiry is a spiral that loops up, out of, and back into our primary, everyday, lived experience. Once a given inquiry is terminated, its products are then available as the background from which subsequent inquiries take their leave. Here it is necessary to differentiate and relate what Dewey sees as the three outcomes of successful inquiries: (i) unified situations, (ii) warranted assertions, and (iii) objects. Dewey offers these three results of inquiry as a more useful alternative to the idea that inquiry terminates in the Truth.

Unified Situation. In all the above examples of inquiry, inquiry terminated in a unified situation--a situation that was settled, stable, and unproblematic. What initially troubled the inquirer as isolated elements are converted into aspects of a unified situation.

Warranted Assertion. Inquiry terminates in assertions. Assertions point forward in time. They assert that something is so and will continue to be so. But the assertions arrived at by inquiry are not just any old assertions. They are warranted assertions. They are warranted by

the inquiry that led to them. According to the commentator Ralph Sleeper (1986:141), “‘warranted assertions’ are the reliable means of obtaining desired results, that they function in controlled activity [viz. inquiry] designed to resolve problematical situations and produce valued consequences.” In the case of ions, if you were to ask a chemist to warrant her assertion that ions exist, she would do so by pointing out all the inquiries and studies that have warranted her assertion.

For Dewey, the idea of a warranted assertion is an alternative to the idea of truth. Instead of a binary opposition, a warranted assertion manifests along a continuum, such that it is more or less warranted depending on the number and quality of previous inquiries that support it. The reason that warranted assertibility may be a more useful alternative to truth is that it is unpretentious. Invocations of the truth have delusions of grandeur, of finality, and of absoluteness. Once we call an assertion true we tend to think that is it and that we can forget about it, take it as given, and move on to other things. To say that an assertion is warranted, however, suggests that no matter how justified by prior inquiries, it is always open to refinement and change. At one time, Newtonian mechanics was considered a universal truth. Later developments, however, exposed it as an assertion that required refinement. As Dewey and Bentley explain, “[Newtonian mechanics] thus gained the high rating of magnificent approximation as compared with its earlier trivial self-rating of eternal certainty” (p. 118). As an alternative to the orthodox concept, they define true or truth in the following manner: “True, Truth: These words lack accuracy in modern professedly technical uses, in that the closer they are examined, it frequently happens, the more inaccurate they appear. ‘Warranted assertion’ (Dewey) is one form of replacement” (LW 16:272).

Objects. What is an object for Dewey and Bentley? Objects are always originally objectives within inquiry. The way in which inquiry achieves a unified situation, and what it is

that it warrants, is often an object. The ions from our third example are a case in point. During the inquiry, ions were objectives. Retrospectively, they are objects. As objects, they become part of the stage or background of future inquiry. They also become tools inquirers employ in the resolution of future problems. “Dewey,” Bentley (1949:166) states, “exhibits inquiry as advancing from indeterminate to determinate situations in full activity throughout, and requires the ‘objects’ determined by inquiry to be held within its system, future as well as past.”

However, in ordinary experience, people generally do not think of objects in this way. More typically, they appreciate objects as things that were there *before*, existing independently of those events called inquiries. However, for Dewey and Bentley, objects are always the outcomes of past inquiries and hence “the only object we get is the object that is the result of inquiry” (LW 16:151). So, objects were always originally objectives of inquiry, for “things exist *as* objects for us only as they have been previously determined as outcomes of inquiries. When used in carrying on new inquiries in new problematic situations, they are known as objects in virtue of prior inquiries which warrant their assertability” (LW 12:122). Thus, because they serve as the objectives of prior inquiries, objects are not independent realities but rather dependent constructs of our prior investigations into the meaning and purpose of the conditions within our environment. This transactional view of objects resembles the understanding of sociologist Herbert Blumer (1969:80), who claims that “the individual is designating different objects to himself, giving them meaning, judging their suitability [as objectives] to his action, and making decisions on the basis of the judgment.”¹⁴

How the Transactional View Unifies the Four Separations

It is now possible to demonstrate how a transactional approach to inquiry converts the traditional separations into aspects of a unified process.

#1 Inquired/Inquired Into: Situation. From a transactional view, the traditional split between inquirer and inquired into, or between observer and observed, is resolved with the notion of a more inclusive *situation*, within which these two exist as complements.

#2 True/False: Warranted Assertion. As explained above, from a transactional view the strict dichotomy between true and false is replaced with a continuum of warranted assertability.

#3 Theory/Observation: Inquiry. In a transactional view, theory and observation are equally essential phases of the single ongoing spiral of inquiry. The bottom half of the diagram (Phases 1, 2, and 5) is the observational, perceptual, or empirical aspect of inquiry. The top half of the diagram (Phases 3 and 4) is the theoretical, conceptual, or mental aspect of inquiry. The observational and theoretical phases and ideas feed in and out of each other until the originally discrepant facts are organized into a coherent whole. The two phases are inseparable partners within inquiry understood as a wider transaction.

#4 Induction/Deduction: Inquiry. The conventional separation between *induction*, or reasoning from specific observations to general ideas, and *deduction*, or reasoning from general ideas to specific observations, is central to orthodox logic. In a transactional view, induction and deduction are equally essential phases of the single ongoing spiral of inquiry.

The left half of the diagram (Phases 1, 2, and 3) is the inductive phase of inquiry. It represents a movement from the particular problem to a general solution. The right half of the diagram (Phases 4 and 5) is the deductive phase of inquiry. The general hypothesis is refined into a particular experimental test. The inductive and deductive phases of inquiry feed in and out of each other until the originally discrepant facts are organized into a coherent whole. The two phases are inseparable partners within inquiry conceived as a wider transaction. Dewey states: "Any account of scientific method must be capable of offering a coherent doctrine of the

nature of induction and deduction and of their relations to one another, and the doctrine must accord with what takes place in actual scientific practice” (LW 12:415). Dewey continues: “Induction and deduction are aspects of the same act, and each occurs through the other” (Ibid.)

Dependability of Communication

Communication plays a crucial role in inquiry or problem-solving, as does language, the quintessential means--or as Dewey describes it, the “tool of tools.” (LW 1:134). Etymologically-speaking, to communicate is to make common (LW 10:248-9). Such common communication occurs in both ordinary and scientific communities. The difference between scientific and everyday communication, in the words of Dewey and Bentley, is that “science uses its technical names efficiently . . . The efficiency lies in the ability given the worker to hold such names steady--to know what she properly names with them--first at different stages of her own procedure and then in interchange with her associates” (LW 16:46) So, the difference is that inquirers in scientific--including social scientific--communities tend to search for more precise and technical meanings that will more effectively guide inquiry toward successful outcomes. Dewey and Bentley term this the process of progressively scrutinizing and refining terminology--as well as discarding terms unsuited for use in effective inquiry and unambiguous communication--“a passage from loose to firm namings” (LW 16:46).¹⁵

Logic is the term of choice for Dewey in describing inquiry in communicative terms. Indeed, logic for Dewey signifies the “need for the development of a general theory of language in which form and matter are not separated” (LW 12:4). Form is nothing less than the technique of analysis, including those conventionally identified under the title of ‘formal logic’; while matter is the subject-matter or content for analysis and study. Through language use, form and matter, as well as techniques and subject-matter, can be viewed as reciprocally or

transactionally related aspects of the same process--the process of meaningful communication. By converting objects in everyday experience into “things with a meaning,” communication “whether it be public discourse or that preliminary discourse termed thinking” reconstructs conventional terms into precise instruments for resolving common problems (LW 1:132).

Summary

In taking a transactional approach to inquiry, I have shown how Dewey applies the transactional strategy to the five-step process of inquiry. Starting with a variety of conventional separations, it was demonstrated that Dewey converts these separations into distinctions, envisages the distinguished items as aspects or phases of inquiry and then binds them together into a more inclusive transaction. In this way, Dewey was able to offer an account of inquiry as a flowing, flexible, ever-changing affair that does justice to inquiries as they actually occur both in everyday life and science. In *K & K* as well as elsewhere in their writings, Dewey and Bentley understand this account of inquiry as dependent on the reliability of language-use and communication.

Common Misunderstandings

In this section I consider five common misunderstandings of the transactional view. Due to its unconventionality, the transactional approach easily succumbs to misinterpretation. Each misunderstanding relates to one or more aspects of transaction and the relationship that transaction has with the process of inquiry.

#1: Rejects Analysis and Distinctions

One misunderstanding is that by disallowing analysis or the drawing of distinctions, the transactional view fuses all differences together into one undifferentiated whole—what Jim Garrison (2001:286) calls “zipperless holism.” This mistaken account results from the

unwarranted premise--often described as a false dichotomy--that either all elements are cleanly separated into partitioned categories or that all elements are interconnected into a single inseparable whole. While the transactional view resists the reification of concepts or the adoption of absolutes, it does not prohibit analysis or the drawing of distinctions. Nor does it insist on a holistic account that neglects all differences.

All divided notions are not fodder for Dewey and Bentley's critical assault on dualisms. In chapter 10 of *K & K*, Dewey explains: "Distinctions are more than legitimate in their place. The trouble is not with making distinctions . . . Petrifications of distinctions . . . into inherent (and hence absolute) separations is the 'vicious' affair" (LW 16:248). So, fixed dualisms and functional distinctions are not identical. Fixed dualisms prove pernicious to intelligent inquiry and systematic reflection by antecedently delimiting the range of subject-matter and the methods of investigation. Functional distinctions, on the other hand, prove their worth as tools in inquiry and do not impose separations antecedent to the process itself. With the designation "*the philosophic fallacy*" (LW 1:29), Dewey calls attention to the strategy of translating the results of inquiry into antecedent forms, absolutes and separations, thereby failing to "account [for] the operations and processes that condition the eventual subject-matter" (LW 1:352). Moreover, in an early work on the relationship between the psychological concepts of stimulus and response, entitled "The Reflex Arc Concept in Psychology," Dewey also cautions against employing distinctions that might have the taint of this philosophic fallacy: "we ought now to be in a condition to ask of what nature is the distinction, instead of taking it for granted as a distinction somehow lying in the existence of the facts themselves [i.e. as an antecedent separation]" (EW 5:104). In other words, when inquirers import antecedent divisions of factual or ideational material, these distinctions merit critical evaluation. Particularly, they should aim to eliminate those separations that function not as useful instruments within inquiry, but as prior

constraints on inquiry. Consequently, functional distinctions develop out of the process of inquiry and operate as guides that assist inquirers in reaching warranted assertions or outcomes.

#2: Scope Too Great

Another misunderstanding related to the last is that transaction includes the whole wide universe within its scope, such that the transactional view is simply too broad to be useful. This misinterpretation resembles Sholom Kahn's befuddlement over the scope of Dewey's concept of experience (LW 16:456). Beholden by this common misinterpretation of the transactional view, a reader of *K & K* leaps from Dewey and Bentley's claim that transaction addresses itself to the cosmos of fact to the conclusion that any transactional explanation or inquiry must identify and include every single fact within the entire cosmos as part of its account. So, for instance, an explanation of why some New Guinea natives still practice cannibalistic rituals would have to consider contemporaneous fluctuations in speculative investing on the New York Stock Exchange and perhaps even the planetary trajectory of Mars. However, not only does this interpretation impose an excessive burden on the inquirer, but it also misstates the requirements of the transactional approach.

To successfully achieve an objective in inquiry often requires abstraction and emphasis. By focusing on phases or time-space slices of a spatio-temporal process, the inquirer comes nearer to understanding an event without contemplating every possible implication that the event could possibly have within the wider cosmos. Returning to the above example, the behaviour of the New Guinea cannibals can be studied to the exclusion of the New York Stock Exchange and the planet Mars. The investigator employing the transactional approach would find it not only inefficient, but also unreasonable, to accommodate the demand that he consider apparently irrelevant and unrelated conditions within a situation. As White (1949:61) claims:

The scientist never grapples with all the interrelated phenomena that confront him in a given situation. To do so would be to embrace the cosmos every time a sparrow falls. This is undesirable as well as impossible. The scientists must always abstract a certain segment of reality, a certain class of phenomena, from all others, and deal with it as if it existed by itself, independent from the rest.

So, while the transactional view does envisage events in a wider system, what it does not do is to force the inquirer to consider how these events impact the entire spread of the universe.

Instead, a key distinction can be made between consequences for a given wider system and consequences for the entire universe. The transactional view need only address the former.

#3: Idealism Reinvented

In asserting that the known is inseparable from the knowing, some contend that the transactional view simply offers up a new version of idealism. This misunderstanding mirrors Bernstein's objection that Dewey's notion of experience as a vast and impersonal cosmos infused with human needs and concerns is merely a re-packaged form of idealism. Dewey and Bentley anticipate the misinterpretation: "There are probably readers who will translate what has been said about knowings-knowns into terms of epistemological idealism" (LW 16:52 ff8). In many ways, this misunderstanding stems from a broader tendency among commentators to pigeonhole Dewey and Bentley within one or the other side of a dualism--specifically, idealism or realism--that *K* \mathcal{C} *K* expressly aims to undercut. Bentley and Dewey are clearly not appealing to a species of common-sense realism, consisting of (i) humans, (ii) objects and (iii) a hermeneutic (inter-)activity by which the former comes to know the latter (LW 16:9). So, the argument goes, the authors of *K* \mathcal{C} *K* must be advocating some form of idealism. However, the identification of the transactional view as idealistic misses the mark. In *K* \mathcal{C} *K*, Dewey and Bentley expressly repudiate an idealistic account, stating that "[s]uch a translation misses the main point—namely, that man and his doings and transactions have to be viewed as facts within the natural cosmos" (Ibid). In other words, the naturalistic rendering of human and non-human

activity in transactional terms does not accord with an idealistic account of such activity in terms of a mind-dependent or mind-infused world.

#4: Interaction Works Just Fine

Another objection leveled at Dewey and Bentley's transactional approach is that it proves unnecessary given that inter-action and interactional approaches to inquiry do a perfectly acceptable job. This position is well grounded, and in fact Dewey and Bentley repeatedly accept the force of the objection. In encountering many situational disturbances, an inter-actional approach will sufficiently reunify the problematic situation. For instance, "[t]horoughly legitimate interactional procedures," such as classical mechanics, allow inquirers to achieve successful outcomes without resort to "later statement in [a] wider system", such as when mechanical engineers resolve basic design problems (LW 16:115). So, interactional approaches deserve a place in the scientist's tool-kit, even though transactional approaches have the comparative advantage of providing a more integrated account of the interacting elements within a broader system.

A closely connected and even more daunting objection is that self-action, inter-action and transaction can be clearly differentiated in all methodological approaches to inquiry. In practice, then, no trace of one approach manifests in combination with the other approach, and a synthesis of approaches proves impossible. To the contrary, though, Dewey and Bentley claim that natural and social scientific methodologies typically "employ both interactional and transactional observation" (LW 16:67). So, combining approaches to explanation and inquiry is not only possible, but is probably more common in usage than single approach methodologies.

#5: A New Name for Behaviorism

The final misunderstanding takes the form of a question: Were not Dewey and Bentley behaviorialists? “Under hypothesis, ‘isms’ and ‘istics’ of all types” are to be avoided, Dewey and Bentley contend, due to their unfortunate tendency to engender absolute fixities in meaning (LW 16:52 ff15). Although this statement would seem to support the conclusion that they were not behaviouralists, a better answer to the question requires consultation with the text of *K & K* as well as the deployment of a distinction.

First, some behavioralists reduce all human inquiry and action to behavioristic--i.e. mechanistic or physiological--explanations arrived at through observation, and deny all ideational processes unless they too are reducible to observable human behaviour (for instance, Skinner 1943, 1971). Bentley and Dewey disclaim any status as behavioralists in this first sense: “Our use of the word ‘behavioral’ has no ‘behavioristic’ implications.” (Ibid). Other behavioralists permit ideational streams, yet refuse either to reduce them to behaviouralistic explanation or to idealistically expand them so that the mental encompasses the entire domain of experience. As explained in the previous section, the authors of *K & K* reject the position that their method is idealistic, stating that they are “no more behavioristic than mentalistic” (Ibid). Thus it would seem that Bentley and Dewey belong within the second group of behavioralists.

However, Dewey and Bentley do not allow themselves to be pigeonholed so easily, and so refuse to treat their terminology of behaviour as an absolutely settled feature of the transactional view. Fearing that their approach will come to be broadly identified with behaviouralistic research programmes, Dewey and Bentley identify a word less conducive to widespread use:

Such a word as ‘conduct’ has many more specialized implications than has ‘behavior’ and would not serve at all well for the name for a great division of research. We shall be open to the adoption of any substitutes as our work

proceeds, but thus far have failed to find a more efficient or safer word to use (LW 16:52 ff15).

The authors of *K & K* claim that the intended meaning of 'behavior' bears greater resemblance to the meaning of a more specific term, 'conduct.' In addition, Dewey and Bentley maintain that the terminology of behaviour is thoroughly open to the possibility of reconstruction. By allowing investigators to recycle previous terminology and to reformulate its meanings, the openness of terminology to continual change and firming consequently frees up inquiry from pre-given external constraints. In this way, investigators can accommodate the exigencies of novel paths of research with appropriately redefined terminology.

Application of the Transactional Approach to Politics

The sole previous attempt to apply the transactional approach to politics was made by Nathan Hakman (1958) in an essay entitled "Bentley's Transactional View of Politics." He advances the thesis that Bentley deploys four postulates for understanding social action and that there are six benefits of understanding social phenomena in transactional, rather than traditional social scientific, terms.¹⁶ Unfortunately, Hakman overstates the case for applying transactional inquiry to social-political phenomena: "Transactional inquiry is concerned with collective action and nothing else" (39). However, in *K & K*, the transactional view's almost exclusive application to technical problems in logic and the philosophy of language severely weakens Hakman's argument that transaction applies solely to the subject-matter of collective or social action.

More recently, Eric A. MacGilvray (2001) has criticized Dewey's pragmatic political theory for departing from its primary subject-matter. He claims that "because pragmatism is essentially a theory of meaning and justification . . . pragmatists must necessarily draw upon extra-pragmatic commitments of some kind to defend any substantive political position" (1).

Similarly, MacGilvray would likely dispute the application of Dewey and Bentley's transactional view to political phenomena, as attempted in Hakman's article and in the present project, on the ground that the transactional view is essentially a "theory of meaning and justification," and thus inapplicable to political phenomena.

In this section, I respond to this objection by demonstrating that Dewey and Bentley's transactional view, as developed in *K & K*, is continuous with ideas found in their individual works on political and democratic theory. So, while transactional analysis may be applied to political phenomena, this form of inquiry is not--contra Hakman's position--exclusively fit for addressing collective action issues. In other words, the transactional approach has a wider subject-matter domain or jurisdiction than simply political or collective action.

In the first sub-section, I show that within Bentley's *The Process of Government* resides a strong critique of the positivistic social science methodology so central to modern political science and formal political theory, as well as an indictment of the methodological individualism at the root of neoclassical economics. In the second sub-section, I illustrate Dewey's legacy for deliberative democratic theory by examining a commonly misunderstood historical debate. And in the final sub-section, I adduce the degree to which Dewey and Bentley's political writings stand connected to the issue of how democratic theory relates to the stability and order of democratic institutions.

Bentley on Group Theory and Social Science Methodology

In the present section, our attention turns to Bentley's *The Process of Government* (1967 [1908]) for the purpose of proving that the transactional view has far-reaching political implications. In many ways, this work represents an ingenious blending of the theory of group activity at work in Georg Simmel's *Soziologie* (1999) and the dynamic notion of the public found in Dewey's *The Public and Its Problems*.¹⁷ Although published twenty years before *The Public and Its Problems* (1927)

and over forty years prior to *Knowing and the Known* (1949), the transactional approach percolates through this early work of Bentley's and points to underappreciated contributions in the area of social science methodology.

Legacy for Economic and Political Theory. While the work did not initially receive a warm reception, Bentley's (1967 [1908]) *The Process of Government* has in time come to have an enormous influence on political and economic theory.¹⁸ Beginning in the 1950's, the work received high praise for its contribution to the burgeoning discipline of political science and the rapidly changing sub-discipline of political theory.¹⁹ Given Bentley's admission that his interest in politics was only derivative of his "interest in economic life," it is unsurprising that this work has also had an impact on the discipline of economics (210). Particularly relevant for the present project is the credit constitutional economists James Buchanan and Gordon Tullock (1962:9) give to Bentley's work for inspiring their own account of politics as process in *The Calculus of Consent*. *The Process of Government* also provided the formative ideas for the development of group theory and what has more recently been labeled 'political pluralism.' However, as will be seen, much that passes nowadays as formal political theory fails to meet the requirements of the transactional view--which, despite the lack of explicit mention, informs the methodology of the entire work.

On the opening pages, one finds the statement: "THIS BOOK IS AN ATTEMPT TO FASHION A TOOL" (Bentley 1967; Ratner 1958:576). Taking Bentley at his word, his purpose is to propose a method for better understanding social-political events, and particularly the doings of groups. Bentley's sense of the term 'group' covers the whole gamut of actions which agents collectively engage in: "It [group] means a certain portion of a society taken . . . not as a physical mass cut off from other masses of men, but as mass activity, which does not preclude the men who participate in it from participating likewise in many other group

activities” (211). He also employs the term ‘interest’ interchangeably with the term ‘group’, for “[t]here is no group without its interest” (Ibid). Interest also means the activity valued from a specific perspective and relative to the group members’ shared objective: “The interest is just this valuation of the activity, not as distinct from it, but as the valued activity itself” (213).

Bentley also conceives a special kind of group, the “underlying group,” which is less “manifest, . . . palpable [and] measurable” (209), more inchoate with less clearly defined interests, than fully formed political groups--not unlike Dewey’s account of the public in eclipse (LW 2:313-4). Rather than socially isolated entities, Bentley’s (1967:443) groups participate in the flow of social-political activity, where part and whole dissolve into integrated phases of process.

Bentley eschews both the idea of a general good beyond the separate interests of a multiplicity of groups and the idea of a group interest that reduces to the good of separate individuals. Assuming the existence of a greater public good, researchers attribute this objective quality to a harmonious social collectivity, thereby neglecting the group conflict endemic to politics: “no such group as the ‘social whole’ enters into the interpretation in any form whatever. Where we have a group that participates in the political process we have always another group facing it in the same plane” (220). On the other hand, the good of groups cannot be reduced to the good of constituent individuals: “The raw material we study is never found in one man by himself, it cannot even be stated by adding man to man. It must be taken as it comes in many men together” (176). Bentley’s recognition of the persistent group struggle would influence later group theorists and pluralists to similarly reject social wholes, the primacy of the individual and the correlative accounts of an objective good or societal interest.²⁰

Although Bentley rejects the concepts of a total and individuated good, he does salvage the concept of a group interest. To recall, group interest means, for Bentley, the valuation of group activity. The relationships of groups overlap, such that shared memberships and activities

become commonplace features of the process: “The activities are interlaced . . . the interlacing itself is the activity. We have one great moving process to study, and of this great moving process it is impossible to state any part except as valued in terms of the other parts” (178). Bentley employs the term ‘group’ as merely a piece of verbal economy, an indicator of activity clusters, and a functional place-holder within a larger process. Groups have no ontological and independent status outside of their part in the overall process of political activity. In *The Process of Government*, Bentley’s account of groups constitutes an early formulation of the transactional view. Separate stages and interests of collective or group action only have worth in virtue of their belonging to a more inclusive “great moving process”—a process that, in hindsight, Bentley would almost certainly call a ‘transaction.’

The peaceful settlement of interest group conflict happens through government action. The intervention of governmental institutions can potentially balance antagonistic interests: “Government is the process of the adjustment of interest groups in a particular group or system” (260). As government adjusts the divergent interests of political groups, politics reverts to a stable system. In another of his works, *Relativity in Man and Society* (1968 [1926]:119-120), Bentley clarifies the meaning of the state in terms of its capacity to produce stability: “the term state indicates a great complex of closely related activities, which hold together, and get enough representative process for stability. The state is fundamental not as a mystic being but only in the sense of this stability, this durational extent, this relative permanence.” Through interest representation and mediation, government-induced stability provides a proxy in Bentley’s theory for the missing notion of the common interest or public good.²¹

According to Norman Jacobson (1964:17), the legacy of *The Process of Government* for group theory outshines the impact it has had elsewhere because of “a universal impatience, even among Bentley’s followers, for Part I . . . the exclusively theoretical part of the work.” In the

first quarter of the work, Bentley criticizes three social theorists--Albion Small, Rudolph von Jhering and Ludwig Gumpowicz--for reifying notions such as desire, purpose and class, while attributing to them undeserved explanatory and causal power. Although Bentley described *The Process of Government* as an attempt to fashion a tool, much of the first part is dedicated not to fashioning but rather to undermining other theorists' tools. This negative strategy anticipates Dewey and Bentley's concerted critique of self-action in *K & K*.²² Yet the two tasks, negative and positive, reinforce each other, as Bentley explains during the transition to the positive task in *The Process of Government*: "I have wished to make it clear why the method of interpreting society which I am about to set forth is justified, and why the irruption into it of any unassimilated factors of the kind I have been criticizing would only serve to distort" (165).

Transaction and Social Science Methodology. *The Process of Government* frames a transactionally-oriented critique of the methodological model for the social sciences. This model treats social science as an essentially imitative standard of natural science that is firmly grounded in the tenets of Logical Positivism.²³ These tenets include: (i) realism, or the belief in a mind-independent, objective reality, (ii) epistemological empiricism, or the position that knowledge is gained through sense data and (iii) verificationism, or that the meaning of phenomena can be verified by independent observers. Statements are either analytic, synthetic or lack sense. Analytic statements--often called tautologies--are true in virtue of their terms, and include statements of logic and mathematics. Synthetic statements--often termed empirical--can be confirmed or denied by scientific procedure, including observation and experimentation.²⁴ Humans test hypotheses derived from scientific theories and thereby discover the underlying laws that govern social phenomena. All metaphysical statements lack sense. In adopting the positivist methodology, political scientists have crafted an approach to their discipline that prioritizes value-neutral empirical study of political phenomena before normative theorizing.

The author of *The Process of Government* demonstrates how this methodological model in the social sciences has resulted in more harm than good. Bentley (1967: 213) criticizes the tendency in positivistic thinking to treat scientific facts as superior, or more indicative of the internal reality of things and events, than common-sense facts.²⁵ Instead, scientific and common-sense facts are continuous and coequal. Science itself literally is a practical human affair, work, or concern, though one in which the relation of the practical (or doing) to the theoretical (or knowing) is opposite to common sense. According to Bentley, “science is itself a form of doing, of practice . . . that . . . inevitably has reflex consequences upon other forms of practice” (LW 16:254-5). So, both common-sense and science are reciprocally--or better yet, transactionally--related. Common-sense knows in order to do, and science does in order to know, barring any antecedent constraints on the kinds of outcomes that can issue from the transaction (Hayek 1945:520-2; Taylor 1957b:4). Thus, on Bentley’s critical view, modern social science’s strongly positivistic orientation errs in overlooking the practical and normative dimensions of common-sense experience, and in overemphasizing the predictive and behavioristic dimensions of scientific experience.

However, Bentley’s general critique of positivistic social science has gone unnoticed by most social scientists. James Ward (1981:222) confirms this point: “While Bentley’s work was admired by figures as diverse as John Dewey [and others] . . . his understanding of the character and problems of behavioral science has been given little attention.” Commentators have misunderstood the tough-minded empiricism at the root of Bentley’s critique of animistic notions and billiard-ball causality as, instead, an appeal to positivistic methodology. So, ironically, by understanding Bentley’s work as a plea for a more empirically-oriented social science, modern social scientists--particularly political scientists and economists--have misconstrued it as an invitation to positivism, rather than, as it actually is, a renunciation of

positivistic methodology. As a result, most social scientists entirely overlook the critical lessons of *The Process of Government*.²⁶

In *The Process of Government*, Bentley warns against what Dewey and Bentley would later call “self-actional” thinking. In self-actional accounts, society is understood as being actuated by self-moving powers--be they ideals, sentiments, a general will or some other self-actional concept. However, these accounts attribute the same “mental ‘spooks’” and “mind-stuff” to physical phenomena that Bentley (1967:18) rails so hard against in the first quarter of *The Process of Government*. He argues that researchers have lazily avoided the observation of social facts, preferring to use “convenient catchwords and symbols to save them the trouble of pushing their thinking” (56). So, for Bentley, sound social science methodology requires exact terminology, a focus on human action and its purposes and the avoidance of self-actional concepts that only obstruct further inquiry.

In the last fifty years, political scientists have embraced an economic approach to political analysis, producing formal models that both explain and justify political behaviour. Largely modeled after orthodox neoclassical economic theory, formal political theory embraces (i) methodological individualism, (ii) an aggregative account of politics, by which individual preferences are converted into social preferences, and (iii) rationality conceived in purely instrumental terms, as behaviour aimed at utility-maximization. Given his training as an economist, Bentley would have undoubtedly been familiar with formalized models in economic theory and, as Ward (1978:604) asserts, he would have been sceptical of “the explanatory status of such concepts as the ‘individual and ‘rationality.’” A critique of these assumptions, particularly methodological individualism, will be returned to in chapter six.

Taking Transaction Seriously

In this final section, I respond to the objection that transactional thinking was never intended to be applied to the issue of how democratic theory relates to institutional stability. Instead, the transactional approach was solely meant to address certain technical problems, so the objection goes, in expanding the domain of scientific method and logic through an analysis of language.

In part, this objection has already been answered by demonstrating that traces of the mature notion of transaction materialize in Dewey and Bentley's earlier political works. To recall, in Bentley's *The Process of Government*, transaction punctuates the group process of politics, resists self-actional accounts and also forms the backbone of his critique of methodological individualism and positivistic social science. In Dewey's *The Public and Its Problems*, transaction illustrates in concrete and functional terms how democratic publics form and work to solve their common problems in public-spirited ways (to be discussed in chapter five). So, the transactional view does have application to political and democratic theory. But this response still does not adequately answer the question: How does transaction apply to the study of political and democratic institutions?

Many commentators have criticized Dewey's democratic theory for avoiding the issue of how to design a corresponding set of democratic institutions. On Damico's (1978:118) reading, Deweyan democracy denotes many things: "It is a form of government, a set of procedures and freedoms for making the state responsible to the public, and a way of life, one marked by the spread of the 'intelligent' or 'scientific' attitude within all social institutions." Political democracy for Dewey signifies the institutional phase of democratic governance, while democracy as an idea (or way of life) points to the conceptual or theoretical phase (LW 14:225-6, LW 2:325). Richard Posner objects that Dewey overemphasizes the idea of democracy, and

particularly the epistemic preconditions for a deliberatively democracy, while neglecting the practical difficulties of institutionalizing the idea.²⁷ According to Posner (2003: 109), Dewey ignores “the variety and complexity of parties and interest groups, the variety and complexity of the issues that confront modern government, the political apathy and ignorance of the people” and opts instead for a utopian account of deliberative democracy modeled after an academic “faculty meeting” (Ibid). In addition, Smiley (1999:645), targeting Dewey, asks: “How, if at all, can pragmatists rely on experts to decide which methodologies are helpful to developing democratic institutions?”

An answer to both Posner’s objection and Smiley’s question can be found through a joint reading of Bentley and Dewey’s *K & K* and Dewey’s *The Public and Its Problems*. Dewey’s concept of public spirit expresses the idea that publics and experts, through mutual consultation and inquiry, can coordinate their plans and actions in the solving of common problems.²⁸ So to Smiley, Dewey would respond that choosing methods for designing democratic institutions is not outside the purview of those tasks that publicly-spirited citizen-expert partnerships could accomplish. In other words, expert-bureaucrats need not, and should not, make decisions about policy matters without consulting what Dewey (LW 2:245) terms a ‘public,’ that is, those citizens who stand to be affected by the decision outcome.²⁹ According to the transactional view’s postulational method, inquirers deploy certain limited yet open-ended postulates for the sake of guiding inquiry. To Posner, Dewey would thus reply that, consistent with the postulational method, democratic ideas such as public spirit serve as exploratory suggestions, proposals and hypotheses in an open-ended process of institutional transformation.³⁰ For instance, Dewey argues in “The Future of Liberalism” that the idea of liberalism, so central to the modern notion of a liberal democracy, contributes to “the positive construction of favorable institutions, legal,

political, and economic” when understood in non-absolutist and experimental terms (LW 11:291).³¹

In order not to foreclose the many possible avenues for realizing a democratic community, Dewey purposely abstains from laying out the particulars of a plan or recommending a final destination in the quest to institutionalize a better form of democracy. “Dewey resisted calls for him to develop a specific model of democratic government, arguing that it must look differently in different contexts” (Schutz 2001:288). In stark contrast, Francis Fukuyama (1989:210) declares that by the latter half of the twentieth-century “the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government” had been reached. Rather than advocate for “political democracy” or a discrete set of political institutions (in Fukuyama’s case, liberal democratic ones³²), Dewey proposes a set of leading principles or postulations that together are termed the “social idea” of democracy (LW 2:325). As postulations, these ideas are intended to direct subsequent investigations into the design of a stable and viable governing apparatus; however, taken alone, they have no direct correspondence with any particular set of institutions.³³ So instead of grappling with the challenges of institutional design, this idea orients the democratic process towards a broader--and some say less concrete--objective: namely, the enrichment of individual and communal experience, or the “creation of a freer and more humane experience in which all share and to which all contribute” (LW 14:230). Therefore, Dewey understands democratic transformation as the open-ended pursuit of an emancipatory ideal using flexible procedures of institutional experimentation and reform.

In some measure it must be conceded that Bentley and Dewey did not exhaustively address all issues with regard to democratic theory and institutions. Conspicuously absent in Bentley’s works--particularly in those published during his lifetime--is any normative treatment

of democracy. So, even though one commentator has boldly accused Bentley of being undemocratic (MacIver 1947:220), it appears difficult given the paucity of his writings on the subject to determine what his views about democracy would have been. However, by consulting biographical material and a posthumously published work, one finds some evidence for Bentley's ideas about democratic theory and institutions.³⁴ Where Bentley's political writings remain utterly silent about democracy, it is also possible to find guidance in Dewey's writings on the subject--particularly in his primary work on democratic theory, *The Public and Its Problems*. In chapter five, my exegesis of the debate between John Dewey and Walter Lippmann will assist in clarifying the importance of Dewey's ideas on democracy, and particularly his notion of public spirit, in anticipating the contemporary notion of deliberative democracy. In chapter six, I shall draw on the critical lessons of the previous analysis in order to bridge the divide between constitutional economics and deliberative democracy.

Within this chapter, I have outlined the approach of Dewey and Bentley's transactional view, with particularly close attention paid to the topics of social science methodology, communication, inquiry and politics. In later chapters, these treatments will enable further progress to be made toward the stated aim of this thesis: viz., bridging the deep divide between constitutional economics and deliberative democracy. I trust that I have already made clear how the transactional view operates as a methodological tool. The ultimate objective is to show that the proper relationship between democratic theory and institutions is a transactional one.

At this point, the project turns to a presentation of three views of deliberative decision-making and the constitutional economics critique.

CHAPTER 3

THREE VIEWS OF DELIBERATIVE DECISION-MAKING

In this chapter I present three views of deliberative decision-making, each approximating the account of a particular deliberative democrat or that of several grouped together. Each view provides a theory of how discourse or deliberation affects the legitimacy of the eventual outcome of a democratic decision-making process. In this way, the following chapter rebuts a point made by James Johnson (1998:162), an economist and critic of deliberative democratic theory: namely, that deliberative democrats “do not treat deliberation primarily as a mode of political decision-making.” To the contrary, I argue, each one of these three views proposes a decision-making model specifying the procedures of deliberation that legitimate the outcomes of the deliberative process. Besides giving an exposition of the relationship between procedures, outcomes and legitimacy, I also evaluate how each view of deliberative decision-making affects the stability of democratic institutions. In the final section, the central theory of deliberative democracy is elaborated in six core commitments. Given the centrality of these commitments to each of the three views presented, I contend that they broadly represent the key tenets of the deliberative democracy research programme.¹

The following exposition prepares the way for the next chapter, in which I expound the critique of deliberative democratic decision-making based on constitutional economics.

What is Deliberative Democratic Decision-making?

To gain a fuller understanding of how deliberation affects the outcomes of decision-making processes, I examine three views of deliberative democratic decision-making. Rather

than attempt to survey and duplicate each element of every deliberative theorist's account, I instead construct three stylized views which roughly represent their positions on how deliberation affects decision-making outcomes. In contrast to "decisionism," or the view that some decisions need not be justified, deliberative democrats insist on giving reasons for all decisions, but do not require that every deliberative forum culminate in a decision (Burkhalter et al. 2002:404; Honig 2007:2; Habermas 1996:453). Distinct from difference-bridging dialogue, deliberation need not terminate when participants discover common ground, a shared way of speaking or a "fusion of [interpretive] horizons" (Gadamer 1990:397). Although dialogue may prepare the way for deliberation, it is deliberation that aims to produce legitimate policy decisions and, when successful, accomplishes this end (Berman 1993; Briand 2005:19).

I contend that these three stylized views of deliberative decision-making represent the major streams of thought within the research field of deliberative democracy. Some democratic theorists will therefore only receive passing attention or, in some cases, be passed over entirely. These omitted theorists, many of whom describe themselves as deliberative democrats, actually endorse only a nominally deliberative account of democratic decision-making. Examples include John Rawls (1996, 1999), whose notion of public reason antecedently constrains the content of deliberation in ways unacceptable to most deliberative democrats, and David Gauthier (1986, 1993), who restricts deliberation to the constitutional level of choice instead of making it a universal requirement of all decision-making processes.²

Consistent with presenting the three views to follow as stylized models, an acceptable level of creative license is employed in explicating each account. One way in which this is accomplished involves extending the approach to cover issues and matters not explicitly addressed by the theorists themselves. For instance, elements from John Dryzek's theory of deliberative democracy--influenced by, and yet critical of, Habermas's theory of discourse ethics-

-complement and refine some weaker areas in the Habermasian view of deliberative decision-making.

First View: Habermas

This section outlines the deliberative institutions and decision-making processes associated with Jürgen Habermas's discourse ethics, and more broadly with his theory of deliberative democracy. In the first sub-section, I present the key tenets of Habermas's account of rational deliberation and then consider his rationale for the distinction between communicative and strategic action. What follows is an examination of the ideal speech situation, which establishes the presuppositions of communicative action. Actual deliberations must conform to these presuppositions if they are to generate understanding and consensus. In the second section, I identify Habermas's two major categories of discourse, moral and legal. Finally, I shall consider the two general tracks that Habermasian deliberation follows—one, towards informal forums of discourse within the public sphere and, the other, towards formal forums, including constitutional, legislative and adjudicative decision-making.

By way of overview, Habermas's theory of deliberative democracy has three central themes. First, it delivers a modern, post-metaphysical critique of reason, which acknowledges that the empirical sciences have undermined metaphysics without reducing all rationality to the crudely instrumental (means-end) version.³ Second, Habermas's deliberative theory rests on a theory of communicatively-based action which is strongly cognitivist and universalist in its thrust. Third, the primary focus of Habermas's discourse ethics is on justifying claims and norms through a process of dialogue—a process that is rational, fair and free from coercion and manipulation (McCarthy 1995: viii-x). This procedure of rational argumentation involves the production of reasons in support of claims, ultimately allowing participants to reach a fair and rational agreement.

Rational Deliberation and Communicative-Strategic Action

Habermas's view of deliberation conceives communication as a way of reaching a shared understanding. It emphasizes the speech act thesis--viz., that speech should be viewed as a special type of action--and the concept of a validity claim--i.e. that "the assertion that the conditions for the validity of an utterance have been filled" (1984:38). Communication and validity claims have a special relationship in Habermas's theory of deliberative democracy. Agents try to redeem the validity of claims by determining whether they are true (truth or efficacy of actions), right (rightness of norms) or truthful (truthfulness or sincerity of expression).⁴ Habermas (1984:60-70) contends that each of these validity claim types corresponds to a particular domain or set of domains for action, which he labels "world-concepts."⁵ Agreement to undertake collective action is only possible when consensus is manifest across all action types.⁶ Agents must possess the conviction that it is possible to jointly redeem the validity of all claims by reaching consensus through discourse, thereby giving rise to the fourth and most important kind of action: communicative action or a "comprehensive concept of communicative rationality" (Habermas 1984:14).

Communicative action consists of a rational procedure, meaning that it "carries with it connotations based ultimately on the central experience of the unconstrained, unifying, consensus-bridging force of argumentative speech" (1984:10). This kind of communicatively-directed agency is only possible if actual discourse approximates a set of normative boundary conditions (22). In what Habermas terms the "ideal speech situation," these normative boundary conditions express themselves as presuppositions of discourse, ensuring that the deliberative process closely resembles a fair and rational procedure of argumentation. As normative boundaries, these conditions of argumentation can be usefully compared with rules. Indeed, as Habermas (1990:89) clearly states, the conditions of the ideal speech situation rule out

“all external or internal coercion other than the force of the better argument and thereby also neutralize all motives other than those that [are] of the cooperative search for truth.” Designed to eliminate “strategic” motives and forceful means for reaching agreement, such rules or “pragmatic-transcendental presuppositions of discourse” constrain acceptable forms of speech and action from within the discourse situation.⁷

Among these normative boundary conditions are rules that argumentation must follow: (1.1) No speaker may contradict himself. (1.2) Every speaker who applies predicate F to object A must be ready to apply F to all other sufficiently similar objects resembling A. (1.3) Different speakers may not employ the same expression with different meanings. Violations of these rules can result from incompetence, error, or the intent to deceive or manipulate the other party to the discourse.

Additional “dialectical” rules are: (2.1) Every speaker may assert only what he believes. (2.2) A person who disputes a proposition or norm not under discussion must give a reason for doing so.⁸ If participants comply with these dialectical procedures, i.e. offering up genuine reasons and expecting the same from others, then they are more likely to cultivate trust through honest dialogue pursuant to mutual understanding, truth-seeking and preference transformation. However, persons may also gain some advantage from violating dialectical rules so long as their transgressions remain undiscovered by others.

On a third level, rules for deliberative engagement establish limitations on the use of rhetoric and the like. According to Habermas (1990:88), these rules model deliberation so that “the structures of a speech situation [are] immune to repression and inequality in a particular way.” The presuppositions at the rhetorical level include: (3.1) Every subject with the competence to speak and act is allowed to participate in the discourse. (3.2) a. Everyone is allowed to interrogate any assertion or claim whatsoever. b. Everyone is allowed to propose any

assertion or claim whatsoever into the discourse. C. Everyone is allowed to express their attitudes, wants, and concerns. (3.3) No speaker may be stopped, whether by internal or external constraint, from exercising the prerogatives stated in (3.1) and (3.2).⁹

Logical, dialectical and rhetorical rules provide the means necessary for fairly test the rationality of claims in actual discourse. The testing process requires reasoned argument, or the provision of good reasons in support of claims and norms.¹⁰ If deliberators agree that good reasons have been proffered and rules have been complied with, then the validity of the claim or norm is successfully established through discourse. If, on the other hand, a deliberator rejects a claim's validity, then, as Habermas (1990:137) explains, "he denies the validity of an utterance in at least one of [these] three aspects"--i.e. logically, dialectically or rhetorically. In validating norms, participants must consider the interests of all parties concerned, and seek to formulate the norm in a way that generalizes those interests to a higher level.¹¹ Ultimately, the testing of claims and norms occurs for the sake of achieving consensus or shared understanding about a public issue or problem between participants to a discourse. Although agents may doubt that consensus is an assured outcome of discourse, they nevertheless believe that, so long as they reject the use of coercive or manipulative means, reaching a rational agreement is a genuine possibility.¹² Participants in discourse must instead corroborate the validity of proposed claims and norms through "the force of the better argument" (89).¹³ Therefore, communicative actors will deliberate *as if* consensus is a realizable goal, even if it proves to be a highly improbable one.¹⁴

In contrast to communicative action, strategic action, according to Habermas, involves providing incentives to agents so that they will act on the basis of self-interested or egoistic motives. This strategy of motivational management is applied through "external means by using weapons or goods, threats or enticements" for the sake of altering the behaviour of parties to

the interaction (133). As Habermas (1990:58) puts it, “one actor seeks to influence the behavior of another by means of sanctions or the prospect of gratification in order to cause the interaction to continue as the first actor desires.” Thus, it is no mistake that one commentator, Hilary Putnam (2002:114), uses the term ‘manipulation’ as a stand-in for Habermas’s expression ‘strategic action.’ Moreover, by commodifying outcomes, agents interact in a strategic fashion for the sake of rewards or pay-offs.¹⁵ Often, this takes the form of bargaining, a practice that Habermas (1996:177) does not necessarily identify with strategic action, but believes, according to McCarthy (1992:59), is a “second-best alternative that we [as deliberators] can turn to when discourse has shown there to be no common interest.” So, instead of communicatively validating claims and norms in discourse, strategically acting individuals mold their behaviour to incentive-based schemes that, simultaneously, promote their private interests and induce agreement.

As a counterpoint to communicative action, strategic action coordinates human interaction through the base means of influence and motivation. Unlike its communicative counterpart, this form of purposive social action cannot adequately bind agents together in collective endeavours. “In such cases [of strategic action],” Habermas (1990:36) states, “coordination of the subjects’ actions depends on the extent to which their egocentric utility calculations mesh.” Due to the weakness of a bond formed between agents who have overlapping self-interested objectives, strategic action constitutes a flimsy ground upon which to build reasoned consensus and coordinated social action. An example of a scenario in which strategic action consistently fails to generate cooperative agreement is the game of a “prisoner’s dilemma situation.” In this strategic game, the specific design of situational constraints, the model of human agency and the incentive structures induce only one rational strategy: defection.¹⁶ Since rationally motivated cooperation in a prisoner’s dilemma situation is, by

definition, impossible given the availability of choices and payoffs, participants who act strategically will always choose not to cooperate.¹⁷ In keeping with Habermas's unsympathetic view of strategic action, Thomas McCarthy (1991:66) characterizes these strategic games and the general game-theoretic approach to which they belong as one of the "hoarier forms" of "modern social theory."¹⁸

Rather than being motivated by self-interest and maximal payoffs, communicative actors orient their speech-acts towards rational and fair outcomes by fulfilling the discursive procedure's normative preconditions (Habermas 1993:58). Deliberators will pursue those outcomes which promote the public or common good rather than those that favor their private or partial interests. According to Habermas (1990:65), participants in discourse engage in a process of imaginative rehearsal or Meadian role-taking, "adopt[ing] the perspective of all others" for the sake of reaching a mutual understanding about their separate interests.¹⁹ So, participants in discourse must embrace a second-order interest in treating every other parties' interests equally--a meta-interest that prohibits the privileging of one's own first-order interests and ultimately amounts to a requirement of universal empathy or benevolence (Estlund 1990). In this way, Habermas's deliberative procedure purposely substitutes a communicative and other-regarding model of human agency for the economist's model of *homo economicus*.²⁰ This alternative model, or *homo communicans* in van Aaken's (2004:19) terminology, is of a free and equal agent who engages in political discourse in order to spell out the terms of his political equality and autonomy through a process of rational argumentation. In legal terms, Habermas (1995:130) conceives citizens' exercise of political autonomy through deliberation as their capacity "to view themselves jointly as authors of the laws to which they are subject as individual addressees."

Ideal and Real Discourse

Habermas distinguishes actual discourses into two general categories, legal and moral, both of which involve the redemption of contested validity claims and norms. For both moral and legal discourses to be rational, they must also abide by those guidelines established in another meta-norm: the discourse principle (or principle D). According to Habermas's (1996:127) discourse principle, "just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses." Principle D is to be an impartial method for justifying norms based on the actual--or, at the very least, the expected--consent of all agents who have relevant concerns (107).

Moral deliberations include discourses of justification and application. In discourses of justification, Habermas's (1990:65) citizens apply the universalization principle (or principle U) to contested moral norms, asking whether "all affected can accept the consequences and the side effects [that the] general observance [of the norm] can be anticipated to have for the satisfaction of everyone's interests." Once a moral norm is justified via principle U, the discourse of application proceeds, so that the norm is applied to a state of affairs and guided by a principle of appropriateness (Baynes 1991:42-9, 1992:112-5). "What must be determined here [in the discourse of application]," Habermas (1993:14) explains, "is which of the norms already accepted as valid is appropriate in a given case in light of all of the relevant features of the situation conceived as exhaustively as possible." While discourses of justification answer the question of *whether* the norm ought to be applied given an abstract and universalized outlook, discourses of application answer the question of *how* the norm should be applied given the unique conditions of the situation.²¹

Citizens within a democratic society must also settle issues more mundane than moral ones--particularly how to create fair and rational legal-political regulations. The testing of legal

norms is directed by the principle of democracy, which Habermas derives from the discourse principle and the set of rights that define legal personhood (1996:121-3). The principle states that “only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that has in turn been legally constituted” (110). Assuming that citizens in a pluralistic society cannot agree on a single ranking of values, they instead agree upon a normative procedure that legitimates decision-making outputs: viz., that all affected citizens have the opportunity to exercise their political autonomy by participating in the discursive-legislative process as free and equal agents (Habermas 1996:110, 1998:55).

Yet given the difficulties obtaining the conditions for an ideal speech situation, it is unlikely that discourse will produce those legal rules that encompass the generalizable interests of all affected parties. In practice, so the objection goes, the stringent presuppositions of ideal discourse cannot be met.²² As a result, deliberation must be institutionalized in order to ensure that norms and rules guiding actual legal and political more closely resemble the presuppositions of fair and rational argumentation (McCarthy 1992:62). According to Habermas (1996:92), “institutional measures are needed to sufficiently neutralize empirical limitations [e.g. scarcity of resources] and avoidable internal and external interference [e.g. repression and manipulation] so that the idealized conditions always already presupposed by participants in argumentation can at least be adequately approximated [in practice].”

In order to make the institutionalization of democratic deliberation a sufficiently open-ended project, the constitution of a democratic state must permit a multi-track model of discourse. According to Habermas’s (1996:314) account, public deliberation occurs “along two tracks that are at different levels of opinion- and will- formation, the one constitutional, the other informal.” Informal discourses take place within what Habermas terms “public spheres,” spaces in which publics--or groups of citizens, including social movements and private

organizations at all levels of civil society--interact and deliberate independently of the state, and in ways that are typically critical of state power.²³ Meanwhile, “[s]tanding in contrast to the ‘wild’ circles of communication in the unorganized public sphere,” Habermas (2001:773) states, “are the formally regulated deliberative and decision-making processes of courts, parliaments, bureaucracies, and the like.” Consequently, formal discourses, including situations of momentous constitutional choice and the ordinary decision-making of officials in state institutions, take place side-by-side with the informal discourses of citizens within civil society.²⁴ However, Habermas (1996:307-308) believes that informal discourses in public spheres are more susceptible to inequalities, manipulation and domination than formal discourses.

Formal discourses include the bureaucratic administration of law and policy, the making of laws by parliaments and legislatures, the popular election of political representatives and the issuing of judgments by judicial or adjudicative bodies. So, as Habermas makes clear, this view of deliberative decision-making supports the key features of formal discourses in the political systems of existing liberal democratic states. For instance, Habermas admits that majority rule is effective in “deciding substantive questions in courts, parliaments or self-governing agencies,” as well as in resolving deep disagreements between citizens, given its “internal relation to the search for truth” (Habermas 1996:179; McCarthy 1998:137). In contrast to aggregative theories of democracy, though, popular democratic decision-making does not occur exclusively through the private registration and aggregation of preferences. While voting and elections are necessary for democratic choice, since both convert public opinion into communicative and then into administrative power by way of legislation, they are not sufficient, since “public opinion that is worked up via democratic procedures into communicative power cannot ‘rule’ of itself, but can only point the use of administrative power in specific directions” (Habermas 1996b:29). Hence, the outcomes of electoral contests alone, even though they can direct state action, do not signify

meaningful social choice. Instead, meaningful collective decision-making--or what Habermas calls "will-formation"--requires electoral results coupled with public deliberation. On the other hand, unlike direct or plebiscite democracies, deliberative decision-making in public spheres does not directly command the exercise of the state's coercive power. If this were the case, then the distinction between formal and informal discourses, state institutions and public spheres, would break down.²⁵

Informal discourse can influence formal decision-making processes in various ways. Legislatures and courts in democratic societies make decisions that roughly translate the sovereign people's deliberated opinion, as formed through informal discourses, into laws and authoritative decisions.²⁶ According to Habermas (1996b:28), "[i]nformal public opinion-formation generates 'influence'; influence is transformed into 'communicative power' through channels of political elections; and communicative power is again transformed into 'administrative power' through legislation." Instead of resulting from the exercise of state power or propaganda, then, "opinion- and will-formation" is the consequence of communicative action, or the validation of claims and norms by groups of citizens (publics) participating in consensus-directed discourse. Citizens deliberate about everyday affairs and issues over extended periods of normalcy, which Habermas (1996:374) terms the "public sphere at rest," or about highly divisive issues during brief periods of crisis, at which time citizens mobilize as mass publics and engage in intense political activity. Even when deliberating within smaller groups, citizens communicate and act as if they are part of a potentially wider forum--a counterfactual "public at large" (390). In other words, no matter what size the deliberative group--whether a mass social movement or diminutive voluntary association--citizens must attempt to consider the interests of all those affected by the outcomes of their deliberations. Hence, by complying with the meta-norms of discourse--viz., the universalization, discourse and

democratic principles--deliberators will be more likely to reach an understanding about their generalizable interests. Support for a constitution's legitimacy also depends on post-founding generations' compliance with these meta-norms.²⁷ In their deliberations over its principles and rights, they "tap" and renew its normative content (Habermas 2001:774; Honig 2007:11).

Support for the legitimacy of the constitution as a common project--or what Habermas labels "constitutional patriotism"--deepens because citizens believe that, despite their differences, the constitutional essentials could be discursively redeemed. According to Habermas (1992:7), "the political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens awareness of the multiplicity and integrity of the different forms of life which coexist in a multicultural society."²⁸ The constitution protects the public sphere and its multiplicity of informal discourses, while the outcomes of such discourses provide valuable critical feedback to the state on how to reconstruct institutional arrangements, formal discourses and decision-making procedures (Habermas 1996:171). Hence, citizens perceive the constitution as a legitimating source of their shared identities as discursive subjects and potential originators of the law.

Before proceeding to the next view of deliberative decision-making, I will briefly consider some objections to Habermas's theory of deliberative democracy. First of all, it should be noted that consensus, as a decision-making outcome, is distinct from unanimous agreement, for it additionally requires that agents support the result for identical reasons. Usually consensus also requires a perfect alignment of deliberators' preferences. Habermas treats consensus as the regulative end that discourse aims toward, but one that, even he concedes, actual discourses will rarely, if ever, reach. This emphasis on consensus has worried many commentators, both those who are critical of and those who defend the Habermasian framework, but otherwise doubt whether consensus is a feasible goal.²⁹

Second, the presuppositions of Habermas's discourse ethics effectively prohibit appeals to and audience's emotion and other rhetorical devices from the deliberative process. In effect, Habermas banishes rhetoric to the domain of strategic action, just as Immanuel Kant (1965 [1787]:592, A738/B766) relegated it to the land of heteronomy (rather than autonomy) and Plato (1960:30-31, 454e) to the lesser realm of "conviction without knowledge." Yet, while rhetoric may serve to manipulate and coerce, it can also produce particular benefits in discourse, such as to frame the issue under consideration in new and more productive terms as well as sway otherwise recalcitrant agents to support a cause.³⁰

The same logic for admitting rhetoric into deliberation also applies to negotiation or bargaining. According to McCarthy, Habermas effectively demotes negotiation to a second-best alternative relative to communicative action. Habermas (1986:176) concedes, "[w]hen only particular interests are at stake, conflicts of action cannot be settled, even in ideal cases, through argumentation, but only through bargaining and compromise." However, bargaining's second-best status is not necessarily warranted in every case where parties have opposing interests. Instead, a negotiated outcome should only be prohibited when one party strategically employs illicit means, such as coercion or manipulation, to enforce or entice the compromise. Prohibiting negotiation *tout court* not only turns out to be unjustified, but also impractical; as Elster (1998c:14) comments, "[i]n practice, one cannot create the conditions for arguing without at the same time opening up a possibility for bargaining." So long as standards of fairness constrain the process, a bargaining process can provide both a just and an effective route by which to reach agreement.³¹ Habermas (1996b:25) accounts for such a "legitimate kind of bargaining" that relies on "a prior regulation of fair terms for achieving results, which are acceptable to all parties on the basis of their differing preferences." Also, opting for a negotiated outcome sometimes proves more feasible given the lower decision-making threshold.

Therefore, rather than a second-best alternative, the status of negotiation as a communicative method in democratic decision-making should be on par with, not subordinate to, deliberation.³²

Although these constitute substantial modifications to Habermas's theory, they are merited in light of the previous objections. Note, however, that even in its modified form, the Habermasian view of deliberative decision-making still remains predominantly cognitive or rationalist in its focus.

At this point, a second view of deliberative democratic decision-making takes center-stage.

Second View: Gutmann-Thompson

Amy Gutmann and Dennis Thompson's deliberative democratic theory finds its most thorough and persuasive expression in *Democracy and Disagreement* (1996) and *Why Deliberative Democracy?* (2004). In these works, the authors argue for two propositions: one, that politics is punctuated by continual moral disagreement; and, two, that deliberation is the best way to settle these persistent moral conflicts. "By making democracy more deliberative," Gutmann and Thompson (1996:52) state, "citizens stand a better chance of resolving some of their moral disagreements and with those that will inevitably persist, on terms that all can accept."

The second view of deliberative democratic decision-making, as I shall now present it, is centered on Gutmann and Thompson's theory of deliberative democracy, but also draws on John Rawls's notion of public reason and elements from Seyla Benhabib and John Dryzek.

The Meaning of Deliberative Democracy

Although they share a general commitment to liberal democracy, Gutmann and Thompson (1996:370 ff51) attempt to distinguish the specifics of their own theory from Rawls's "paradigmatic" account. The authors of *Democracy and Disagreement* express the "core idea" of

deliberative democracy in the following manner: “when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions” (1). So, how does their theory differ from Rawls’s? Like Rawls, Gutmann and Thompson argue that deliberation should be constrained by substantive principles, such as the protection of basic liberties and equality of opportunity. Their differences from Rawls must instead concern the logistics of deliberation—that is, how and by whom it occurs. In Rawls’s case, deliberation in its purest form occurs in courts, through the adjudication of legal disputes by judges and the activity of interpreting and applying legal-institutional norms in conformity with the principles of justice enacted in a constitution. Gutmann and Thompson, on the other hand, see deliberation exemplified in the activities of popular assemblies, where policy and law are made by citizens and their representatives. Members of popular assemblies not only draft bills and authoritatively pass them into legislation; but they also formulate and revise principled standards for regulating their own reasoned deliberations.³³

The point at which Gutmann and Thompson diverge from Rawls is in their distinctly different prioritization of constitutional essentials and deliberative procedures. Gutmann and Thompson (1996:39) state the difference: “His [Rawls’s] theory [of public reason] remains constitutionalist . . . in the priority it gives to principles of justice over processes of deliberation . . . Although Rawls implies that deliberation is important, he does not pursue the implication.”³⁴ To evaluate Gutmann and Thompson’s claim that Rawls does not seriously consider the implications of deliberative democracy requires a more thorough elaboration of Rawls’s concept of public reason.

Rawls on Public Reason. The problem that public reason is meant to address is that of how to produce a stable political regime in a pluralist society. One central assumption is that citizens must be willing to support the existence of stable institutional arrangements and to do

so for the right reasons.³⁵ However, in a pluralist society, instability is a manifest threat because of the competition between citizens with different and often incompatible conceptions of the good, or what they perceive as the best way to live. As a result, citizens and the groups to which they belong compete to control the coercive power and policy-making function of the state. Yet, if a single comprehensive doctrine receives state sanction, then this exclusive endorsement can potentially lead to the brutal suppression of citizens favoring rival doctrines, or alternative conceptions of the good (Rawls 1996:37).

In order to produce a stable regime, citizens must be willing to uphold a set of shared political values. Since imposing a single conception of the good would be far too oppressive, they must agree to be reasonable, i.e., to suggest and comply with neutral set of norms that will govern their interaction and to accept the “burdens of judgment” that come with living in a pluralist society (Ferrera 2004:580). When citizens accept the burdens of judgment, they recognize that, given their deep differences in comprehensive religious and philosophical doctrines, full consensus concerning their respective values is unlikely (Rawls 1996:60). In addition, as Rawls (1996:49) explains, reasonableness demands that “[p]ersons . . . are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance others will likewise do so.” Thus, citizens are mutually obligated, in this contractarian sense, to be reasonable and follow the principles of justice that govern their political society.³⁶ Legitimacy accrues to political institutions in the degree to which they remain neutral towards their diverse and typically discordant worldviews.³⁷

Legitimacy requires a neutral framework of principles to which all citizens may appeal in their use of public reason. Principles of justice provide fair terms of cooperation through a system of rights and protections that can successfully accommodate the “fact of reasonable pluralism”—or the reality that citizens with deep differences need to coexist in peaceful and

tolerant ways.³⁸ Otherwise, without the rights and protections afforded by liberal institutions, majorities would endanger the freedom of minorities, impose upon them a single conception of the good, and consequently jeopardize the polity's stability. To ascertain what those fair terms of cooperation would be, citizens engage in a thought experiment, imagining themselves in an "original position" of perfect equality, where they would choose the principles to govern a just society without knowledge of their personal endowments or their private fortunes in the eventual distribution of goods. With the introduction of public reason, Rawls (1996:11-15) limits the subject-matter of political talk to exclusively public matters, in other words, to what one would contemplate in the thought experiment of the original position: namely, the "basic structure of a just society."

In *Political Liberalism* (1996), Rawls employs a "political conception of liberalism" in order to negotiate the problem of stability in a pluralist society. According to this conception, the plurality of views and values that citizens hold should overlap and, in the area of shared agreement, yield a principled account of justice.³⁹ This "overlapping consensus" is made possible by two features of citizens: (i) their status as free and equal citizens and (ii) their common understanding of political society as a "fair system" of long-term cooperation.⁴⁰ Rawls's notion of public reason supplies an ideal for citizens to struggle towards in regulating their political talk: "the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood" (226). As a result, citizens who attempt to realize the ideal of public reason bracket the diverse aspects of their worldviews when engaging in public political discourse. Public reasons must also be offered in the specific setting of "public forums," including legislative, executive and judicial institutions as well as among

citizens voting “in elections when constitutional essentials and matters of basic justice are at stake” (215). According to Rawls, legal institutions, and particularly the Supreme Court, exemplify the kinds of state organizations in which members deftly exercise public reason through deliberation (231). However, reason brought to bear within forums nested in the “background culture,” including in private associations, scientific groups, churches and colleges, need not be public (220). Consequently, the kinds of reasons offered and intended to count as public in public forums must pertain to political issues, such as matters of justice and questions concerning the constitution--in other words, to the subject-matter of a “political conception of justice.”⁴¹

Rawls’s decision to limit the exercise of public reason to a particular subject-matter and setting gives rise to a series of trenchant criticisms by Maeve Cooke, Seyla Benhabib and John Dryzek. According to Cooke (2000:958), Rawls’s notion of public reason is insufficiently dialogical and transformational to live up to the deliberative ideal: “public reasoning is presented by Rawls as an essentially *‘monological’* or *private* process . . . not a dynamic process of reasoning that generates normative agreement . . . but an idea imposing a constraint on publicly acceptable political principles.” With respect to the construction of Rawls’s original position, Cooke’s criticism resounds with especial force, since the thought experiment does not resemble a public procedure of reason-giving, but rather an introspective process of justification.⁴² For Benhabib, Rawls’s theory, owing to the notion of public reason, is simultaneously too little and too much; too little in the way of procedural deliberation; too much in the manner of excessive restrictions on the substance and setting of deliberation. First, Benhabib (1994:36) alleges that Rawls’s notion of public reason unnecessarily constrains the kinds of issues that citizens may attempt to place on the public agenda. In addition, the model restricts the ways in which agents and institutions are allowed to justify their positions on public issues. For instance, reasons based on

an individual's religious views do not qualify as public reasons because they are inaccessible to those who do not share their religious worldview. Lastly, Benhabib contends that Rawls artificially cordons off the legitimate public space of discourse, excluding voluntary and private associations and including only organizations directly tied to the state. Therefore, on Benhabib's recommendation, Rawls should ease the domain restriction on public reason's subject-matter and extend its exercise to spheres outside of state institutions and state-sponsored forums.

Dryzek also critically evaluates Rawls's concept of public reason; yet differently than Benhabib, he contrasts it with the positive features of Gutmann and Thompson's theory of deliberative democracy. In his estimation, Rawls's theory, unlike Gutmann and Thompson's, is incomplete.⁴³ Dryzek (2000:15) argues that Rawlsian agents would deliberate too uniformly: "Rawls implies that all individuals will reason in the same way, and must ultimately reach the same conclusions." In other words, public reason guarantees consensual agreement by so limiting the domain of legitimate reasons that all agents are compelled to rationalize the outcome in an identical fashion. In addition, Dryzek claims that Rawls's notion of public reason imposes exogenous constraints on the discussions of agents: "there is nothing to interactions that induces individuals to reason and behave according to the precepts of public reason. Public reason is a set of commitments that individuals must adopt before they enter the public arena, not what they will be induced to discover once they are there" (Ibid). Rawlsian public reason thereby forces deliberators to conform their statements and reasons to antecedently (or exogenously) formed restrictions on the content of deliberation. Consequently, Rawls's concept of public reason eliminates the opportunities for agents (i) to configure the discursive constraints within the process of deliberation itself (i.e., endogenously) and (ii) to reach agreement based on a pluralistic rationale.

Gutmann-Thompson on Deliberative Disagreement. Unlike Rawls's account of public reason, Gutmann and Thompson's theory resembles a more comprehensive account of deliberative decision-making. They do not restrict the subject-matter that deliberators will consider to political and constitutional matters alone. Moreover, deliberators may introduce partial and egoistic views, which are not directed exclusively toward the common good, into their deliberations. "In the hands of Gutmann and Thompson," Dryzek (2001:17) declares, "deliberative democracy begins to look like a complete theory of deliberative democracy." Instead of proscribing the scope of deliberation's possible outcomes to consensus alone, the authors of *Democracy and Disagreement* allow deliberation to result in mutual respect and understanding. Consensus is not always reached in deliberation due to the many obstacles found in human nature and in the limiting conditions of the deliberative situation.

Arriving at consensual agreement can be blocked, according to Gutmann and Thompson (1996:41-44), by at least four kinds of obstacles: (i) limited resources, (ii) narrow self-interest (or "limited generosity"), (iii) deep differences in commitments (or "incompatible values") and (iv) imperfect knowledge (or "incomplete understanding") about what is in the interest of any individual or all members of the group. In contrast to neo-classical economists (including constitutional economists), Gutmann and Thompson (1996:21) maintain that "[e]ven if economic interests (including both motives and justifications) correlated perfectly with political positions, the issue still will not be reducible to self-interest."⁴⁴ In other words, not all disagreement can be understood in terms of conflicts between agents possessed of exclusively self-regarding motives. Instead, it is possible to encourage people through deliberation to take a broader moral perspective on their common situation--to glimpse what Rawls (1996:49) calls "fair terms of cooperation"--a view that, in turn, makes people more generous and less self-interested in their social relations with others.⁴⁵

Another claim that Gutmann and Thompson make is that deliberation allows people to both compete for scarce resources and to live together civilly--i.e. tolerating each others' differences in values, interests and knowledge. David Hume claimed that justice as a convention develops in human society as a way of resolving conflicts over the proper distribution of goods. Hume's argument assumes two things: one, such resources will not be so abundant as to satisfy every human need; and, two, that humans, by their very nature, will not display unlimited munificence. Gutmann and Thompson (1996:22) claim that Hume misses at least two other significant sources of disagreement: (i) incompatible values and (ii) incomplete understanding, both of which are "more deeply rooted in the human condition than Humean circumstances of justice would have us believe." Even with shared conventions of justice, individuals with deeply conflicting moral values or with limited knowledge of their situation will not always overcome their initial disagreement.

Gutmann and Thompson's conception of deliberative politics relies on two sets of principles—(i) formal-procedural and (ii) substantive-constitutional--to regulate the deliberative process of decision-making and to assist agents in overcoming the aforementioned obstacles to agreement.

Procedural-Formal Principles. In the process of deliberation, agents must regulate their behaviour in accordance with a set of procedural principles, which Gutmann and Thompson (1996:53-163) define as (i) "reciprocity," (ii) "publicity," and (iii) "accountability." The substantive outcomes of deliberative decision-making processes encompass created laws, policies and proposals, which are legitimated through a procedure of justification or reason-giving. These principles establish standards of morality and fairness for deliberation as it prototypically occurs in a public assembly, whether composed of citizens or their

representatives. Each of these procedural principles applies to the process as well as the substance of deliberative democratic decision-making.

First of all, Gutmann and Thompson's procedural standard of reciprocity shares many things in common with the Rawlsian notion of public reason. "Reciprocity," on Gutmann and Thompson's definition (2001:98), states "that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact." Comparable to public reason, this notion of reciprocal reason implies "the capacity [of citizens] to seek fair terms of social cooperation for their own sake" (52). Even when faced with the prospect of deep disagreement, reciprocity in deliberation requires that each citizen give reasons to support her views. These reasons are those that could be found acceptable by other similarly well-intentioned citizens, who are likewise willing to provide publicly acceptable reasons in support of their positions. Also consistent with public reason, Gutmann and Thompson's notion of reciprocity demands a special pedigree of reason in order for it to count as publicly acceptable and justifiable.

Reciprocal reasons must stand half way between prudence and impartiality. As prudent, reasons are based on self-interest and strategic motivation. As impartial, they are warranted by comprehensive religious and philosophical doctrines (e.g. truth-seeking) and altruistic motives (53). Reciprocity is an improvement over prudence or impartiality because it allows agents to refine the grounds for agreement, including mutually acceptable terms of fairness and morality. In the face of deep disagreement, prudent decision-makers who attempt to negotiate towards a mutually advantageous outcome will often deadlock when neither party can benefit without a corresponding loss by the other party. In this case, self-interest proves too thin a basis for agreement. Likewise, decision-makers motivated by impartial reasons will attempt to prove the incontestability of their views by demonstrating their moral superiority. But when confronted with others holding incompatible views and values, citizens rarely advance toward a decisive

collective outcome. Instead, they must be satisfied with mere toleration.⁴⁶ In other words, truth is also too weak a ground for consensus. What cooperative agreement through deliberation requires is reciprocity; and what reciprocity requires is that agents “appeal to reasons that are recognizably moral in form and mutually acceptable in content” (57). Hence, to provide reciprocal reasons, similar to Rawls’s public reasons, demands that agents bracket their selfish motives and comprehensive worldviews. Only through reciprocal reason-giving can deliberators expect each other to provide accessible moral reasons and to pursue fair terms of cooperation.

The procedural standard of reciprocity also resembles the public justification tenet. To recall, the public justification tenet holds that in order for a political decision to be democratic and legitimate, the views and interests expressed in it must withstand the test of deliberation, wherein each participant publicly justifies his position and preferences to his fellow deliberators. “When citizens deliberate,” Gutmann and Thompson (1996:55) state, “they seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons.” Moreover, the testing of reasons in deliberation must be actual, not hypothetical, in order to legitimate the outcomes (Gutmann and Thompson 2001:100). The quest for deliberative justification presupposes that agents are similarly motivated to justify their claims to others. Otherwise, arguments and reasons “cannot reach those who refuse to press their public claims in terms accessible to their fellow citizens” (Ibid). So, similar to Rawls’s constraints on public reasons, claims based on reasons of self-interest and religion must be set aside on the rationale that they are not widely accessible to citizens holding diverse and incompatible comprehensive doctrines.

However, these limits on the pedigree of reasons offered in deliberation do not eliminate bargaining and negotiation from the decision-making process. Gutmann and Thompson (2001:114) permit negotiation to either replace or accompany deliberation in the decision-

making process: “Whether political bargaining satisfies reciprocity (or any other moral standard) depends in part on the actual consequences of political bargaining in a particular social context. If those consequences can be shown to be mutually justifiable to the people who are bound by them, or at least more mutually justifiable than the consequences of deliberative processes, then to this extent substituting bargaining for deliberation would satisfy the fundamental aim of democracy.” Similar to the rationale for allowing parity between negotiation and deliberation (argued for in the last section), bargaining is permitted so long as it conforms to the procedural standard of reciprocity, including the requirement that outcomes withstand the test of justification and promote fair terms of social cooperation.⁴⁷ Gutmann and Thompson (1996:55) claim that “[d]eliberative reciprocity shares” with prudence and bargaining “this basic concept of mutual exchange but gives it moral content that formally resembles impartiality.” Indeed, a decision-making process characterized by both deliberation and negotiation takes on the trappings of a morally defensible exchange process.

The procedural constraints of publicity and accountability demand that information about the process of deliberation and the substance of its outcomes be disclosed to citizens. Publicity is an especially pressing exigency for those citizens who are actually and potentially affected by the decisions, policies, laws and proposals that public assemblies enact when operating in their deliberative capacity. According to Gutmann and Thompson (1996:96), “institutions of democracy should protect citizens against the temptation of officials to forsake publicity for the sake of expediency.” In other words, deliberative outcomes and processes must be publicized, rather than kept secret, in any but the most exceptional of circumstances. In addition, participants in deliberative assemblies need to provide arguments and reasons to those who are concerned and affected by the results of their discussions. As Bernard Manin (1987:359) confirms, “decisions are legitimate because they are, in the last analysis, the outcome

of the deliberative process taking place before the audience of all the citizens.” Hence, members of deliberative bodies must justify their decisions to parties both inside and outside of the forum.⁴⁸ By refusing to keep their reasons for supporting the enactment of a policy or law secret, these deliberators satisfy the procedural standard of accountability: “Public accountability enables citizens and their representatives . . . to find ways to limit its [i.e. secrecy’s] scope . . . [for] officials tend to insist on more than they need. But when challenged in a public forum, they may find that they can do just as well with less” (104). Therefore, accountability requires that representatives justify their decisions publicly to an audience of their constituents.

Substantive-Constitutional Principles. While procedural principles place limits on the procedures of deliberation that produce consequences for both the process of and the substance of democratic decision-making, substantive principles place independent constraints on the outcomes of deliberation with similar effect. Gutmann and Thompson’s (1996:199-229) substantive principles include (i) “basic liberty,” (ii) “basic opportunity” and (iii) “fair opportunity.”

Basic liberty requires that the outcomes of deliberation respect a comprehensive list of rights and freedoms, including rights to free association, conscience, bodily integrity, speech and even to a minimum level of personal welfare. However, this conception does not go uncontested. It offers a middle way between the positions of libertarians, who defend only a right of non-interference by the state, and egalitarians, who advance the thesis that rights should include entitlements to a minimal level of welfare—e.g., in terms of food, shelter, vocation etc.--provided by the state (200). Relying on the distinction between positive and negative liberty, libertarians advocate wholeheartedly for the protection of negative liberty only and egalitarians for protection of positive liberty, even at the cost of sacrificing a degree of negative liberty.⁴⁹

The principle of fair opportunity complements the principle of basic opportunity by expanding the chances for citizens to secure positions open to all. Gutmann and Thompson (1996:301) see the provision of basic and fair opportunities as a prerequisite for energizing citizens to meaningfully engage in deliberation: “Empowerment is a critical aim in deliberative democracy. If citizens are to participate effectively in deliberation, they must enjoy basic opportunities that include adequate income and decent jobs.” The principle of fair opportunity specifically directs the state to determine the most equitable conditions under which citizens can compete for these government positions (e.g. public service exams), and thus allows citizens to factor their chances of success into their overall choice of life plans. While libertarians assume that any process of hiring is acceptable so long as it does not infringe on an individual citizen’s negative liberty, egalitarians endorse affirmative action schemes that correct past wrongs and level the competitive hiring playing field.⁵⁰

Once more, Gutmann and Thompson do not resolve the tensions between libertarians and egalitarians by choosing to vindicate either of these views. Instead, they recommend a mediated solution secured through deliberation and reflective testing. In order to determine the most agreeable proportion of libertarian restraint and egalitarian activism in the formulation of standards of equal opportunity, citizens should reciprocally exchange reasons to reach a common understanding and, ultimately, agreement about how to construe a principle of equal opportunity. After obtaining an outcome, deliberators and non-deliberators alike, on Gutmann and Thompson’s (1996:353) account, may test whether the resultant “view [or outcome] fits with considered judgments about particular cases” and whether it “provides a coherent and workable way of thinking about and practicing deliberative politics.” Reminiscent of Rawls’s (1971:20-21) notion of “reflective equilibrium,” agents determine the acceptability of the

outcome based upon how it aligns with their personal moral intuitions, on the one side, and moral theories, on the other, making slight alterations to each until a relatively good fit obtains.

Democracy after Pure Proceduralism

Obtaining a fair or just outcome from a decision-making process may seem as simple as defining the procedure that guarantees a fair or just result. However, the problem of designing such a flawless procedure rarely admits of an easy solution. To illustrate this point, it helps to refer to a distinction employed by John Rawls (1971:74-75) between perfect, imperfect and pure procedural justice. To use Rawls's example of perfect procedural justice, a group of persons is to divide a cake and the fair outcome should be an equal one; the best procedure to ensure that the outcome adheres to the egalitarian standard of fairness is that the first person divides the cake in half and then acquires the last piece. This is a case of perfect procedural justice, since both the procedure and the independent criterion for evaluating the result's fairness always coincide to affirm the just outcome. Unfortunately, perfect procedural justice is uncommon among most decision-making procedures.⁵¹ More commonly cited are cases of imperfect procedural justice, for which "the characteristic mark," Rawls tells us, "is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it" (74). The best illustration of imperfect procedural justice is a criminal trial, whereby regardless of the fact that all the rules of evidence and applicable statutes are designed to secure the conviction of a guilty defendant, a guilty person may be exonerated or an innocent person convicted (74-5). In contrast to both the perfect and imperfect versions, pure procedural justice lacks an independent standard for the fairness of the outcome; rather, the procedure and its background conditions guarantee that the outcome is fair or just. According to Rawls, a "fair procedure translates its fairness to the outcome only when it is actually carried out" (75).

In the deliberative decision-making process, pure proceduralism means that conformity to the conditions and procedures of a fair discourse (e.g. no lying, manipulation or coercion) constitutes the justice of the outcome. No self-standing criterion or substantive principle should operate as a means to assess the outcomes of deliberation; instead, only the acceptability of the procedures and conditions by which the deliberations are conducted ought to matter.⁵² In the purely proceduralist mold, deliberative theories emulate aggregative theories of democracy, for “the collective outcomes produced need no further justification beyond the rationale for the method itself” (Gutmann and Thompson 2004:15). Where they still differ, though, is in their treatment of agents’ preferences: aggregative theories take preferences as given (or exogenous to the decision process), while deliberative theories model preferences as mutable (and thus endogenous) insofar as reasons can be offered in defence of their alteration.⁵³ Nonetheless, if approximating a pure deliberative procedure vindicates the outcome, then this procedure must render the outcome legitimate and correct. Gutmann and Thompson oppose any model of deliberative decision-making cast in this pure proceduralist mold.⁵⁴

However, some standard of legitimacy must also be used to test the acceptability or epistemic value of reasons that support the outcome. As a result, deliberative democracy is subject to a serious dilemma: (i) if the legitimacy of the outcome is constituted through a pure procedure, then the procedure cannot also legitimate the reasons that equally vindicate the outcome, so one must give up the hope of acceptable supporting reasons; and (ii) if these reasons are to acceptably justify the outcome, then they must be legitimated by a standard independent of the deliberative procedure itself, in which case the procedure is no longer pure.⁵⁵ One possible solution to this dilemma is to make the norms for acceptable reasons and outcomes immanent within the procedure or process of communication itself, so that they may both justify and constitute the legitimacy and correctness of the outcome without requiring an

outside standard. This is the solution chosen by Habermas. Gutmann and Thompson (1996:352) select a different solution, viz. to make both the reasons and the legitimacy of the outcome depend on a set of theoretically “bootstrapping” or process-driven principles: “Deliberative democracy expresses a bootstrap conception of the political process: the conditions of reciprocity, publicity, and accountability that define the process pull themselves up by the means of the process itself.” As free-standing principles, the procedural kind (reciprocity, publicity and accountability) operate to regulate the conditions of deliberation, while the substantive kind (basic liberty, basic opportunity and fair opportunity) act to monitor the content of deliberation. Working in concert with each other and the process itself, they are capable of successfully legitimating deliberative outcomes (348). However, they do not resemble first principles; nor are they supported by other first principles or foundational assumptions. Instead, they derive their own justification and authority in “the land of middle democracy,” where direct appeals to moral intuitions and arguments about concrete cases, not unassailably firm foundations, lend legitimacy to these mid-level principles.⁵⁶

An example of a pure proceduralist theory of deliberation can be found in Carlos Nino’s (1996) epistemic account of deliberative democratic decision-making. Nino notices that in most decision-making processes, agents will elect to shift the decision rule from unanimity to majority in order to overcome feasibility issues, such as limited time and minority holdouts (118). The unanimity rule is thought to provide an effective surrogate for the epistemic standard of impartiality, which determines whether an agent is capable of knowing and empathetically considering the views and interests of every party to the choice situation--a standard that is commonly associated with moral dialogue. “When moral discourse is institutionalized and replaced, due to pragmatic considerations, by a regimented surrogate such as majority rule,” Nino states, “one must examine whether the surrogate still guarantees, even if to a lesser degree,

the requirement of impartiality” (117). Likewise, if each party agrees to accept a change from unanimity to majority rule and does so in a manner free from manipulation or coercion, then majority rule becomes the operative standard of decision-making. Majority rule substitutes for unanimity because it, more or less, approximates the epistemic notion of impartiality in moral dialogue. On analogy with choosing surrogate decision rules, agents can agree to institutionalize a rigorous set of discursive procedures that roughly approximate the constraints of moral dialogue, so that “the results are presumed to be good because they are produced by that procedure” (118). Hence, Nino recommends a directly democratic process by which citizens meet, discuss and determine, according to a previously accepted decision rule, the constitution of deliberative democracy--that is, the makeup of a suitably constrained set of pure deliberative procedures.⁵⁷ Consequently, strict conformity to these procedures will dictate the acceptability of outcomes in future deliberations.

Gutmann and Thompson oppose the pure proceduralist strategy of deliberative democrats, such as Nino, for multiple reasons. First of all, to legitimate decisions solely on the basis of the conditions and procedures of deliberation, and not by reference to independent standards of acceptability, Gutmann and Thompson (2001:96) claim, fails to regard citizens as free and equal agents. To this, pure proceduralists reply that, “[a] theory that contains substantive principles unduly constrains the democratic decision-making process, including the process of deliberation itself” (Ibid.) To nullify the outcome of a deliberative decision-making process because it violates substantive principles, such as basic liberty and fair opportunity, would then undermine the democratic authority of agents to deliberate and decide for themselves.⁵⁸ Gutmann and Thompson argue that to overlook the fairness of outcomes, as pure proceduralists do, can lead to even more egregious failures to treat citizens as free and equal. For instance, pure proceduralists who embrace majority rule as a pure procedure will favor

outcomes in which, for instance, a majority prohibits the member of a minority party defeated in an electoral contest from criticizing the result, or stops them from afterward competing on fair terms for positions in the state bureaucracy. However, this objection to pure proceduralism is not limited to the argument that strict compliance with a procedure, such as majority rule, can produce morally objectionable outcomes--although they do believe this to be the case. What they are more concerned about is the extent to which substantive values and principles persist as constraints on deliberation, even when the process is claimed to be purely procedural.

The second reason for rejecting pure proceduralism is that it uncritically inherits a set of hidden and fixed substantive presuppositions, which though independent of the procedural norms and principles, nevertheless regulate and constrain the range of possible outcomes. According to Gutmann and Thompson (1996:96), pure proceduralists “assume that an outcome is fully justified if it satisfies substantive principles that are completely distinct from the process.” So, despite their claims that they do not appeal to any criteria apart from the procedures, they almost inevitably smuggle into their assessments of decision-making results independent evaluative standards.⁵⁹ In addition, if these standards go unnoticed, then they cannot be critically scrutinized and reformed to suit changing exigencies. In contrast, “[b]oth procedural and substantive principles are systematically open to revision in an ongoing process of moral and political deliberation” (Ibid.) But since substantive and procedural principles inevitably operate in deliberation, their existence and role in the process must therefore be openly acknowledged and subject to an open-ended process of critical review.⁶⁰

How does Gutmann and Thompson’s account of deliberative decision-making affect democratic institutions and their legitimacy? In the spirit of Cohen’s mirroring metaphor, the two theorists propose that the process of designing institutions should emulate the deliberative model. Although Gutmann and Thompson’s (1996:358) examples emphasize deliberation

within either direct or representative popular assemblies, they recommend extension of the practice to almost every kind of democratic forum and institution: “The essential idea is that all institutions of government have a responsibility for deliberation.” Deliberation ought not to be sequestered within the judicial branch of government, to become the sole reserve of the courts. Institutionalizing the deliberative ideal, Gutmann and Thompson (2001:89) claim, requires both the reform of existing institutions and the invention of novel ones: “To fulfill those demands [for more deliberation], we may need to consider changes in our institutions, and perhaps the creation of new ones.” In addition, public reasoning and deliberation needs to carry over to non-political contexts and institutions. “Unless citizens have the experience of reasoning together in other [non-governmental] institutions in which they spend more of their time,” Gutmann and Thompson (1996:359) maintain, “they are not likely to develop the interest of the skill that would enable them to deliberate effectively in politics. That is why it is so important that the processes of decision making which citizen encounter at work and at leisure should seek to cultivate the virtues of deliberation.” Their point is similar to Robert Putnam’s thesis (2000) that participation in private and public organizations (e.g. bowling leagues, PTA and political parties) builds “social capital,” which parlays into more active levels of political engagement.⁶¹ More joining translates as more reciprocity, or familiarity with the principle that if one contributes to the public good, other will be more likely to do the same.⁶² Likewise, Gutmann and Thompson identify the practice gained from deliberative choosing and reciprocating in the workplace, recreational associations and civil society institutions as valuable for fostering greater aptitude and efficacy at deliberating in political contexts. Hence, both political and social institutions matter in promoting the activity of deliberative decision-making and the capacities necessary to do so in an improved manner.

Even though Gutmann and Thompson's six principles place substantially weaker constraints on deliberation than Rawls's notion of public reason, they nonetheless fall prey to a version of Dryzek and Benhabib's objection to Rawls. To recall, Rawls severely restricts the subject-matter domain of deliberation to issues of basic justice and constitutional essentials as well as the setting of deliberation to state-sanctioned forums. "[T]he content of [Rawlsian] public reason is pre-determined by a liberal conception of justice," Rainer Forst (2001:352) explains, "and [thereby] restricts possible claims and arguments." Although Gutmann and Thompson's constraints on deliberation are not nearly as restrictive as Rawls's, they do impose formidable restrictions on (i) the accessibility of reasons and (ii) the economy of moral deliberation. According to Weithman (2005:269), "[m]any deliberative democrats [including Gutmann and Thompson] think participants in public deliberation should not appeal to considerations the reason-giving force of which cannot be appreciated by those to whom they are offered. " He continues, "[s]uch considerations are sometimes described as 'inaccessible' to those who cannot appreciate their reason-giving force" (Ibid.) For example, given an agent's fundamentalist religious beliefs, her bonafide reason for opposing euthanasia is that, according to the text of the Bible, the deed of killing someone is sinful and punishable by God. However, she would be forced under Gutmann and Thompson's (1996:56) constraint to justify her position on the basis of "relatively reliable methods of inquiry," that is, on grounds that are acceptable to non-fundamentalist, but which are not her own.⁶³ As Shapiro (1999:31) notes, "[t]he Gutmann/Thompson model works only for those fundamentalists who also count themselves fallibility democrats." Moreover, according to Weithman (2005:279), while Gutmann and Thompson do require that deliberators display a commitment to providing accessible reasons, "it is possible to use public reasons while engaging in thoroughly self interested behavior."⁶⁴ So, deliberation absent the genuine airing of sectarian views and reasons

proves incomplete; as does deliberation in which agents misrepresent their genuine reasons for supporting or disputing a claim.⁶⁵ Similar to Benhabib's critique of Rawls's notion of public reason, Gutmann and Thompson's constraint excessively restricts the kinds of reasons that can be justifiably offered by deliberators in defending their positions. In this respect, Dryzek (2000:15) is too eager to exempt Gutmann and Thompson's theory from his argument against Rawlsian public reason: namely, that it is a constraint which "individuals must adopt before they enter the public arena, not what they will be induced to discover once they are there." Therefore, Gutmann and Thompson exogenously constrain deliberators in a way that discourages sincere reason-giving and encourages them to dissemble.

Lastly, Gutmann and Thompson's principle of the economy of moral disagreement exaggerates the central place of moral conflicts in deliberation and the extent of its irenic effects. In order to accommodate the fact of pluralism, they maintain that it is necessary for deliberators to capitalize on areas of moral agreement and downplay areas of moral disagreement--in other words, to search for common ground in any moral conflict.⁶⁶ This gives rise to another objection. Often, moral disagreements are so deep, involving irreconcilable value-systems, that one party's concerns will be entirely disregarded by the other, thus making the search for common ground a hopeless task. As Knight and Johnson (1994:286) argue, deliberation is not guaranteed to produce peaceful effects. Instead, it can intensify rather than moderate or eliminate conflict.⁶⁷ Therefore, on both grounds--the overstated role of moral disagreement in deliberation and the limited extent of its irenic consequences--Gutmann and Thompson's principle of the economy of moral disagreement proves indefensible, and thus merits removal from the second view.

At this stage, the exposition and analysis turns to the third and last view of deliberative democratic decision-making.

Third View: Ackerman-Fishkin

The third view of deliberative democracy to be discussed is modeled after Bruce Ackerman and James Fishkin's individual and collaborative works. With them, the deliberative ideal takes on a more practical orientation than either of the initial two views.

Ackerman on Constitutional Dialogue

Two of Ackerman's earlier works are particularly germane to the topic of deliberative decision-making: (i) the essay "Why Dialogue?" (1989) and (ii) the paired volumes of *We the People* (1991, 1998). In the former work, he distances deliberation from Habermas's conceptually abstract notion of an ideal speech situation and connects it with the more practical alternative of dialogue as "the first obligation of citizenship" (6). In the latter, he proposes that U.S. constitutional history has affirmed a dualistic model of deliberation and law-making, whereby the lower or normal type of deliberations and legislative acts derive their legitimacy from the higher or constitutional type.

Ackerman's "Why Dialogue?" examines the function that dialogue serves in the life history of a morally contemplative agent. One function of dialogue is that it allows the moral inquirer to progress in her truth-seeking efforts. While the Socratic activity of engaging in discussion with all comers is a worthwhile calling, it is certainly not one that all, or even most, persons are drawn to. Assuming limited resources (e.g. time and material means), most people would rather dedicate these resources to personal and professional affairs, such as engaging in work and play, business and family matters.⁶⁸ However, lacking either personal motivation or moral compulsion, moral agents are likely to abstain from dialogic activity altogether. In response to this live possibility, Ackerman (1989:6) surmises that "[a]lthough a morally reflective person can permissibly cut herself off from real-world dialogue, a responsible citizen cannot

with similar propriety cut herself off from political dialogue.” Thus, the duty to engage in political dialogue is incumbent upon the individual, not some external authority. This leads us to ask Ackerman: Why does dialogue in a public and political context become more imperative on the moral agent than it does in a private or personal context?⁶⁹ Ackerman devotes the remainder of the essay to the task of answering this question.

Ackerman distinguishes his own dialogical model of moral and political agency from Habermas’s model of discourse ethics. Habermas proposes that the ideal speech situation serves as a regulative check on the process of discourse, so that moral agents are more likely to arrive at moral truth if they approximate its conditions.⁷⁰ However, Ackerman (1989:8) objects that the conditions of the ideal speech situation are too remote from the conditions of everyday life to provide much guidance in understanding how actual dialogue operates: “the world of practical politics does not seem at all close to anybody’s idea of an ideal speech situation.” In day-to-day political discussions, interlocutors do manipulate, coerce, spread falsehoods and engage in strategically-motivated symbolic behavior. Given this disjuncture between Habermas’s ideal discourse setting and the real-world circumstances of adversarial politics, the only practical choice for conceiving political dialogue is to reject such abstract idealizations: “I am not interested in emphasizing the role of talk in some ideal world we shall never inhabit. I am talking about the very imperfect world in which we live” (7). As an alternative to idealized discourse, Ackerman proposes to ground his case for the increased importance of dialogue in political over moral contexts “upon the distinctive way liberals conceive of the problem of public order” (8).

Since most modern democratic polities include multiple groups competing for control of the state’s policy-making process (Rawls’s “fact of pluralism”), dialogue serves as a reasonable technique for settling group conflicts and allowing citizens to live peacefully together.⁷¹ To

maintain stability and order in a pluralistic political society therefore requires that citizens feel a sense of duty to engage in mutually respectful dialogue. In this way, citizens are bound by what Ackerman calls “the *supreme pragmatic imperative*”--meaning that they must participate in dialogue with their fellows for the sake of confronting and resolving their common quandaries, but not for the sake of settling questions of moral truth.⁷² Although many of their deeply-felt moral conflicts will likely persist, dialogue nevertheless provides a pragmatically valuable or useful tool for citizens to peacefully engage in political interaction, and thus for liberal societies to maintain public order.

In the final chapter of *We, the People*, Ackerman (1991:299) unambiguously restates the supreme pragmatic imperative in negative terms: “You’re not a private citizen if you never find the time and energy to deliberate about the public good--either by yourself or, more commonly, with other would-be citizens.” In other words, persons have not earned the rights of citizenship unless they devote at least some of their resources to public deliberation, which is not to say that they must engage in incessant public dialogue. Indeed, it is the exercise of widespread citizen deliberation and choice at major junctures in a nation’s history that determines the normative legitimacy of traditional ideals, claims and documents (including constitutions) that are later appealed to. Without these authenticating moments of popular sovereignty, the problem of democracy’s “empty space”--i.e. the danger that leaders will disingenuously speak in the name of “the people” and falsely claim to represent their interests--becomes even more pressing.⁷³ For a democratic citizenry lacking the will to deliberate is more prone to being persuaded by the appeals of authoritarian regimes and demagogic leaders to that empty space.

According to Ackerman’s unique exegesis of U.S. constitutional history, crises have occurred infrequently in the state and the greater society, including the founding, the period following the civil war (when the thirteenth, fourteenth and fifteenth amendments were passed),

and the Great Depression. At the time of these events, Ackerman (1991:288) claims, the people deliberate en masse and with few or no constraints on their deliberations concerning the subject of how to transform the existing constitutional order. Under these momentous conditions, not every single citizen participates in the dialogue, but every institution does.⁷⁴ Nevertheless, participation by citizens at large increases dramatically relative to the status quo, particularly within social and political “movements whose transformative agendas promise to gain deep, broad, and decisive support” (290). Of equal significance, the manner and substance of political engagements changes from self-interested and partisan clashes to public-spirited and non-partisan dialogue framed “in language that the majority of the people can support” (Ibid). Prior restrictions on political interaction, such as constitutional rules, are shelved for the sake of reconsidering those restrictions and other features of the existent institutional structures.⁷⁵ As a result of these momentous and infrequent institutional crises, the constitutional order promises not to remain a static and closed system, but rather to develop as a dynamic and open-ended project.⁷⁶

In his account of U.S. constitutional history, Ackerman (1991:296) also argues for a “dualist” or “two-track” model of deliberative democratic decision-making--terming it a “dualist Constitution.” The dualist model distinguishes two varieties of lawmaking, “constitutional” and “normal,” similar to constitutional economists, who differentiate between constitutional and ordinary or in-period politics (Galston and Galston 1994:447). Each track of decision-making implies a range of intensity and scope for citizen deliberations:

Quite simply, Americans do not work equally hard all the time. This point lies at the foundation of the two-track lawmaking system. The higher lawmaking track is designed to structure deliberation when we are working especially hard and productively as citizens [during constitutional moments]; the normal lawmaking track, when we are not. If, as I am now assuming, these institutional systems are in good working order, they response to a fundamental fact about modern political existence: mass involvement in political life is a variable, not a constant (Ackerman 1991:199).

Rather than overstate the time and energy that citizens will devote to deliberation, Ackerman conservatively estimates the frequency of widespread deliberation in his dualistic model. The higher law-making track, which requires intensive deliberation, will be taken up only infrequently, particularly during the constitutional founding and when breakdowns or schisms in the constitutional order occur. More typically, citizens will choose to conserve their limited resources by delegating the duty to deliberate (or the supreme pragmatic imperative) to their representatives, thereby excusing themselves because they “have retired from public life” (242). Therefore, in a modern liberal polity, citizens will deliberate sparingly and only with an intention to intervene when political events reach crisis proportions.

Here, I briefly consider two major criticisms that have been leveled at Ackerman’s two-track theory of constitutional order, one by Dryzek (2004) and the other by Vargova (2005). Dryzek (2004:50) alleges that, similar to Rawls, Ackerman merely describes the status quo, in which deliberation occurs during extremely rare, grand events and neglects to make the valuable normative claim that deliberation should occur more regularly: “According to theorists such as Rawls and Ackerman, scarce deliberative capacities ought not to be wasted on ordinary, day to day policy making. Rather, they should be reserved for special constitution-making occasions.” Since Ackerman’s crises in the constitutional order happen infrequently, Dryzek is correct in criticizing Ackerman for excessively limiting deliberation’s regularity. Moreover, since the solutions to these crises typically involve constitutional innovations and amending processes, the forums for these deliberations--e.g. constitutional and ratification conventions, popular assemblies of citizens or their representatives and directly democratic devices such as referenda--are also somewhat restrictive, elitist and not always deliberative (particularly in the case of the last). Yet Ackerman’s decision to limit deliberation’s frequency and scope is not rigidly maintained. As will be seen in “Deliberation Day,” he and Fishkin (2002) extend the province

of deliberative activity one forum further and more frequently than the occasional constitution-making or constitution-amending moment.

Vargova (2005) is more concerned with Ackerman's strict division of the two levels of law-making and the corresponding intensities of deliberation than with the regularity of deliberation. She favours Habermas's two-track model, which allows informal "public sphere" discourses engaged in by ordinary citizens to influence decision-making by authoritative bodies, such as courts, legislatures and executive bureaucracies, in their formal discourses. Vargova (2005:367-368) fears that the dualism between higher and lower law-making as well as higher and lower levels of deliberations is too inflexibly enforced: "Ackerman proposes a normative model of a dualist constitutionalism that strictly distinguishes between two kinds of practices and institutions in a modern liberal polity--constitutional and normal. His normative dualism permeates and divides the spheres of politics, law, and social life, constructing a normatively hierarchical, politically and socially divided society." Although the boundary between constitutional and ordinary deliberations is not nearly as porous as between Habermas's formal and informal discourses, these are surely not the same line of demarcation. Habermas's formal discourses also involve regular deliberations by legislators, judges and bureaucrats, and are not restricted to constitutional moments. Nevertheless, on simply the merits of Ackerman's account, the two-track or dualist model of deliberation, in which deliberation's scope, intensity and significance increases dramatically during constitution-making, might be faulty from a normative perspective.

It might be argued, as many constitutional economists do argue and Ackerman at some points appears to argue, that high-stakes or hot deliberations in ordinary politics too easily disrupt regime stability. However, the counterargument, which Vargova (2005:384) makes, is that by foreclosing the option for citizens to meaningfully deliberate and choose policies in day-

to-day politics, Ackerman's dualistic account engenders "notable democratic deficits," including a lack of deliberative practice amongst citizens, a shortage of proposals for constitutional innovation, the replication of structural obstacles to greater inclusion, and the weakening or "hollowing out" of civil society as a site for deliberation. Hence, Ackerman is not able to follow through on his promise to deliver a constitutional project which is dynamic and open-ended.

Fishkin on Deliberative Polling

James Fishkin's proposal to institutionalize deliberation in a process called 'deliberative polling' has infused the deliberative democracy research programme with a strongly practical, empirical and experimental focus. Whereas ordinary polls can only capture citizens' unreflective and media-generated attitudes about public issues, deliberative polls can measure the hypothetical judgment of an entire nation engaged in deliberation through a scientifically-selected representative sample of citizens who actually participate in face-to-face discussions. In this section, I begin by tracing the idea for Fishkin's deliberative polls back to a passage in Joshua Cohen's (1997) seminal essay on deliberative democratic theory. If participation in deliberative forums informs and improves the quality of citizens' judgments about public issues, then it makes sense to allow citizens to deliberate prior to measuring their opinions. In other words, deliberated opinion, or judgment formed through reasoned discussion, is more valuable than raw opinion, or judgment not arrived at through deliberation. In addition, I consider the design of these deliberative polls, beginning with Fishkin's original design of the national caucus and extending to actual experiments in Britain in 1994 and the United States in 1996.

In one paragraph of Cohen's article, "Deliberation and Democratic Legitimacy," he details the last of four features of the ideal deliberative decision-making procedure. Ideal deliberative decision-making, Cohen (1997:75) says, should be directed toward reaching a "rationally motivated consensus--to find reasons that are conducive to all." At first blush, this

appears naïve given the improbability that deliberators will reach a unanimous agreement, let alone a unanimous agreement based on an identical rationale. However, Cohen concedes that even under the best of circumstances there is no guarantee that agreement will obtain for the same reasons. Indeed, typically it will not, in which case “deliberation concludes with voting, subject to some form of majority rule” (Ibid). Even though the outcome does not meet the ideal threshold of consensus, it nonetheless does not thereby conflate the differences between deliberative decision-making based on reasoned judgment and aggregative choice premised on “nondeliberated preferences” (Ibid). In point of fact, the deliberation that precedes voting still informs the outcome, since the deliberators register their deliberated or rationally judged preferences, not their unreflective predeliberation preferences, during the voting procedure.⁷⁷

How would this hypothesis be tested and in what ways would its experimental confirmation challenge other research findings? First, poll a group of individuals to determine their preferences on an issue prior to deliberation; then, allow them to deliberate; and finally, poll them again after deliberation to assess whether their preferences markedly change. The hypothesis that deliberation qualitatively improves preferences becomes the basis for Fishkin’s proposal to institutionalize deliberative democracy in the practice of deliberative polling.⁷⁸ In contrast, Sunstein (2002:177) highlights how some contemporary empirical research has demonstrated that deliberators tend to “predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies.” In this experimentally confirmed phenomenon known as “group polarization,” similarly-minded individual who met and deliberated on a regular basis moved towards increasingly radicalized and less consensual positions.⁷⁹ Therefore, this empirical research weighs heavily against the deliberative hypothesis, revealing evidence that deliberation proves more divisive and less rational than Fishkin and other deliberative theorists would have us believe.

Fishkin presents the basic design for the deliberative poll originally in an article in the *Atlantic* (1988) and then in the book *Democracy and Deliberation* (1991). In the former presentation, entitled “The Case for a National Caucus,” he argues that the American electoral system faces a “false dilemma”: either “we must choose between the competence of elites--well informed but antidemocratic--and the superficialities of mass democracy” (16). In institutional terms, this Hobson’s choice is between either caucuses, i.e. small group meetings of elite-level decision-makers, that minimize equality, but maximize competency, or directly democratic decision-making mechanisms, such as referenda, initiatives, recalls and direct primaries, that maximize equality, yet minimize competency. With no other alternatives, institutional designers must, in effect, decide between the enlightened but non-democratic judgment of elites or the unreflective yet equally weighted views of the majority of citizen-voters. The trend in U.S. electoral politics has been towards the latter, with its frequent use of direct-majoritarian methods and standard public opinion polls, leading to a corresponding sacrifice in competent judgment.⁸⁰

Fishkin’s way of escaping this dilemma is to implement an institutional model of deliberative democratic decision-making: the deliberative opinion poll. First, in the earliest stage of an electoral cycle, researchers must take a scientifically random sampling of citizens who represent the mass of their counterparts both attitudinally and demographically (Fishkin 1995:170). This procedure avoids the tendency for self-selected groups to mirror the social network of the organizer--usually educated, affluent and fairly homogenous (Ryfe 2005:51-2). Then, the researchers organize a national forum, or caucus, where a relatively small pool of participants question specialists and policy-makers, discuss key policy issues and, generally, engage in deliberation as free and equal citizens in a nationally publicized and televised event for two weeks. Moreover, the deliberative forum solves the problem of distortion by inserting a trained moderator into each group, whose function it is to prevent coercion and manipulation as

well as to ensure that participants offer reasons in support of their claims.⁸¹ In this way, those unreflective opinions generated in a metaphorical “echo chamber” (Key and Cummings 1966:2; Neblo 1999:1) where citizens imitate the views propagated by media and opinion elites and standard public opinion polls merely measure the echo, are converted into the reasoned expression of discourse-tested judgments, which the deliberative poll measures. At the conclusion of the forum, organizers poll the deliberators and compare their preferences to the nondeliberated preferences expressed prior to the forum. If the difference is significant, then the outcome of the deliberative poll is worthy of being appealed to by electoral candidates and other politicians both during and after the election; in other words, it reflects the “considered judgments of the public” (Fishkin 1995:162).

The rationale for this institutional innovation, Fishkin assures his readers, is simple and persuasive. Deliberative polling, Fishkin writes (1995:203), “was modeled after ancient Athenian democracy, where randomly selected microcosms were part of local government decision-making.” Although the analogy between deliberative polling and Athenian democracy does not hold in all respects, it does capture the shared conventions of selection by lot, face-to-face discussion and direct decision-making (169). As a statistically representative sample of the larger population, the smaller number of participants in the forum become the hypothetical and ideal proxies for their citizen-counterparts: “If we take a microcosm of the entire country and subject it to a certain experience, and if the microcosm (behaving in the way we would like ideal citizens to behave in seriously deliberating about the issues) then comes to different conclusions about these issues, our inference is simply that if, somehow, the entire country were subjected to the same experience as the microcosm, then hypothetically the entire country would also come to similar conclusions” (173). Participants in the deliberative polling forum deliberate with each other, with experts and with politicians *as if* the nation as a whole were likewise engaged--that is,

as if the deliberative ideal were realized on a larger scale.⁸² In this way, the deliberative poll solves the problem of scale, or the difficulty of assembling a nation of several million citizens together to deliberate and make collective choices, since these citizens represent us, who are not present in the forum, and deliberate for us *as if* we had the same opportunity.

While deliberative polling seems to resolve the problem of scale, how does it address the problem of motivation (or its usual shortage)? Why, in other words, would citizens selected to participate in the deliberative polling forum be motivated to attend? Connected to the motivational problem is the problem of rational ignorance, viz. that voters will rationally choose to remain ignorant about the issues at hand so long as the costs of becoming informed outweigh the likely benefits.⁸³ Since the chances of casting the decisive vote in any large-scale election are so insignificant, it is almost always irrational to become informed--or, conversely stated, it is more often rational to maintain one's ignorance (Downs 1957:85). In the two experiments Fishkin conducted (with the aid of the Kettering Foundation and the Public Agenda Foundation)--one in Britain and the other in the United States--chosen participants were offered an all-expense paid weekend and a small honorarium to compensate them for the time and effort they would invest in reviewing the briefing material and seriously deliberating about salient issues in a national election campaign. Acceptance rates were high.⁸⁴ So the provision of incentives to participants appeared to cure the motivation problem, but to leave intact the rational ignorance problem--that is, the seeming irrationality of reading the briefing material and participating in the deliberations given that the results of the deliberative polling forum were not guaranteed to directly impact the outcome of the subsequent elections.

In Fishkin's two deliberative polls, selected participants were enticed by the prospect of taking part in a televised event that showcased a momentous experiment in deliberative democracy. In the case of the U.S. deliberative poll, called the "National Issues Convention,"

once the participants were invited, Fishkin (1995:167) explains, their preferences instantly began to diverge from the preferences of the population at-large:

The members of the sample began to change from the moment they received our invitation. Knowing that they would be on national television, they began discussing the topic with family and friends, they began to read newspapers and listen to the media with more care, they began reading the briefing materials we sent them. Their views thus immediately became unrepresentative of public opinion in the conventional sense. But those views also became representative in an important new sense. They became representative of the views the entire country would come to if it were populated by persons closer to ideal citizens--people who were motivated to be engaged by the issues and who debated them over an extended period of time.

The preferences of the participants in the forum were qualitatively improved, better informed and supported by stronger reasons, all as a consequence of their deliberative activity *before* the forum--what Ackerman and Fishkin (2002:140) would later term the "anticipation effect." In this way, Fishkin's research findings did not reveal the group polarization effect indicated by prior empirical research and brought to light by Sunstein (2000, 2002). Possible explanations for the difference in levels of polarization and reasonable dialogue within deliberative polling and group polarization research include: (i) the presence of moderators, expert panelists and extensive information in deliberative polling forums as compared to their complete absence in most polarization studies; and (ii) the use of polling prior to and following deliberations in Fishkin's experiments as compared to the standard post-deliberation voting procedure found in nearly all polarization experiments (Sunstein 2002:194; Chambers 2003:320).

In Fishkin's two deliberative experiments, many participants reported in the exit polls that they expected that politicians and the greater public would find the results worthy and legitimate, such that their deliberated judgments would indirectly influence the outcome of the subsequent presidential and congressional elections.⁸⁵ Since participants believed that they had an opportunity to alter the electoral outcome through their public deliberations, then consistent with the rational ignorance thesis, it became rational for them to decide to become informed by

reading the briefing material and talking about the issues in the weeks leading up to the forum as well as participating fully in the forum itself. Indeed, “[t]he premise of the deliberative poll,” Fishkin (1991:115) writes, “is that a small group, a statistical microcosm of the whole, can overcome the rational ignorance of voters in large-scale nation-states.” Therefore, based on the high acceptance rates and the self-reported reasons for attending, it appears as if deliberative polling not only overcomes the motivation problem, but also solves the corollary problem of rational ignorance.

Before moving on to Ackerman and Fishkin’s joint proposal in “Deliberation Day,” I want to consider one objection to Fishkin’s scheme for institutionalizing deliberative democracy: Robert Goodin’s (2003:174) claim that it is an instance of “ersatz deliberation.” On Goodin’s account, ersatz deliberation means that the representativeness of the sample declines after the initial selection is made.⁸⁶ Why? Even though the initial choice of forum attendees represents the larger population both attitudinally and demographically, the gap between the subset of deliberator-agents and the larger population of citizen-principals (or those that the deliberators represent) steadily erodes until the differences are too substantial to constitute meaningful representation: “The question is whether people who started out being representative of the wider community, in all ways we can measure, are also representative of the wider community in the ways in which they change over the course of the deliberation” (175). Goodin’s response to the question is that it “seems unlikely” (Ibid). The outcome of the deliberative poll does not perfectly reflect how the electorate would decide if it had the chance to deliberate as the participants in the forum did.⁸⁷ Goodin’s alternative proposal is for policy-makers to internally reflect and imagine--in what he calls a process of “deliberation within”--how their decisions would affect all those concerned, thereby “assess[ing] what is the right thing to do, from all

perspectives” (179). In this way, Goodin’s solution shares much in common with Habermas’s principle U and with Mead’s concept of ideal role-taking.

However, Goodin’s objection does not hold up under closer scrutiny. In terms of the success of decision outcomes, his alternative might prove equally, or even more, effective than Fishkin’s scheme. Goodin’s internal-reflective account of deliberation places decision-making control exclusively in the hands of expert policy-makers who are less likely to possess (or to imagine to possess) the preferences held by the mass of average citizens.⁸⁸ Goodin chooses one horn of Fishkin’s false dilemma: viz., elite decision-making with less equality in access to the process and more potential for competent judgment. In addition, he neglects the benefits that the deliberative polling process has for citizen-deliberators, such as increased ability to comprehend opposing views, greater capacity for civility and mutual respect, and increased willingness to gather facts and inquire about complex issues, going beyond the superficialities of media accounts and politicians’ sound-bytes (McAfee 2004:54; Talisse 2005:129). Goodin’s initial objection to deliberative polling is also misconceived if the relationship between citizens and deliberators is understood on the model of principals and agents. According to Brennan and Hamlin (1999:110), the principal-agent model of structural representation states that “the design of institutional arrangements [should be such] . . . that political agents, with their own identifiable interests, can be induced to act in the interests of their principals, the citizenry at large.” If conceived in this way, the deliberator-agents represent the hypothetical ideal of the entire nation deliberating together, not an actual population of citizen-principals. So, there exists no principal-agent relationship in the ordinary sense, since the deliberators are not subject to pressure from constituents, leaders or peers to decide in proxy for the interests of their constituents. Instead, the sample of deliberators is representative, at least initially, of the specific features of the greater population (what might be called its ‘representativeness’) and, from then

on, can only loosely be said to represent a hypothetical situation in which the entire population of citizens would participate in deliberative activity.⁸⁹

Even if the gap between the real agents in the deliberative poll and the ideal population deliberating as a whole were *ex hypothesi* substantial, it would be impossible to confirm unless there was measurably widespread deliberative activity occurring in the entire electorate. However, if ubiquitous deliberation were a fact, then deliberative polling would be unneeded; for it is exactly this consequence that, in the long term, Fishkin's institutional scheme is intended to promote. Indeed, Fishkin (1995:162) tells his readers, "[t]he Deliberative Poll is more than a social science experiment; it is also meant to contribute to the public dialogue." The hypothetical notion of representation aids researchers and citizens in imagining the outcome of a nation-wide deliberative exercise--an outcome that, while currently counterfactual, could possibly be realized at some point in the future. "Deliberative polling," according to Fishkin and Luskin (1999:8), "embodies a vision of democratic possibilities." In the end, Fishkin's deliberative poll survives Goodin's objection and, as we see in the following section, informs an even more ambitious proposal for institutionalizing large-scale deliberative decision-making.

Deliberation Day

In many ways, Ackerman and Fishkin's (2002) article, "Deliberation Day," and their identically titled book (2004) substantively alter the plan for deliberative polling to meet a Goodin-like objection. Instead of collecting together a representative sample of the population--approximately four to five hundred--in a national deliberative forum, they propose to assemble smaller groups of no more than fifteen across the country, together composing nearly the whole population of citizen-voters. Meeting in communities everywhere on a new national holiday, Ackerman and Fishkin (2002:129) envision citizens realizing the ideal of widespread deliberative activity, though for only one day "one week before major national elections."⁹⁰

These assemblies would task citizens to interview experts and politicians and then to engage in deliberations about issues, party platforms and candidates' positions in a civil and reasoned manner. At the end of the day, participants would register their deliberated opinions, which when compared to nondeliberated opinion, would constitute a qualitatively improved and more informed product: namely, deliberated opinion--or, better yet, judgment. Since experts and politicians would be interrogated by their constituents without the mediation of political advertising, communications strategists and speech-makers, "opportunities for reasonably accurate information [would] . . . enter the dialogue" (149). Therefore, opinions formed through deliberation would be worthy of politicians, the media and citizens to appeal to in their ongoing deliberations up until the day of voting.

Ackerman and Fishkin design the institution of Deliberation Day so that it addresses what they conceive as the main problem of modern democratic institutions: civic privatism. With the institutional transformation of voting from a public to a private act, institutions removed politics from public view. John Stuart Mill worried that the secret ballot would, in Ackerman and Fishkin's (2002:129) words, become "just another commodity for private gratification" or a means by which the "secret balloter would merely choose the politician who most pandered to his private interest."⁹¹ On the other hand, John Stuart Mill's father, James Mill, had objected that in the absence of the secret ballot, people would go through the routine of voting, following the example and pressures of others (usually those people more wealthy and powerful than themselves), but forever lack the genuine power to decide.⁹²

Even conceding the elder Mill's point and the obvious advantages of the secret ballot, the insight of the younger Mill still survives scrutiny. Why? The public nature of voting and the deliberation that precedes it have inestimable value to citizens if they are to meaningfully participate in democratic decision-making (130). Otherwise, democratic citizenship reduces to

the private activity of registering preferences, allowing those preferences to be aggregated into decisive outcomes and foregoing the opportunity for genuine dialogue with fellow citizens. Consequently, in instituting Deliberation Day, Ackerman and Fishkin purport “to recreate such a social context [suitable for public discussion prior to voting] for most voters while maintaining the benefits of the secret ballot” (129-30).

How does Ackerman and Fishkin’s (2002) Deliberation Day compare to Fishkin’s deliberative poll? Both solve the problem of motivation. While deliberative polling offers participants an all-expense paid weekend trip and honorarium, Deliberation Day provides them with a stipend of one-hundred-fifty dollars (129). Moreover, both defuse the problem of rational ignorance. Instead of providing the opportunity to directly influence the outcome of the election, participants in Deliberation Day “recognize that they have a responsibility as citizens to take the public good seriously” (133). In other words, civic duty motivates participation, as well as self-interest. In addition, both are capable of overcoming the problem of scale. Whereas deliberative polling relies on a representative sample of the larger population to deliberate in proxy for the rest of the nation, Deliberation Day recruits citizens from all over the nation to actively partake in the day-long discussions and inquiry: “Deliberative Polls offer a counterfactual picture of informed and engaged public opinion. Deliberation Day begins to approximate the realization of such a [deliberated] public opinion for the entire society” (134). In this way, Deliberation Day actually does respond to Goodin’s objection by closing the gap between real deliberating representatives and the ideal of an entire deliberating populace. Ackerman and Fishkin also propose a set of explicit rules to regulate the deliberations.⁹³ As a consequence of implementing Deliberation Day, it is expected that citizens will cultivate a habit for deliberating before, during and after political events. Thus, the public character of politics, which John Stuart Mill feared the secret ballot would eliminate, returns with a vengeance.⁹⁴

However, Ackerman and Fishkin's proposal is not without its critics. To conclude this section, I will discuss Richard Posner's (2002a) sceptical attack on Deliberation Day in his article "Smooth Sailing." Posner's objections take two forms: (i) concerns that Deliberation Day is too utopian and (ii) doubts that citizens will be motivated to participate. Posner (2002a:41) states his case: "The proposal by Professors Ackerman and Fishkin for a Deliberation, on which citizens lured by federal financial incentives would engage in collective deliberation over issues and candidates in the forthcoming national election, seems to me to misunderstand what modern political democracy is and should be." Posner is particularly concerned that more regular public debate would only lead to the erosion of mutual respect, more polemics and a corresponding loss of political stability during major national elections (42). He also worries that the institution of Deliberation Day would constitute a thinly-veiled means by which academics would attempt to model the electoral process after a faculty meeting (Ibid). Obviously, he argues, not all citizens are capable of civil and reasoned discussion, so that debate would devolve, "making our politics more ideological, and therefore, more divisive" (Ibid). In his argument, Posner insists that Deliberation day would be unrealistic given human nature and motivations. Moreover, Posner (2002a:41) writes: "Democracy doesn't need deliberation. If spending a day talking about issues were a worthwhile activity, you wouldn't have to pay voters to do it."

Originating from an economist, this is a surprising statement, and likely part of a rhetorical, rather than a well-reasoned, argument. The defect in the argument that paying participants to engage in an activity implies that it is not worthwhile arises mainly from Posner's failure to consider the economic notion of opportunity costs.⁹⁵ When an agent decides to engage in one activity--for instance, deliberation--she inevitably foregoes others--e.g. spending time with family and friends. To determine whether it is rational to engage in the activity--in this case, deliberation--the agent must weigh the costs associated with each forbearance--that is, the

opportunity costs of neglecting to spend time with family and friends--against the activity's additional (or marginal) benefits or returns to the agent. In this way, the agent can determine whether it is rational to invest scarce resources (e.g. time and energy). If the difference is positive (or an overall gain), then the agent would be rational in choosing the activity; if negative (or an overall loss), it is instead rational to forebear. Typically, shortages of motivation can be remedied by the provision of incentives (financial or other), which increase marginal benefits relative to opportunity costs, and thereby produce overall gains. Although Ackerman and Fishkin's argument is built on the assumption that citizens will develop a habit of deliberating and eventually a sense of civic duty to deliberate for the sake of the public good (rather than their own self-interest), it would be unrealistic to assume that this attitudinal transformation would occur instantaneously. Instead, paying citizens is a realistic strategy to promote participation initially, assuming that agents would normally employ this cost-benefit calculus and determine that the opportunity costs would exceed the marginal benefits. After a long period of habitual activity followed by acceptance of public deliberation as a responsibility of citizenship, citizens might no longer require remuneration for the deliberative services they render. Hence, in order to reverse the trend towards civic privatism, it is sometimes necessary for institutional designers--in this case, Ackerman and Fishkin, but also others--to initially work within the constraints of commodified political activity in order to eventually undermine their hold on the norms and institutions of political society.

Having covered the three views of deliberative democratic decision-making, the discussion proceeds to the next and final section, an exposition of the central features of the deliberative democracy research programme.

The Six Core Commitments of Deliberative Democracy

In this final section, I bring together the summaries and analyses of the previous three views of deliberative decision-making into a single set of six core commitments. Parkinson (2003:180) states the case for making such a presentation: “[D]espite the bewildering variety of theoretical starting points, deliberative democracy does have a core set of propositions that distinguish it from its rivals.” Based on the three previously-presented views of deliberative decision-making, these commitments, I propose, are shared by most, if not all, the researchers and theorists working in the deliberative democracy research programme.

#1: Public Justification

According to the public justification commitment, the outcomes of political decision-making process are democratic and legitimate insofar as the views and interests expressed in them withstand the test of deliberation. In the process of justification, each participant provides reasons to vindicate his position to his fellow deliberators. Through the process of discussing and contesting each other’s claims, deliberators entertain the possibility of arriving at qualitatively improved or enlightened collective choices. Closely connected to this commitment is the idea that citizens of a deliberative democracy are capable of changing their own and other citizens’ preferences on issues. When subject to public justification, preferred outcomes may be transformed in response to critical objections or the offering of better reasons (Manin 1987:350). Even if preferences are not transformed through discourse, participants may still be more sympathetic to accepting the decision if they feel that their views have been considered.

All three views of deliberative decision-making illustrate this commitment to public justification. First of all, Habermas makes the requirement of reason-giving an integral part of discursively redeeming the normative validity of claims. Next, Gutmann and Thompson’s

procedural principle of reciprocity demands that deliberators provide reasons that they would expect other parties to find reasonable. Finally, Ackerman and Fishkin insert a moderator into their Deliberation Day group meetings to ensure that deliberators provide reasons to support their assertions, so that mere opinion becomes considered judgment. However, in actual institutions and democratic practice, Ferejohn and Pasquino (2002:27) note, the “most democratic institutions, in terms of closeness to the people,” such as secret ballot voting and echo-chamber-like opinion polls, “are not expected to be deliberative at all, whereas the least democratic decision-making institutions,” such as courts and the president or prime minister’s cabinet, “are expected to be conducted as more or less pure forums of public reason.”

For the deliberative democrat, simply aggregating citizens’ stable and privately-formed preferences is insufficient for establishing the legitimacy of a collective decision. Legitimacy demands deliberation, which requires that agents publicly justify, or provide reasons in support of, their claims. Despite Gutmann and Thompson’s antecedent accessibility constraint and Habermas’s appeal to consensus (or agreement based on the same reasons) as the regulative ideal for discursive agreement, toleration of pluralistic rationales for decision outcomes proves superior to artificially limiting the range or kinds of reasons in advance of deliberation. All in all, deliberators must offer reasons to their fellows and to those outside the choice situation if they wish their individual claims and collective choices to be evaluated and eventually accepted as legitimate.

#2: Procedural Legitimacy

According to the commitment to procedural legitimacy, the constraints on the conditions of the deliberative procedure determine, at least to some degree, whether the decision-making outcome is legitimate. In other words, the legitimacy of the procedure in many ways constitutes the legitimacy of the outcome. Although this commitment may resemble strict or pure

proceduralism, it differs from a form of proceduralism that, for instance, always supports the legitimacy of outcomes so long as they are decided by majority rule. Procedure-independent or substantive standards that restrict the realm of legitimate outcomes, particularly protections of the basic rights and liberties of free and equal agents (see commitment three), are also crucial to the deliberative process. So, while procedural legitimacy does not exhaust the deliberative democrat's account of legitimacy, it nevertheless is an essential component in justifying outcomes.

All three deliberative theorists demonstrate a commitment to procedural legitimacy. Habermas internalizes the rules or constraints that settle the legitimacy of outcomes in the media itself--that is, in speech or communication acts--as immanent norms of discursive interaction. Gutmann and Thompson appeal to both procedural and substantive principles in order to evaluate the fairness of the process of deliberation and the outcomes, respectively. Although they criticize Habermas's theory as pure proceduralist, because it disallows antecedent standards that limit the range of possible outcomes, it is doubtful that that label is deserved given his concern that outcomes respect a basic schedule of citizen rights. Ackerman and Fishkin focus on the institutionalization of the procedure in a day spent by all citizens deliberating in small moderated group discussions. The procedure is intended to instill a sense of civic duty in citizens to deliberate, to enrich the quality of decision outcomes and to restore a sense of legitimacy to public political engagement, rather than private commodified political activity.

The question also arose as to whether a legitimate procedure includes or excludes bargaining and rhetoric. Dryzek's critique of Habermas's exclusion of rhetoric and demotion of bargaining to a second-best procedure were shown to be flawed. Of course, rhetoric and bargaining that lean toward manipulation or coercive measures should not be acceptable. On

the other hand, rhetorical and negotiation strategies regulated by rules of fair use and dealing are legitimate. Gutmann and Thompson (2004:51) allow for rhetoric and bargaining to complement or substitute for deliberation as the conditions of the situation demand. Ackerman and Fishkin (2002:148; 2004:102) also concede that some level of negotiation and rhetorical engagement will enter the deliberative forums so long as the moderator or foreman believes that it facilitates progress in the ongoing discussion. However, participants in Deliberation Day, as in deliberative polling, are not pressured to reach a consensus, but only to discuss the issues before registering their preferences in the final poll. Acceptance by deliberative theorists of bargaining, as we will see in the next chapter, provides a point of contact between their research programme and that of constitutional economists.

#3: Free and Equal Agency

Deliberative democrats hold that agents to any deliberation be afforded basic liberties and equal treatment consonant with their status as democratic citizens. In one sense, equality means formal equality before the law. In another sense, equality means having basic needs met (food, clothing, shelter etc.). Invoking this second sense, Joshua Cohen and Joel Rogers (1983:157-8) claim that “the absence of material deprivation is a precondition for free and unconstrained deliberation.” Habermas (1996) appeals mostly to the first sense of equality, while Gutmann and Thompson (1996, 2004) believe that equality implies the second sense as well. Despite these differences, it is possible, as Ackerman and Fishkin (2002:129) have shown, to provide incentives for participation--an honorarium or “compensation for the day’s work of citizenship”--so that equal access to deliberative forums becomes feasible for all regardless of socio-economic status. Another deliberative theorist, Jane Mansbridge (1997:412), proposes that deliberators be permitted to exercise “equal power,” or relatively equivalent influence over the deliberative outcome no matter what their socio-economic status. Any temporary

inequalities among participants in a deliberative forum must then be justified by the subset of the group holding the greater power (Ackerman 1980:4-8; Bachrach 1980; Gastil 1993:26ff10).

All three theorists admit a place in their views of deliberative decision-making for a schedule of basic rights and liberties, whether constitutionally established or not, protecting individual citizens against the will of majorities. These basic rights and liberties afforded to free citizens do function as antecedent constraints on the outcomes of deliberations. In this way, none of these deliberative democrats are pure proceduralists, even though some others, such as Nino, come close to Gutmann and Thompson's caricature of Habermas's theory. However, the normative assertion that basic liberties should constrain possible outcomes relies on the assumption that these decision-making processes involve high-stakes, or directly generate policies and laws, and so warrant constraints on outcomes. At least in the case of Habermas, Fishkin and Ackerman, the outputs of informal discourses or deliberative forums do not directly dictate how the coercive means of the state are employed; although they do have some influence in mobilizing public support or popular will-and opinion-formation. This issue of whether basic rights should impinge on the range of acceptable outcomes relates to Archon Fung's (2003:345) distinction between hot and cold deliberation. Cold deliberations are low-stakes, in that they do not raise controversial issues and the results will only be advisory to policy-makers. Hot deliberations, on the other hand, involve high-stakes decision-making, implicating extremely salient issues and directing (not just advising) state action. In hot deliberations, the need for basic rights to delimit what outcomes are legitimate is more pressing, since deliberators effectually control the coercive apparatus of the state.⁹⁶

#4: Collective Interest

According to the commitment to collective and reciprocal interest, researchers and theorists in the deliberative democracy research programme have the conviction that interests do not accrue

solely to individuals, but some are shared in common through reciprocal understanding and other-regarding activity. Habermas's appropriation of Mead's notion of role-taking, or the ability to empathize with others as if their interest were one's own, and his principle U affirm the proposition that interests can be generalized among a group of deliberators. In some ways, Gutmann and Thompson's reciprocity and publicity principles follows the lead of Habermas's two means of affirming the generalizability of interests, but in a weaker form. While not barring the expression of partial interests, their requirements that deliberations not be secret and that deliberators seek to offer reasons that could be accepted by their fellows predisposes all parties to seek to find common ground, or a collective (generalizable) interest (Gastil and Dillard 1999:20; Melville et al. 2005:46) However, Gutmann and Thompson's additional requirement that public reasons be accessible artificially restricts the expression of some interests (particularly, sectarian ones) which, while not generalizable, nonetheless have an important role to play in deliberations.

So, for deliberative democrats, the public interest or general good does not amount to the aggregation of individual interests or conceptions of the good. The individual, unlike in liberal theory, is not always the primary unit of analysis. Often, through discussion, individuals decide to conform their own private interests to a generalized interest when they see that it advances the common good, a shared set of values, a higher principle or collective goal (Laslett 1956:169; Pelletier et al. 1999). This conclusion aligns deliberative theorists to some degree with civic republicans and communitarians without committing them to a perfectionist view of the state, in which the state's function is to cultivate virtuous citizens (Mouffe 1992:230). In their discussion of the leveraging strategy, Fishkin and Ackerman (2002:135, 147) concede that some individuals will not change their views as a result of the activities on Deliberation Day, but will do so in the build-up to the event, while they contribute to "the community's general fund of

social capital.” Relying on this same notion of social capital, Robert Putnam (1995:67) echoes their point that collective activity, including deliberation, must manifest widely--in informal social networks, not merely in a single day’s activities--for it to transform self-identity into an acknowledged collective identity: “dense networks of interaction probably broaden the participants’ sense of self, developing the ‘I’ into a ‘we,’ or (in the language of rational-choice theorists) enhancing the participants’ ‘taste’ for collective benefits.” By engaging in discussions that improve their social and political connectedness (or social capital), citizens will come to realize how their own interests coincide with and diverge from those of their fellow community members. Consequently, they might become more competent at identifying what is in their collective interest, or to their collective advantage.

However, this conclusion that interests may be collective in nature does not commit deliberative theorists to an ontology of collective entities apart from individuals or to the existence of some entity on the order of Rousseau’s general will. Instead, deliberation is double-barreled in the sense that it is at once both individually and collectively oriented. Individually, participants must think, argue and evaluate for themselves. Collectively, the point of the deliberative process is to find common ground by exposure to other thinkers, arguers and evaluators. “[F]or Rousseau,” Manin (1987:347) reminds us, “the basis for legitimacy lies not in the free individual capable of making up his mind by weighing reasons, but rather in the individual whose will is already entirely determined, one who has made his choice.”

Deliberators may always decide in any particular case to defect, or if it suits them to favour their own particular interests over the collective interest. In other words, unlike Rousseau’s theory, it is not the case that the minority view is just a mistaken account of the collective interest--or, in Rousseau’s terminology, the general will.⁹⁷ The voicing of minority views is valuable and deserves protection in the deliberative process.

#5: Greater Inclusivity

With greater access to deliberative forums, more voices are heard. “Ideally, deliberative democratic arrangements entitle each citizen to participate in decision-making processes” (Smith and Wales 2000:56). However, not only is it difficult if not impossible to realize full participation, but the outcome can be babel, not deliberation.

According to a less demanding and problematic criterion, institutional designers should commit themselves to promoting more inclusive deliberative forums, or to a process sometimes referred to as “scaling out” (Levine et al. 2005:3). Such a process would enlist participants who are among the poor, the disenfranchised and those who would otherwise not have the opportunity to deliberate. Consistent with this commitment, Robert Dahl (1979:102) understands greater inclusivity as more widespread involvement in forming public agendas and giving reasons for public decisions: “citizens must have adequate and equal opportunities for placing questions on the agenda, and for expressing reasons for endorsing one outcome rather than another.” Moreover, deliberative forums should be inclusive of “alternative ways of speaking and knowing” (Burkhalter et al. 2002:411). On David Ryfe’s (2005:50) account, inspired by Habermas’s principle U, “public decisions ought to be influenced in some way by the citizenry that will be affected by them.” So, inclusion in deliberative forums is meaningless unless those citizens touched by the outcome also have significant influence in the decision-making process.

Gutmann and Thompson’s solution to the problem of how to make deliberative assemblies more inclusive is to equalize resources, providing all members of society with the basic opportunities that enable participation. However, this option may be too ambitious and dangerous given that enthusiastic attempts to redistribute resources more justly usually lessen political stability and invite corruption. Fishkin and Ackerman’s more feasible plan offers

incentives that offset the opportunity costs of participation and thereby make participation more attractive to citizens having a lower socio-economic status. In his deliberative polls, Fishkin rejects the option of self-selected deliberative groups because of the bias towards exclusion. Ryfe (2005:52) clearly articulates the reason of a combined need for inclusivity and legitimacy: “the idea that deliberation increases the legitimacy of outcomes also seems to be threatened by this tendency toward homogeneity. Legitimacy hinges on a belief that all views have been expressed and considered--an unlikely situation given the makeup of most self-selected deliberative groups.” Self-selection produces groups composed exclusively of the more educated and affluent members of society.⁹⁸ In order to promote greater inclusivity and legitimacy, then, Fishkin chooses instead to employ a scientifically random poll with controls to ensure that the sample is representative of the greater population. Prior to Fishkin, Callenbach and Phillips (1985) anticipate the deliberative poll with their proposal to use random sampling to select a citizen legislature.

Habermas’s attempt at promoting inclusivity is the most utopian, viz. including all those who are affected by the consequences of the group’s decisions. Not only does Habermas’s proposal fail to address the problem of scale, but it also does little to address the problems of motivation and rational ignorance. Of the many attempts to rework Habermas’s theory, Nancy Fraser’s (1992:122-3) provides one of the most feasible suggestions for negotiating the difficulties associated with inclusion. She proposes “*subaltern counterpublics*,” which mobilize lower status groups in highly “stratified societies” to create and engage in “counterdiscourses” that express their members’ needs and interests in resistance to the dominant discourses. So, multiple competing discourses would flourish in the place of a single homogenizing discourse in which elites, even if they belong to the minority, work to exclude or silence the less well off. Similar to Habermas, Dahl (1989:126-30) frames the “question of inclusiveness” in terms of

how to grant equal decision-making power to those who are affected by a demos's decision. Gastil (1993:17) proposes to qualify the principle of inclusivity (or inclusiveness) so that different degrees of affectedness generate comparable degrees of influence in the decision-making process: "a democratic group strives to include those people who are *profoundly* affected by its decisions, invite those *significantly* affected, and at least consider the views of those *marginally* affected."

Assuming inclusion of at least those profoundly affected by the decision, should minority views prove decisive in the deliberative decision-making process? In Fishkin's analysis, the institutional designer's choice to grant control of the decision-making process to a minority of participants mistakenly opts for the elitist horn of the false dilemma.⁹⁹ Perhaps this is why Fishkin and Ackerman (2002:136, 142) propose that the rules on Deliberation Day include (i) that a majority will elect a foreman and (ii) that a super-majority may decide to exclude an offending member. If Ackerman and Fishkin are right, and giving too much decision-making authority to minorities undermines the democratic force of the process, then should deliberative forum designers choose a decision rule of majority or super-majority before unanimity? It is on this point--namely, the analysis of decision rules and their consequences--that deliberative theorists' views falter or fall entirely silent. And it is in this respect that constitutional economists may be capable of assisting the deliberative democracy research programme in gaining a more nuanced view of the deliberative decision-making process.

#6: Open-endedness/Critical Reflexivity

"The idea of democracy is the cutting edge of radical criticism" (Pitkin and Shumer 1982:43). According to the commitment to open-endedness and critical reflexivity, the opportunity for participants to question the ground rules or constraints on the conditions of deliberation should be open-ended. Given that humans are fallible creatures, human institutional designers might

make mistakes in modeling the limits on deliberative decision-making, and so the option should always remain open for participants to critically reformulate the terms of discourse. Referring to Baynes's notion of "recursive validation," Benhabib (1994:38) explains that the "normative constraints of discourses would themselves be subject to discursive validation; the rules of the conversation could themselves be challenged within the conversations itself." However, if all the constraints on deliberation become essentially defeasible, then the institutional designer is confronted with a paradox. Once the thorough-going critical reconstruction commences, parties to the discourse may undermine any and all procedural rules and substantive limitations on the range of acceptable outcomes. Institutional design then becomes pointless, since parties can begin every discourse by agreeing on their own set of ground rules and limits on legitimate outcomes. If, on the other hand, institutional design is here to stay, then the opportunity for the participants to reflexively criticize the terms of the discourse is preempted by the institutional designer, thereby closing the path toward future reform.

The solution to the aforementioned paradox must involve a middle way--or what Dworkin (1977:31) calls "the hole in a doughnut" of bounded discretion--that allows deliberators to exercise critical judgment in reformulating some subset of the discursive constraints or ground rules, while leaving others fairly constant (or immune to reform) contingent upon the outcome of a higher-level deliberations. Meta-deliberations might involve procedures by which elected officials and citizens amend constitutionally established constraints on the outcomes of deliberations (e.g. rights and liberties) or by which institutional designers restructure the relatively absolute rules of discourse. For instance, Fishkin and Ackerman (2002:142) grant any participant in Deliberation Day the prerogative "to persuade his fellows to challenge the agenda set by the national campaigns." So, issues that other groups decide are important enough to make it on to the collective agenda could be set aside and substituted with

others by the prerogative-exercising group. Likewise, Gutmann and Thompson (2004:57) contend that the theory of deliberative democracy, including its substantive and procedural principles for regulating deliberation, must be “provisional” and “self-correcting,” meaning that “its principles [should] invite revision in response to new moral insights or empirical discoveries.”

As will be seen in the next chapter, empirical studies by constitutional economists and others cast doubt on several of the operative assumptions, methods and theories of deliberative democrats. The failure to contend with these empirically-minded objections might explain why, as deliberative democrat Robert Talisse (2004:2) insists, “deliberativism has yet to transform political theory.” Accordingly, to accept the open-ended invitation to reflexively criticize and improve upon the existing deliberative democracy research programme means that deliberative democrats must seriously consider the validity of these outside criticisms and, in some cases, adopt the assumptions and methodologies of their critics—viz., constitutional economists and empirical researchers—in order to effectively overcome them.

CHAPTER 4

THE CONSTITUTIONAL ECONOMICS CRITIQUE OF DELIBERATIVE DECISION-MAKING

In the previous chapter, my aim was to state three distinct views of deliberative decision-making and critically evaluate them. Due to the sheer quantity and diversity of approaches for studying deliberative democracy, it was necessary not only to narrow the universe of theoretical accounts down to three, but also to extrapolate the commonalities between these views in terms of six core commitments. According to Michael Neblo (2005:170), deliberative democratic theories lack a “common language accessible to both the political philosopher and the empirical researcher.”¹ To overcome this deficiency, I sought in the last chapter to elaborate deliberative democracy’s six core commitments as a unified normative-positive research programme.

Given the greater uniformity of assumptions, methodological rigor and level of communication between its theorists and researchers, the constitutional economics tradition more closely resembles a genuine research programme than deliberative democratic theory. In this chapter, I present and analyze the tenets of the constitutional economics research programme, and of its parent programme of public choice theory, as well as the critical objections that constitutional economists direct against models of deliberative decision-making.² In contrast to deliberative democratic theory, constitutional economics displays an undeniable orthodoxy in its theoretical assumptions and in its research methods. Constitutional economists derive their assumptions from two standard sources: (i) microeconomics and (ii) public choice theory. First, researchers base their economic models of political activity on either the microeconomic theory of the firm or the theory of the consumer; in the former case, the proper

subject-matter for study is the supply of goods by profit-maximizing agents; and in the latter, the consumption of goods by utility-maximizing agents. Secondly, researchers restrict their assumptions and methodologies to the authoritative statements articulated by the programme's founders: (i) James Buchanan, (ii) Geoffrey Brennan, (iii) Gordon Tullock and (iv) Victor Vanberg.³

Alternatively known as the 'economics of politics,' public choice provides an economic framework for better understanding the process of political decision-making and of how the design of institutions conditions both choices and outcomes. In the first section, I examine this parent research programme from which constitutional economics develops and the central assumptions held in common by its theorists and researchers. In the next section, the constitutional economics sub-research programme and its central commitments are carefully articulated. Finally, with the requisite elaborations of public choice and constitutional economics in place, I adumbrate constitutional economists' six criticisms of deliberative decision-making. Few economists, and even fewer public choice scholars and constitutional economists, endorse deliberation as a legitimate method of democratic decision-making in anything but a highly attenuated form.⁴

At this point, we turn to an exposition of the central tenets of the public choice research programme.

The Public Choice Research Programme

By the late 1950s and early 1960s, economists began to take notice of how the actions of governments, politicians and voters could be modeled more precisely by utilizing the analytic tools of economics. These models assisted economists in explaining and predicting political activity, such as voter turnout and bureaucratic behaviour, in the same way that economic models facilitate a better understanding of economic activity, such as consumer and firm

behaviour. Among those economists, one in particular, James Buchanan, began employing microeconomic concepts in the 1950s to analyze decision-making by state actors and institutions. In Buchanan's (1989:13) words, "[p]ublic choice is a *perspective* on politics that emerges from an extension of the tools and methods of the economist to collective and nonmarket decision-making."⁵ After co-writing *The Calculus of Consent* (1962) with Gordon Tullock, Buchanan would author many more books and articles, both independently and collaboratively, that became the basis for constitutional economics as well as public choice, a sub-discipline within both economics and political science.⁶

What follows is an account of how public choice researchers, taking their cue from Buchanan, have come to understand the study of politics and economics as a "closed behavioral system." By a closed system of behaviour, what they mean is that economic and political analyses of agent behaviour should proceed on a symmetrical set of assumptions.

Symmetry of Assumptions in Political and Economic Analysis

In order to analyze political phenomena using economic tools and concepts, researchers must deploy a similar, if not identical, set of assumptions for political agents as economic agents. Likewise, they must assume the same things of political systems that they assume of economic systems, or market-places. So, I begin by presenting Buchanan's argument for aligning the assumptions in both political and economic analyses, or in what he terms a "closed behavioral system."

Buchanan's Closed Behavioral System. Although he was not the first to argue for symmetry of assumptions in the fields of economics and politics, Buchanan (1972b) nevertheless makes one of the most convincing cases in his essay, "Toward Analysis of Closed Behavioral Systems."⁷ In it, he rebukes welfare economists and social theorists for shortsightedly tendering the view that decision-makers acting in their public roles--i.e, as bureaucrats, politicians and

voters--behave differently than they do in their private roles--i.e., as economic agents, consumers and producers. In economic matters, agents work only for the sake of advancing their own interests, values or conceptions of the good; while supposedly in political matters, they selflessly toil for the sake of promoting the public interest or general good. "The 'theory of public choice,'" Buchanan (1972b:14) proclaims, "rests on a single decision structure." Just as utility-maximizing individuals make decisions to buy and sell in the economic marketplace, so the same individuals make decisions in political contexts.⁸ Politicians choose policies; bureaucrats choose how to implement them; and citizens choose a bundle of policy proposals (or a candidate's platform) when they vote in elections. By relying on a unitary set of assumptions about human agency, public choice integrates what were previously two models--one, concerning political choice and, the other, economic choice--into "a single decision structure." This, of course, means that public officials behave as self-interested, utility-maximizing agents on the economic model of *homo economicus*--not exceptionally, or as we would expect, Ostrom (1975:848) says, of "enlightened and benevolent leadership." In other words, agents behave in ways analogous to opportunistic business entrepreneurs or monopolists. As Buchanan (1984:11) conveys in his appropriately titled essay "Politics without Romance," public choice divests political theory of its usual romantic notions, such as the common good of "the people" and the selfless political leadership of the "benevolent despot." In their place, it substitutes "notions that embody more skepticism about what governments can do and . . . notions that are surely more consistent with the political reality that we may all observe about us."⁹

Three Postulates

Buchanan formalizes the public choice research programme in terms of three postulates: (i) methodological individualism, (ii) rational choice and (iii) politics as an exchange process.¹⁰

#1: Methodological Individualism. Although dispute arises at the margins, the postulate of methodological individualism at the hard core of the public choice research programme is accepted in some form or another by each and every public choice scholar. As the public choice scholar Vincent Ostrom (1987b:35) writes, “the first assumption [of public choice] is the proposition that individuals are the basic units to be considered in the design of political institutions.” The behavioral postulate of *homo economicus*, or economic man, establishes a set of assumptions about human agency that can be summarized in two propositions:

MI (i): Autonomous individuals are the primary units of analysis in inquiry.

MI (ii): Methodologically-speaking, social researchers must adopt a singular model of individual psychology in order to isolate and measure the effects of alterations in the individual’s environment.¹¹

The ordering of these statements is intentional, from the least controversial to the most; from MI (i), establishing the primacy of the individual, which most liberal democrats share, to MI (ii), positing the singular psychological makeup of the individual, which arouses controversy depending on how the methodological individualist decides to define the individual’s substantive motivations.¹² According to the libertarian philosopher Robert Nozick (1974:32-3), methodological individualism means that “there is no social entity . . . only individual people, different individual people, with their own individual lives.” While methodological individualists can accommodate the attribution of motivations and preferences to collectivities or social wholes, they do so only insofar as these social dispositions are reducible to individual dispositions.¹³

#2: Rational Choice. The second postulate of the public choice research programme is rational choice. Although it is a dominant theoretical approach in political science and economics, rational choice actually has no unitary definition to which all of its proponents and detractors appeal. According to Green and Shapiro (1994:13), “there is no single rational

choice theory or unambiguous standard for assigning the label ‘rational choice’ to a theory.”

Nevertheless, public choice theorists and researchers have reached consensus on some general rational choice assumptions--one of which has already been discussed in considerable detail: methodological individualism. The remaining assumptions are summarized in four propositions, as follows:

RC (i): Individuals are purposive and freely choosing agents, whose actions are the result of intentional goal-directed behaviour.

RC (ii): When confronted with alternative choices, rational agents select the one which maximizes expected utility or payoff.

RC (iii): For an agent’s action to be rational, it must satisfy a minimal set of consistency conditions, particularly those of connectedness, transitivity and independence.

RC (iv): Models of rational choice have universal applicability, such that differences among agents rarely affect researchers’ conclusions.

The fourth and last assumption of rational choice, or RC (iv), is that models of rational behaviour are assumed to be universally applicable. Rational choice assumptions--for instance, about purposive and utility-maximizing behaviour--extend to most if not all people, regardless of their political ideology, psychological state, prior socialization or cultural background, and generally bear out under empirical testing *ceteris paribus*.¹⁴ However, differences in individual preferences and orderings do establish the conditions for conceiving politics as an exchange process. As the third public choice postulate, politics-as-exchange will be discussed in more detail within the following section.

#3: Politics as Exchange. The third and final postulate states that by modeling politics as an exchange process a novel and analytically useful account of political choice and collective action results. In treating political choice as a generalized form of economic exchange, public choice scholars make a direct analogy between politics and the market: on the one hand, the market is idealized as a perfectly competitive and decentralized network of exchanges; and,

on the other hand, politics is taken to reflect a series of individual and collective interactions that imitate economic transactions.¹⁵ “Politics is a structure of complex exchange among individuals,” Buchanan (1987:246) explains, “a structure within which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges.” The strength of the analogy between markets and politics depends on understanding the interactions between political actors as exchange relationships--or what Friedrich von Hayek (1976) terms “catallaxy” and Frank Cunningham (1995:111; 2002:103) calls the “‘catallactic’ approach.”¹⁶ When faced with the prospect of engaging in collective action, agents stand to reap personal gains as well as losses as a result of their contributions. Since no person would voluntarily agree to an exchange that would make her worse off, and would only engage in a trade that would make her better off, then all voluntary exchanges must produce end-states that are Pareto-superior: that is, a just state of affairs in which at least one person is better off and no person is worse off.¹⁷ “For Buchanan,” Jules Coleman (1990:137) comments, “to say that a state of affairs is efficient is to say that it is the outcome of *voluntary exchange* within a given *framework of trade* (or within an institutional setting).”¹⁸ Hence, exchanges in both markets and politics should garner efficient and just results so long as they are voluntary and occur against a specific institutional background.

However, the self-interest that motivates political exchange does not always provide an adequate basis for group collaboration. Indeed, in many instances, it tends to generate collective action problems. Self-interested agents will choose to forebear the expense of contributing to the group action while retaining the benefits of group membership, thereby living up to the moniker of “free-riders” (Olson 1965). For instance, if they share a public resource or “commons,” such as a pasture for grazing sheep, acting in a way that is individually rational, i.e. continually adding sheep to maximize their private payoff, can eventually lead to their collective

ruin, viz. an over-grazed pasture. In this situation, typically referred to as the “tragedy of the commons,” agents have no reason to contribute to the long-term collective good by limiting their personal short-term gain, and all the reason to bring about a collective bad through their self-seeking behaviour (Hardin 1968:1247; Buchanan 1970). As Vanberg and Buchanan (1990:184) observe, “rational self-seeking actors cannot be expected to contribute unless there are selective incentives, that is, benefits that are contingent on the actors’ own contributions.” Hence, coordinating collective action requires that agents mutually agree to abide by a general scheme of selective incentives--which, as Olson (1965:51) explains, “stimulate a rational individual in a latent group to act in a group-oriented way.”

Following game theorists, public choice scholars typically model the strategic choices and payoff structures involved in market and political exchanges in a format similar to a prisoner’s dilemma, yet with strikingly different results. In a prisoner’s dilemma situation, two parties must make separate decisions about whether to cooperate or defect, lacking any communication between them and in full knowledge that mutual cooperation is the most desirable outcome and mutual defection is a less desirable outcome; yet, the costs associated with unreciprocated cooperation make defection the most individually rational, and yet collectively non-optimal, choice.¹⁹ Different from the prisoner’s dilemma game, though, the outcome of the exchange game is either mutual exchange or mutual non-exchange. The difference can be explained by the change in game conditions--viz., both parties are allowed to communicate--as well as the shift towards synchronous and reciprocally contingent action: agent one yields his only if agent two yields; and if one does not yield, then neither does the other. “Exchange is necessarily reciprocal,” Buchanan comments, “[since] each trader gives up something of value in exchange for something of value given up by the other trader.” Consequently, the players in the exchange game reach what game theorists call a “Nash

equilibrium” and what Przeworski (1991:20) defines as a solution whereby each player “does what is best for her given what others [decide to] do.”²⁰ Indeed, the exchange game resembles a coordination problem, and not a prisoner’s dilemma situation.²¹ Given that agreement and exchange are typically regulated by contract, public choice scholars have turned to the contractual analysis of constitutional politics—sometimes referred to as ‘constitutional contractarianism.’ Public choice scholars’ emphasis on constitutional contractarianism marks the advent of the public choice sub-programme of constitutional economics, to which our attention now turns.

Constitutional Economics

Constitutional economics develops out of public choice and particularly the third postulate at the hard-core of the public choice research programme. Creating a constitution transforms competitive relations into cooperative ones, making the “interest, even of bad men, to act for the public good” (Hume 1985 [1777]:15-16; quoted by Buchanan and Tullock 1962:314). In this way, constitution-making resembles a market transaction. Due to the strength of the analogy, constitutional economists believe that they are warranted in modeling constitutional agreement using the analytical tools of public choice. According to Buchanan (1990:4), “individuals choose to impose [constitutional] constraints or limits on their behavior primarily, even if not exclusively, as part of an exchange in which their own actions are sacrificed in return for the benefits they anticipated from the reciprocally extend restrictions on the actions of others.” In addition, constitutional economists are contractarians.²² According to the contractarian logic, the mere fact of agreement indicates that the arrangements agreed to are ones that, as Scanlon (1982) asserts, “no person could reasonably reject.”²³ “This way of thinking,” Buchanan (2003a:146) explains, “is, at base, procedural rather than substantive . . . [so] that [outcome] which emerges from agreement is normatively superior because it emerges

and nothing more.” So long as what is agreed to is the outcome of free and voluntary consent and not the product of fraud or coercion, that outcome is legitimate--as well as efficient and just. The reason for the efficiency and justice of the outcome ties together the notions of constitutionalism to contractarianism: namely, that a Pareto-efficient process of free exchange generated the constitutional agreement (Coleman 1984, 1990). Thus, the efficiency, justice and legitimacy of the constitution-making process transfer to the constitution’s content, viz. the rules and institutions. In this way, the public choice analysis of constitutions shares with liberal constitutionalism a commitment to the normatively legitimating force of a constitutions--what, in Rawls’s (1971:84) terminology, is as “a cooperative venture for mutual advantage.”

What is the proper domain of inquiry for constitutional economics? Constitutional economists study constitutional rules, how they function and the ways in which those rules are chosen in constitution-making situations. Buchanan (1990a:3) states that, “[c]onstitutional economics directs analytical attention to the choice among constraints.” Although constitutional rules can also empower individual choice, their primary function is to limit or constrain the choice set, so that the process of choosing in ordinary politics will reliably generate acceptable outcomes.²⁴ Constitutional economists analyze the working properties of rules in order to determine how they restrain behaviour in ordinary politics, and particularly how they might convert negative-sum conflicts into zero-sum and positive sum (or Pareto-optimal) cooperative outcomes. The study of constitutional rules is, therefore, both a normative and positive project, involving assessments of how fair and efficient specific rules are, as well as “wholly positive analyses that consist of comparing alternative structures [of rules] from within the perspective defined by the hard core of the research programme” (2). For the purposes of the present project, the result of this positive and normative treatment of constitutional rule-

making is an analysis of decision rules--majority rule as well as its alternatives--that, as will be seen in the last major section, challenges the dominant models of deliberative decision-making.

Two Levels of Choice

Constitutional economists frame the decision-making process as a two-level hierarchy of choice. "Constitutional thinking," Buchanan (2003a:154) declares, "requires a modicum of understanding of the two-stage distinction, that between rules within which ordinary politics proceeds, and the activity of ordinary politics itself." Choice occurs on two levels: a higher level, on which agents choose constitutional rules to govern their later political interactions, and a lower level, on which agents engage in post-constitutional, in-period or ordinary politics and make choices in accordance with a framework of previously chosen constitutional rules.

Since players are unsure as to whether prospective constitutional changes will benefit or harm their own interests--operating as Buchanan tells us, under a "veil of uncertainty"--they will almost always exercise enlightened self-interest in their choice of rules. The level of uncertainty and the likelihood of agreement are correlated to how abstract the rules are, so that, according to Brennan (1984:126), "it is easier to get consensus the higher the level of abstraction at stake."²⁵ Consequently, they will choose rules that satisfy broad standards of justice and efficiency (such as superiority and optimality in the Paretian sense) rather than their own sectional wants and desires. So, the dynamics of decision-making during a constitutional convention differ dramatically from the dynamics of choice during ordinary politics. At the constitutional level, agents are more likely to agree to fair and impartial rules, rather than those which strategically favor their own interests.

At the constitutional level of choice, Buchanan endorses a unanimity decision rule because it provides a feasible standard of efficiency and fairness in such a high-stakes collective decision-making situation. Especially with regard to choices about constitutional essentials, "for

[these] decisions . . . can significantly affect human life and property,” Buchanan writes, “the individual may choose to accept [the decision rule of] . . . greater-than-majority agreement.” Indeed, by adopting unanimity as a benchmark, decision-making bodies can push voting rules towards qualified or super-majorities in order to increase the likelihood that more parties will benefit from the outcome.²⁶ Buchanan (1987:248) broadens the application of the unanimity norm to the constitutional plane of decision-making: “when the unanimity criterion is shifted one stage upward, to the level of potential agreement on constitutional rules . . . the in period violation of the criterion [viz., employing a simple majority rule] does not imply the inefficiency of the rule so long as the latter is itself selected by a constitutional rule of unanimity.” Therefore, in Buchanan’s hands, the unanimity standard licenses, on the one hand, the use of a qualified majority rule for constitutional decision-making and, on the other, simple majority rule for ordinary political decision-making insofar as the rule has been adopted by unanimous or near-unanimous agreement at the constitutional level.²⁷

The Rationale for Rules

Turning to the real world of constitution-making, why would Madison and the other American Founders bear immense costs in order to devise a constitutional order with separated powers, checks and balances, various forms of qualified or super-majority voting rules and a complex federal system? One possibility is that the U.S. Constitution was designed as a protective scheme to insure against the risks and lower the potential costs imposed by majoritarian democracy (Schwartz 1989:32; Buchanan and Vanberg 1989:15). “Complaints are everywhere heard,” James Madison writes in *The Federalist* no.10, “that our governments are too unstable, that the public good is disregarded in the conflict of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of a superior and overbearing majority” (Hamilton, Madison et al. 1961

[1787]:45). The threat of majority tyranny has been articulated in places other than in *The Federalist Papers*, such as the writings of Alexis de Tocqueville (1965 [1835-40]:251) and John Stuart Mill (1976 [1835/40]:213-9). Quoting Madison, Tocqueville (1969 [1835]:255) acknowledged the imminent threat of anarchy “in a society under the forms of which the stronger faction can readily unite and oppress the weaker.” In response to the threat of majority tyranny, so the interpretation goes, Madison and his fellow Framers crafted the constitutional provisions with the ultimate purpose of protecting the political system against the destabilizing effects of majority coalitions (Ostrom 1987b:86-8). In other words, they intended to restrain the majority from despotically depriving minorities of their basic rights, liberties and property. Buchanan (1997c:220) echoes this point: “James Madison, the most important of the American founders, sought to forestall the emergence of coalitional or factional forces by incorporating several procedural checks and balances into the constitutional structure.”

This model of constitutional democracy is sometimes referred to as ‘protectionist democracy,’ since the strong constitutional constraints that its proponents recommend function as protections for minorities against majority coalitions.²⁸ Protectionist democracy finds its expression not only in Madison’s constitutional theory, but also in the constitutional economics strategy of justifying constitutional constraints for the sake of protecting minority rights and interests. Indeed, this conception of democracy is widely accepted among constitutional economists as Madison’s primary legacy for the programme. Buchanan and Tullock (1962:25) explicitly state the connection: “Madison and the other Founding Fathers may have been somewhat more cognizant of the economic motivation in political choice-making than many other less practical counterparts who have developed the written body of American democratic theory.”²⁹

Setting aside their conception of democracy, the main objective of constitutional economists is to investigate the rationale for choosing constitutional rules. The constitution is conceived as principally a choice mechanism (Buchanan 2003a, Ostrom 1987). Since constitutional rules are the so-called “rules of the game,” structuring the way in which ordinary non-constitutional politics will be played, choosing them is a high-stakes affair (Buchanan 2003a:147; Ostrom and Ostrom 2004:108). Buchanan (1978:6) claims that one of the primary reasons for carefully choosing rules is that “the outcome of deliberation may well be dependent on the voting rules adopted.” In *The Calculus of Consent*, Buchanan and Tullock (1962:78) inquire into the kinds of decision-making rules that would be chosen in a situation of constitutional deliberation and choice. As a consequence of their analysis, Buchanan and Tullock infer that “there is nothing . . . that points to any uniqueness in the rule that requires a simple majority to be decisive” (81). Thus, majority rule does not deserve the esteemed status that political theorists, including John Locke (1988[1690]), Brian Barry (1979), Jane Mansbridge (1981), Robert Dahl (1989), Jürgen Habermas (1996) and John Rawls (1971), have afforded it.³⁰ Despite the widespread defence of simple majority rule as either a superior or an optimal decision procedure, Buchanan and Tullock’s analysis weighs in heavily against this conclusion.

Buchanan holds that at the fundamental level a majority rule should be replaced with a unanimity rule because then no external costs are imposed on the losing minority voters, since everyone must consent in order for the group to reach agreement. “When unanimous agreement is dictated by the decision-making rule,” Buchanan and Tullock (1962:64) explain, “the expected costs on the individual must be zero since he will not willingly allow others to impose external costs on him when he can effectively prevent this from happening.” Thus, when Buchanan and Tullock state that they will use “the situation in which no external costs are imposed on the individual” as the baseline for measuring the costs of collective action, they

mean that they will employ the decision rule of unanimity as the benchmark.³¹ In constitutional choice situations, a unanimity decision rule has special properties that fail to manifest in ordinary or post-constitutional politics. As Buchanan (1987:228) claims, “the standard arguments against the application of the unanimity rule do not apply with equal force at the constitutional level and at the operational level of choice.” Simply put, the high stakes of constitutional deliberation make it worthwhile to invest greater time and resources in negotiating towards a unanimous decision. In contrast, rules chosen in the constitutional convention to govern ordinary politics, or post-constitutional choice, need not be unanimity; they may be simple majority or qualified majority in the case of “general legislation.”³² Qualified majorities are preferred on issues where stakes are high, particularly those that jeopardize minority interests, threatening to deprive them of liberties and property. “[A]t a constitutional tier,” Ostrom (2004:115) notes, “decisions are made about who is eligible to participate in policy making and the rules that will be used to undertake policy making.” In policy decisions about, for example, whether to shift the tax burden on to a politically marginalized group or whether to adopt a society-wide ban against worship of an unpopular religion, super-majority rules requiring, for instance, two-thirds, three-fourths, or five-sixths of the total voting population, better protect the interests of minorities and groups with intense moral commitments.³³ To preserve institutional stability and to ensure that “the status quo of public rules” remains in force as “a set of relatively absolute absolutes,” decision rules for amending the constitutional rules also need to approach the unanimity threshold (Buchanan 1989c:45). However, the greater protection afforded by a super-majority rule also entails greater expenditures of time and resources spent in prolonged negotiations to reach a closer-to-unanimity threshold. In justifying greater-than-majority decision rules, constitutional economists appeal to James Madison and his belief, evidenced in *The Federalist* no. 10 and codified in the U.S. Constitution, that the excesses of majoritarian democracy--

particularly the abuse of minorities by tyrannical majorities--require the imposition of clever institutional constraints (Hamilton, Madison et al. 1961 [1787]:39-52). Indeed, majoritarian democracy cannot effectively constrain its own excesses, even though many democrats have endorsed the position that it can--in what Buchanan (1991:235) terms the "electoral fallacy."³⁴

So, the central insight communicated by Buchanan and Tullock is that the choice of alternative decision rules reflects the conditions of the choice situation and the stakes that agents face in arriving at decision outcomes; the higher the stakes, the more demanding should the threshold for agreement be; the greater the opportunity for one party to dominate another, the stronger the institutional constraints should be to diminish those perverse incentives. One of the implications of divorcing Buchanan and Tullock's approach from their conclusions is that their approach alone might be brought to bear on issues of deliberation. Specifically, through the intelligent design of decision rules and other constraints on deliberation, it might be possible to redress the problems of feasibility in institutionalizing deliberative democracy.

At this juncture, I will turn to consider several criticisms of deliberative democratic decision-making made by constitutional economists and empirical researchers.

Criticisms of Deliberative Democratic Decision-making

The constitutional economics critique of deliberative models of democratic decision-making has many targets but few marksmen. The critical objections that I will catalogue originate mostly from the founders of constitutional economics with the limited remainder originating from lesser known theorists working in the public choice and constitutional economics research programmes. For this reason, I will expand upon some of the criticisms of deliberation's inadequacies to include related treatments by positive or empirical researchers both inside and outside of the public choice and constitutional economics research programmes. These additions will demonstrate how, in some cases, study of the actual phenomena of

deliberation has corroborated the constitutional economists' criticisms of deliberative decision-making.

#1: Unattainable Ideal

The first criticism that constitutional economists direct at deliberative democratic theorists is that their models are overly idealistic, unattainable or utopian. "The requisite, hard-nosed insistence on feasibility is almost entirely absent [in political theory]," Brennan and Lomasky (1993:6) insist, "and this because there has been inadequate attention to political *science* properly understood and too much attention to political ideals." The strongly ideal or counterfactual nature of discursive theories of democracy has even led some constitutional economists to charge deliberative democrats with endorsing an elitist or Platonic framework in which only the best can deliberate (Przeworski 1998; Stokes 1998). However, as Axel Tschentscher (2004:83) points out, this charge is clearly mistaken: "If anything, the resulting framework for public deliberation in real discourse tends to be egalitarian, not intellectually elitist."

Critics who object to deliberative democrats' unattainable ideals typically fault their theories for not being sufficiently functional and empirically-grounded. Ostrom (1974:20) accuses political theorists, in general, of "spend[ing] a great deal of time *talking about* theory and surprisingly little effort in the use of political theory. Scholars should know how to use theory, no just *talk* about theory." These critics look to the empirical conditions under which actual deliberation takes place to support their case. For instance, as an empirical matter, it would appear that democracy is incompatible with deliberation. On the one hand, there exist institutions which are highly deliberative, but not very democratic, such as the Supreme Court. On the other hand, institutions can be observed which are highly democratic but not very deliberative, such as referenda and plebiscites. But very few, if any, institutions are both highly deliberative and democratic. Another problem is that actual political talk occurs amidst non-

ideal conditions--such as speakers who drown others out, intimidate, blatantly lie or employ rhetorical sleight-of-hands to manipulate their audience. So, the question becomes whether designing deliberative situations to approximate ideal conditions (e.g. Habermas's ideal speech situation) will in fact bring deliberation closer to the ideal or, as Frederick Schauer (1997:1321) worries, only "exacerbate the conditions that made the conditions non-ideal in the first place."

A target of these critics is Habermas's discourse theory. Constitutional economists Buchanan and Vanberg (1989) portray Habermas's discursive model of democracy as premised on a truth-seeking or truth-judgment approach to political choice. The appellation 'truth-judgment approach' can be traced back to earlier articles of Buchanan's (1978:5, 1984b:29-30) in which he distinguishes between the market and truth-judgment approaches to politics. In some forums, particularly jury deliberations, the objective of the process is to discover the truth or falsity of a state of affairs and to render judgment in the verdict--that is, to arrive at an accurate truth-judgment.³⁵ According to Buchanan and Vanberg (1989:57), Habermas's dialogue or discourse notion of agreement subscribes to a similar truth-judgment view, understanding decision-making "as a discovery process, a process by which persons [do] not simply reach a compromise but 'discover' what--in some objective sense--*is* fair or just." Constitutional economists dispute this account, claiming that discourse is ultimately about negotiating a balance of interests.

Habermas conceives deliberation as a regimented process of communication whereby validity claims are either rationally confirmed or disconfirmed based on normative rules implicit in discourse. However, according to Kevin Mattson (2002:327), "[i]f we expect anything like a mythical Habermasian 'ideal speech situation' or the glories of 'communicative action,' we'll probably be fairly disappointed when we bring ourselves back to earth and listen to 'actually existing' discussion where citizens talk about political and social issues." Positive researchers

Conover et al. (2002:24) concur with Mattson, noting that “there is an immediate and obvious disjuncture here between the ideal worlds envisioned by political philosophers and the real worlds in which actual citizens practice politics: ideal citizens deliberate, but today’s citizens mostly have conversations that are spontaneous, unstructured and without clear goals.” From deliberative democrat John Dryzek’s (2004b:74) perspective, there is also reason to believe that deliberation rarely, if ever, takes the form of rational argumentation: “As anyone who has observed political deliberation among ordinary people will attest, deliberation in practice is often more about telling stories than it is about making arguments.” Also, according to constitutional economists and some U.S. Constitutional Founders, deliberations more closely resemble interest-driven negotiations than rational discourses. “The result of the deliberations of all collective bodies must necessarily be,” Alexander Hamilton writes in *The Federalist* no. 85, “a compromise of many dissimilar interests and inclinations” (Hamilton, Madison et al. 1961 [1787]:491-2; quoted by Ostrom 1987b:77). Hence, a strict definition of deliberation as the rational articulation of well-reasoned arguments belies the multiform and unregimented way in which people actually engage in political talk.³⁶

If empirical researchers and normative theorists are to share a common language and subject-matter, then they must become more tolerant of diverse modes of communication, such as narrative, oratory, negotiation, storytelling, testimony, gender-specific and culturally unique modes of expression, and so agree to a more robust conception of what deliberation is. The conditions of Habermas’s (1990:89) ideal speech situation establish the criteria for testing the rationality of claims in deliberation, and so rule out “all external or internal coercion other than the force of the better argument and thereby also neutralizes all motives other than those that [are] of the cooperative search for truth.” In contrast, the actual process of democratic politics revolves around institutional incentives for bargaining and compromise, such as vote-trading or

logrolling among legislative representatives, vote-buying by special interest groups, pork-barrel politics or special projects brokered by representatives for their constituencies and other practices that almost invariably result in outcomes where some parties win while others lose.³⁷ Buchanan (1978:5) claims that, “for matters of ordinary politics, the problem is one of resolving individual differences of preferences into results, which it is misleading to call true or false.” Thus, constitutional economists adjudge Habermas’s ideal speech situation to be inappropriate for the rough-and-tumble reality of democratic politics, a reality punctuated by conflicting interests, partisan rivalries and ongoing efforts to broker political deals.

Another ideal feature of deliberation to come under attack is its dual focus on the ideal conditions of the discursive procedure and the decision rule of consensus. As Fiorina (1979:47) explains, theorists are attracted to an account in which “[t]he general presumption is that good people operating in good (i.e., ‘democratic’) processes necessarily produce ‘good’ outcomes.” As the Shapiro-Gutmann-Thompson criticism of pure proceduralism has shown, though, the preoccupation of deliberative democrats with designing a set of ideal conditions that guarantee just, fair or good outcomes is, more often than not, unrealizable in practice.³⁸ “A normative implication of this lesson,” the public choice scholar Russell Hardin (1993:169) argues, “is that political theory cannot be grounded exclusively in democratic procedural values.” In other words, no decision rule, set of procedures or process-guiding principles can validate outcomes consistent with what Rawls (1971:85) refers to as “perfect procedural justice.” In order to consistently achieve acceptable results, what are required are substantive principles that measure the value of outcomes independent of the procedural values and constraints. In addition, “the deliberative democracy literature,” according to Austen-Smith and Feddersen (2006:211), “has paid scant attention to how voting rules might affect the incentives for productive deliberation.” The decision rule of consensus, or unanimous agreement for identical reasons, proves infeasible

given the plurality of reasons that would be typically offered in a highly inclusive, or diversely populated, deliberative forum. So, for this reason, it would be prudent to modify Habermas's ideal threshold of consensus to a lower and more feasible decision rule of unanimity. Recalling Buchanan and Tullock's analysis, if the agents belong to a minority coalition, then the decision-making rule of unanimity will also shield them from external costs imposed by a majority, and ensure that the deliberations produce mutually beneficial--and, indeed, Pareto-efficient--outcomes analogous to those gained in an exchange relationship. Exchange-based deliberation, of course, requires that agents value outcomes differently, which includes having diverse reasons for favoring the outcome that they will eventually agree to.

In deliberative decision-making, though, adopting unanimity as *the* operative decision rule has several familiar drawbacks. First, Vanberg (2004:70) calls attention to how "Buchanan and Tullock have shown [in *The Calculus of Consent*] . . . [that] unanimous agreement as legitimizing principle is to be distinguished from unanimity as practical decision rule." Although to a lesser degree than consensus, unanimity nevertheless legitimates the content of the final decision. However, both consensus and unanimity pose nearly intractable obstacles to reaching agreement. In the case of unanimity, as it has already been pointed out, decision-making or negotiation costs escalate dramatically, eventually making agreement difficult and costly to achieve. Moreover, as van Mill (1996:746) claims, a "unanimity rule can lead to the manipulation of outcomes in various ways"--perhaps the most significant and costly of which is the extortion of terms by minority holdouts. Yet deliberation is itself a legitimating force. Coughlin (2000) demonstrates that deliberation can guarantee consensus, but only under the extremely limiting conditions that all deliberators have identical preferences about what an acceptable outcome is and all private information is revealed publicly in advance.³⁹ According to Cohen (1997:75), even in the situation where dissensus leads deliberators to call for a majority-

decided vote, the quality of the eventual outcome will be improved compared to the outcome of a vote alone--an insight that Fishkin (1991, 1995) cleverly incorporates into the design of the deliberative poll.

In the end, many constitutional economists and positive researchers criticize the deliberative ideal because it appears to be unattainable in practice. One way around this difficulty is to construct theories of deliberation that are more institution-friendly.⁴⁰

#2: Strategic Action

Consistent with *homo economicus*, constitutional economists presume that individuals will always strategically bargain toward the goal of securing their private interests. According to Gutmann and Thompson (2004:113), these “critics of deliberation argue that bargaining is not only more common but also preferable as a way of resolving moral disagreement in politics.” Agents negotiate outcomes which maximize their private advantage in so far as institutional constraints and situational conditions permit. Consistent with Hume’s (1985 [1777]) maxim, citizens should be assumed to behave as “knaves,” or egoistic agents, if the state is to sufficiently guard its institutions against the destabilizing and inefficiency-generating effects of their strategic behaviour (Kliemt 2000:2, 2005:208). Likewise, as Alexander Hamilton writes in *The Federalist* no. 6, even “assuming the pretext of public motive, [individuals] have not scrupled to sacrifice the national tranquility [or public good] to personal advantage or personal gratification” (Hamilton, Madison et al. 1961 [1787]:22). The solution is to intelligently design institutional constraints and incentives that channel egoistic patterns of individual behaviour into mutually beneficial and efficient patterns of collective behaviour. “Whenever an act is mutually beneficial to all who are affected,” Ostrom (1987b:81) insists, “no political problem exists.” As a result, the deleterious effects of strategic behaviour can be overcome and prevented in the future through clever institutional design.

Consistent with what van Aaken (2004:23) terms the postulate of *homo communicans*, these deliberative democrats assume that deliberating agents will behave in a selfless and other-regarding manner, reciprocally evaluating each other's arguments and cooperatively searching for the common good. One example cited by Vanberg and Buchanan (1989:57) is Habermas's invocation of the requirement that deliberating agents engage in an "impartial evaluation of the interests of all who are concerned." Constitutional economists accuse deliberative democrats of failing to appreciate the threat that strategic action poses to institutional stability and democratic order. Nevertheless, some deliberative democrats acknowledge the threat of strategic action. Even Habermas (1996b:23, 25) notes that "the rational choice of optimal strategies" punctuates actual deliberations, and while the rules of discourse should ideally "neutralize power, bargaining itself well allows for strategic interactions." Also, Cooke (2000:968) draws attention to the "dangers to which it [deliberative democracy] is prey--in particular, manipulation of public processes of deliberation for sectional purposes." Four forms of strategic action will be discussed in turn: (i) strategic voting, (ii) logrolling, (iii) rent seeking and (iv) cheap talk.

Strategic Voting. According to Arrow's impossibility theorem, voting procedures and decision-making agendas are susceptible to strategic manipulation in the event of majority cycling. Indeed, most voting procedures succumb to some variety of strategic action. Even if a majority cycle does not occur, the voting procedure will usually fail to satisfy Arrow's criteria for aggregating individual preference orderings into consistent social preference orderings. One reason for this failure is a phenomenon known as strategic voting. According to Elster (1997:6), "[s]ome methods for aggregating preferences are such that it may pay the individual to express false preferences, i.e. the outcome may in some cases be better according to his real preferences if he chooses not to express them truthfully." An agent votes strategically, falsifying the ordinal ranking of his first, second and third preferences, if he believes that the outcome will generate

greater rewards than its alternative, that is, the outcome if he instead votes sincerely. “An individual ‘manipulates the voting scheme if, by misrepresenting his preferences,” Allan Gibbard (1982:358) explains, “he secures an outcome he prefers to the ‘honest’ outcome--the choice the community would make if he expressed his true preferences.” Thus, in these cases, individual and collective goals stand in tension; it is individually rational to vote strategically, yet collectively advantageous to vote straightforwardly.⁴¹ For instance, consider a voting procedure involving a plurality rule and a single non-transferable vote, i.e. each voter has a single vote that can only be cast once for a single candidate. Either of the two following conditions obtain: (i) the voter’s actual first preference has no chance of winning or (ii) his last preference will be victorious if he votes his actual first preference. Assuming that the voter has three ranked preferences, it will be rational for him to vote his second preference, strategically misrepresenting it as his first, in order to not waste his vote or to ensure that his least preferred candidate does not win (Felsenthal and Brichta 1985:320; Christiano 1993:175-6).

Constitutional economists criticize deliberative theorists for failing to take seriously the problem of post-deliberative strategic voting. Strategic voting presumes that voters are familiar with the preference orderings of other voters. However, as William Riker (1982:102) notes, we can never be sure “what ‘true’ tastes are--all we ever know are revealed tastes.” Since deliberation prior to voting tends to reveal others’ preferences, but not always their true preferences, the danger that agents will misrepresent their preferences either in the pre-voting deliberation or in the final vote becomes even more pressing than if voting occurs in the absence of deliberation (Felsenthal and Brichta 1985:312). To resolve the difficulty, constitutional economists contend, institutions must be designed so that they are incentive-compatible, or induce agents to vote their preferences sincerely. In order to “be incentive compatible,” Christiano (1993:180) states, “the procedure [must] aggregate over the true

preferences of individuals.” So, deliberative theorists need to incorporate appropriate incentives into the structure of deliberative procedures if they wish to dissuade agents from strategically voting. If, for instance, a majority vote is held at the end of deliberation, as Cohen (1997:75) recommends when consensus proves unreachable, then the voting procedure will not reflect aggregated preferences which have been qualitatively improved through deliberation, but rather an aggregation of preferences which have been misrepresented for strategic gain. According to Wohlegemuth (2004:39), “[d]eliberation . . . should discourage ‘preference falsification’, understood as the strategic misrepresentation of true preferences.” There are two tactics for attenuating or eliminating the negative consequences of strategic voting or preference falsification: one, structuring the deliberative process so that agents sincerely express preferences in response to positive incentives or negative sanctions; and, two, redesigning the voting procedure--for instance, replacing the single non-transferable voting procedure with a single transferable vote system or Borda count--in order to reduce the likelihood that agents will misrepresent their first-order preference.⁴²

Logrolling. “Democracy, like other human institutions,” Gordon Tullock (2005 [1994]:395) succinctly states, “is not perfect.” Although this comment may appear to belong to the first class of criticisms (deliberative democracy’s unattainably ideal quality), it is instead a prelude to a more specific objection: namely, that deliberative democratic theorists ignore the phenomenon of vote trading or logrolling. As an empirical matter, Tullock (2005 [1998]:347) notes, “democracy everywhere functions by way of logrolling.”⁴³ When logrolling occurs, politics truly imitates an exchange process. Since agent A values agent B’s vote in round two more than she values A’s vote in round one, A promises her vote in the first round for a return of promise from B to vote with A in the next round of decision-making. In this way, Buchanan and Tullock (1966:306, 305) conclude, “logrolling, as an institution, makes majority voting rule

more efficient” and, at least “in this respect, trade in votes is no different from trade in commodities.”

Buchanan and Tullock (1962:132) criticize the failure of democratic theorists to account for “the varying intensities of preferences among voters.” In order to satisfy the normative demand that citizens be treated as political equals, the preferences of these citizens, it is argued, should be counted equally. However, the democratic theorist’s insistence on satisfying the normative requirement of political equality, Buchanan and Tullock argue, translates into a mistaken assumption that preferences are empirically equal, when in fact they are not.⁴⁴

“Applying the strict Pareto rules for determining whether one social institution represents an improvement over another,” Buchanan and Tullock contend, “almost any system of voting that allows some such exchange to take place would be superior to that system which weights all preferences equally *on each issue*” (Ibid). Assuming that Buchanan and Tullock are right and the benefits of logrolling systems far eclipse non-logrolling systems, we can, at most, conclude that vote trading makes outcomes from deliberations terminating in majority-rule votes more efficient.⁴⁵ However, the same reasoning does not persuasively support the judgment that the practice is normatively valuable. Indeed, one reason why deliberative democrats might pay so little attention to logrolling is that it constitutes strategic behaviour, which does not contribute to—and, it can be argued, detracts from—the legitimacy and morality of collective decision outcomes.⁴⁶ Moreover, “[l]ogrolling can easily lead to overspending by government,” Johnson (1991:217) notes, “because voters can trade off votes for expenditures while placing the tax burden on others.” Constitutional economists might agree to prohibit logrolling for this reason.

What deliberative democrats fail to see, constitutional economists claim, is that as long as voting is an iterated procedure and the intensity of preferences vary across individuals, it will be rational for agents to seek to exchange votes on issues that they feel weakly about for votes

on issues that they feel strongly about. Tullock (2005 [1994]:397) rehearses the basic argument for the desirability of vote trading:

[S]uppose that I want A and object to B, but my feelings with respect to A are much stronger than those with respect to B. I find someone else who wants B and objects to A, but whose feelings are much stronger with respect to B than to A. If we now agree to have both A and B, both of us would be better off than if we didn't have either A and B. Intensity of preference should be taken into account in voting as well as simple direction of preference.

So, when preferences are held with varying intensities, logrolling empowers members of a minority to form temporary coalitions with members of the majority in order to gain considerable influence over decision outcomes.⁴⁷

Finally, just because the practice of logrolling occurs under conditions of publicity--such as in open forums, public meetings and televised legislative debates--does not mean that agents will express their preferences sincerely, or in the language of self-interest. As Elster (1998b:102) points out, “[v]ote-trading deals in [the U.S.] Congress . . . are routinely dressed up in public-interest language.” In other words, agents involved in vote trading typically engage in subterfuge, camouflaging their arguments for logrolling schemes with appeals to the common good, impartial reasons and social norms.⁴⁸ In this respect, logrolling dovetails with the next form of strategic action: cheap talk.

Cheap Talk. Whether in the formal discourses of political institutions or the informal discourses of civil society, political talk *is* a standard and usually pervasive feature of democratic societies. “They [economists] tend to think of communication as a mechanism to exchange information,” Bohnet and Frey (1994:342) state, “guided by the principle of [instrumental] rationality and thus contend that speech is always strategic.” However, until very recently, rational choice theorists (which include public choice theorists and constitutional economists) doubted that talk amongst agents directly affects decision outcomes, including their political choices. Only in the counterfactual scenario where agents possess the same preferences over all

outcomes and the costless opportunity to verify the truth of each other's claims can talk have genuine effects on the eventual decision; otherwise, rational choice theorists argued, talk has little or no influence on outcomes (Austen-Smith 1990, 1992:46). The explanation for this shortcoming is that "talk is cheap." Farrell and Rabin (1996:104) ask, "when talk is cheap . . . what incentive is there to tell the truth?" Assuming that the costs of lying or misleading do not exceed the costs of telling the truth, speakers will have an incentive to lie or mislead so long as this tactic advances their interests. Likewise, listeners are likely to ignore the speaker's expressions so long as they are aware of the incentive to dissemble. Such awareness results from the listener's observation of behavioral cues that "reveal the [speaking] agent's information or 'type'"--what theorists refer to as "signaling" (Farrell and Rabin 1996:104).⁴⁹ However, in practice talk does matter, for "costless talk can be made part of an individual's effective strategy set, entailing that such talk might indeed be capable of influencing real outcomes" (Austen-Smith 1992:46). When listeners have little reason to doubt the speaker's sincerity (imperfect information about incentives) and the speaker adeptly phrases appeals in terms that match with the listener's concerns (i.e. framing effects), the speaker's communications can successfully transform the listeners' preferences and the terms of their collective decisions (Denzau 1985; Kahneman and Tversky 1981; Farrell and Rabin 1996:104; Akerlof 1970). Therefore, confidence among rational choice theorists that talk has little or no effect on decision outcomes has turned into scepticism over how strategic communications could *not* significantly affect decision outcomes.

Although there is now relative consensus among scholars that talk does affect decision outcomes, public choice theorists and constitutional economists still allege that cheap talk weakens the argument for deliberation. Sometimes referred to as the 'Rochester critique' of deliberative democracy, the argument states that if duplicity is costless, then communication or

signaling by a speaker will not change the preferences, choices or actions of listeners.⁵⁰

According to Kuran (1998:536), “[n]o system [of deliberation] that publicly reveals preferences and ideas can overcome the problem of insincerity in communications.” The reasoning behind the Rochester critique is nearly identical to the reasoning used to support the conclusion that talk does not affect outcomes. So long as the listeners are cognizant of the speaker’s costless opportunity to dissemble during the deliberations, they will ignore the speaker’s messages. Moreover, awareness of the incentives to talk cheaply makes deliberators doubtful of the sincerity of public-spirited proposals.⁵¹ So, deliberators will neither divulge their genuine preferences nor seek unanimous agreement in earnest (Austen-Smith and Feddersen 2002). Consequently, “deliberation is pointless” (Ward et al. 2003:288).

Solutions to the problem of cheap talk, constitutional economists argue, cannot be found in existing models of deliberative democracy. According to Habermas’s (1984:23) theory of discourse ethics, one precondition for redeeming the validity of a claim in discourse is that it be truthful. Gutmann and Thompson (2004:5) likewise argue that “the truthfulness of . . . arguments is a deliberative virtue.” Despite stipulations that virtue or communicative action require that claims and arguments be sincere, Habermas, Gutmann and Thompson fail to explain how the “validity basis of language works to coordinate social interaction” and, more specifically, to overcome the threat of cheap talk (Johnson 1993:82). However, false and misleading rhetoric may prove more effective than sincere communications at facilitating fluid social action. Moreover, the incentive to engage in cheap talk increases as the costs of verifying the truth of representations rise.⁵² Likewise, Kuran (1998:542) claims that Fishkin, Gutmann and Thompson neglect to consider the “social pressures that, in the process of producing consensus, militate against honest moral discourse.” Since individuals appraise their own views relative to others’ views, fear of public censure and disapprobation will often lead deliberators to

falsify their preferences (Kuran 1995). Despite the paucity of solutions offered by deliberative democrats, others have recommended complementing the deliberative ideal with an “effective ethic of sincerity,” consistency requirements to instill deliberation with the “civilizing force of hypocrisy,” and norms of trust cultivated by deliberators whose “interactions take place repeatedly through time” (Kuran 1998; Elster 1998b; Ward et al. 2003).

Rent Seeking. The final type of strategic action I will consider is what public choice scholars and constitutional economists term ‘rent seeking,’ i.e. the effort to obtain excess rents or income through the acquisition of a government-sanctioned monopoly interest.⁵³ Since under monopoly conditions the price of a good is no longer determined by market conditions (supply and demand), obscene profits accrue to the monopolist (called ‘monopoly rents’) and market inefficiency results. However, in the 1970s, the public choice theorists who articulated the theory of rent seeking were not as concerned with the windfall profits monopolists stood to gain as they were with the resources squandered in pursuit of the state-granted monopoly right.⁵⁴ According to Johnson (1991:329), “the social waste produced by this bad type of rent seeking is the use of resources to obtain, promote, and retain this monopoly position. The social bad of rent seeking is not the rent . . . [but] the resources utilized in ‘chasing’ or trying to obtain the rent.”

So, what is the connection between the strategic behaviour of rent seeking and the constitutional economics critique of deliberation? According to Robert Putnam (1995:76), successful research into how social capital accumulates and influences political behaviour should incorporate the insights of scholars “who stress that closely knit social, economic, and political organizations are prone to inefficient cartelization and to what political economists term ‘rent seeking’ and ordinary men and women call corruption.” Lacking sufficient constraints on strategic behaviour, deliberative forums can fall prey to ascendant or dominant groups of agents,

some seeking to coerce weaker opposition groups; others trying to exploit their role as agenda-setters; and still others attempting to spread misinformation. “Rent-seeking theory argues,” Bohnet and Frey (1994:348) explain, “that those who are part of the agenda setting and decision-making may form a cartel therewith creating and appropriating political rents.” In addition, the state can legally mandate that some private institutions and associations engage in constraint-free deliberations, thereby granting enterprising rent seekers institutionalized support to manipulate and dominate decision-making processes.⁵⁵ However, the bonds of self-interest that hold rent seekers together in cartels (unlike the bonds of civic virtue) provide too weak of a foundation upon which to build a successful constitutional dialogue and agreement. “[F]rom this kind of rent-seeking perspective,” Vanberg and Buchanan (1989:53) observe, “people’s concern for their . . . interests prevents them from actually realizing the gains from constitutional cooperation.” Although in theory Habermas’s presuppositions of fair and rational discourse rule out the possibility of force and lying, as do Gutmann and Thompson’s substantive and procedural principles, in practice neither give sufficient incentives for strategically acting agents to cease expending the resources necessary to secure political advantages over their peers. Therefore, constitutional economists contend, deliberative democratic models of decision-making neglect to incorporate appropriate protections against rent seeking behaviour.

#3: Opportunity Costs and Stakes

Constitutional economists also argue that the excessively high opportunity costs and the comparatively low stakes of real-world deliberations factor strongly against any conclusion that deliberation is worthwhile or beneficial. Schroeder (2002:120) objects that “[t]he opportunity costs of deliberation have yet to be accounted for by deliberative theorists, and those costs alone undermine the attractiveness of the theory.” Several reasons support this objection. First of all,

most citizens must confront what Bohman (1998:418) calls “the pragmatic problem of the scarcity of time or other resources”: that is, they rarely have enough of either to participate in politics directly or on a regular basis, besides engaging in the relatively low-cost activity of voting. Second, and closely related to the last, most democratic citizens do not possess the motivation to forego other activities--time spent on the job, time with family, time spent enjoying recreational activities, and so on--in order to engage in political discourse.⁵⁶ In the language of economics, deliberators would be unwilling to bear the opportunity costs of intense and prolonged political participation: “Even if we were told what citizens might do to secure an arena for ‘authentic’ discourse and deliberation, this would still not answer the further question of the extent to which, and the particular ways in which, citizens may want to employ the instrument of ‘authentic discourse’, if they consider, in economic parlance, its opportunity costs” (Vanberg 2004:6). Third, very few citizens value political participation intrinsically, and most others only value it instrumentally when stakes are high, i.e. when the decision stands to determine the content of laws and public policies that directly affect their interests. Lastly, as the duration of time spent deliberating grows so do the costs of the activity until eventually they exceed the benefits--thus giving way to indecisiveness, inaction and low-quality outcomes. “Sometimes by design, sometimes not,” Shapiro (2000:1; 2002:196; 2003:22) warns, “deliberation can amount to collective fiddling while Rome burns.”

Given its excessive opportunity costs, how can political deliberation be justified in a modern democratic polity? It is Blaug’s (1996:51) position that “earthbound democracy has always involved a retreat from the ideal,” and as such, it “has often been justified by the need to preserve efficiency.” One way to determine whether deliberation is efficient is to conduct a cost-benefit analysis, measuring the projected marginal gains and losses from engaging in political discourse versus alternative activities. After conducting such an analysis, the

deliberative option might still appear unattractive; as Shapiro (2003:39) notes, “sometimes deliberation creates costs that outstrip its advantages.” Referring to four case studies of large-scale, year-long deliberative experiments conducted in four U.S. cities, Weeks (2000:371) warns that “a community dialogue . . . is neither cheap, fast, nor easy.” One claim many deliberative democrats make is that, with enough deliberation, it is possible to reach agreement about how to satisfactorily resolve any political problem.⁵⁷ So, when is enough deliberation too much? Another way to ask this question is: when is deliberation no longer cost-efficient?

In a paper entitled “Buridan’s Ass and the Calculus of Democratic Deliberation,” Peter Kurrild-Klitgaard (2004) argues in a similar fashion that the claimed advantages of more deliberation do not always obtain. The author begins the article by comparing the “supposed benefits of increasing deliberation” to the story by the medieval philosopher John Buridan, in which a donkey pauses long enough over the choice between two hay piles that it eventually starves to death (1). By graphically representing the aggregate benefits and costs of deliberating through time, Kurrild-Klitgaard demonstrates that after breaching a certain temporal threshold (D), the exact value of which depends on how the aggregate costs and benefits curves slope, the costs of deliberating will begin to surpass the benefits. Analogous to the economic law of diminishing (marginal) returns or increasing opportunity costs, after deliberators reach the outer limits of the time frame within which benefits exceed or equal costs, every extra unit of variable input, i.e. each marginal increase in the time spent deliberating, generates fewer extra units of output, i.e. additional advancement towards the objective of agreement, preference convergence or problem resolution. “It seems to be more realistic,” van Mill (1996:747) affirms, “to assume that preferences will not all change to one focal point of agreement simply because we talk about the issues for long enough.” In other words, the deliberative democrat’s standard argument that the cure for political problems within a democratic order is always more time

spent deliberating is specious. “While too little deliberation in some circumstances of social and political life might lead to suboptimal outcomes,” Kurrild-Klitgaard (2004:12) argues, “too much deliberation may certainly do the same.” However, limiting the duration of deliberation to too conservative of a time-frame could also have negative consequences, including more strategic (especially rent seeking) behaviour and hasty or premature decisions.⁵⁸ In the end, Kurrild-Klitgaard arrives at the conclusion that the relative costs and benefits of deliberation should be compared with other alternatives, such as pure voting schemes, market-based solutions and not making any decision at all. So, under some circumstances, preserving the status quo or choosing not to deliberate could be a better option.

Besides weighing opportunity costs and deliberation’s benefits, another issue arises with regard to the relationship between the investment of time and resources to deliberating and the stakes of the eventual decision. According to Mattson (2002:328), “[i]t is not clear, if citizens take the time to deliberate (and who has a lot of free time today anytime?), that they will have much impact on decision makers.” As noted in the last chapter, deliberative forums which produce decisions that merely advise policy-makers present much lower stakes than deliberative institutions that choose and directly determine the contents of policies and laws. Fung (2003:345) favours high-stakes, or what he terms “hot,” deliberations: “Individuals with low stakes in a discussion will be open-minded, begin without fixed positions, and will be dispassionate. I tend to the opposite view; hot deliberations with participants who have much at stake make for better deliberation.” If stakes are high, then deliberators will be more willing to devote scarce resources, and bear immense opportunity costs, particularly if the decision stands to affect their interests. Moreover, “[w]ithout feeling that the stakes are high, or that they [i.e. deliberators] are accountable for an outcome,” David Ryfe (2005:61) writes, “individuals will be less willing to engage their critical faculties.” If, however, stakes are low, citizens will be less

motivated to engage in deliberations unless they are provided with appropriate incentives to offset their investments, costs and reluctance to think critically. Indeed, that the design of Fishkin's deliberative polls as well as Fishkin and Ackerman's Deliberation Day feature monetary compensation reflects their low stakes status. Expressing the opposite view, Shapiro (2003:90) contends that low stakes make for better deliberation: "Ensuring that the stakes in any given contest are comparatively low attenuates the incentives for losers to act on the impulse to defect." However, defection in low-stakes deliberations is fairly innocuous, since by definition the deliberators' decision does not bind them or the state to any specific policy outcome. Finally, Gutmann and Thompson (2004:5) propose that stakes should be somewhere between medium and high if deliberative institutions are to generate the appropriate level of citizen commitment: "deliberative democracy[s] . . . process aims at producing a decision that is binding [and] . . . [i]n this respect, the deliberative process is not like a talk show or an academic seminar. [. . .] They [i.e. deliberators] intend their discussion to influence a decision the government will make, or a process that will affect how future decisions are made." Even if the government is not obligated to implement a set of policy decisions arrived at through citizen deliberations, policy-makers should at least be obliged to consider them as recommendations in a fair consultative process of policy reform.⁵⁹

The level of stakes also affects constitutional deliberations. Relying on Downs's rational ignorance thesis, Buchanan (1989b:29) claims that "if the individual cannot ultimately influence the choice among regimes, it is not rational to participate actively in any discussion of constitutional change or to become informed about constitutional alternatives." Although Downs originally intended the rational ignorance thesis to apply to voting, it can also pertain with equal force, Buchanan claims, to discourse over constitutional change. Some agents may reason that any investment of valuable resources and time discussing and gaining information

about constitutional choices is irrational so long as their deliberations have little or no chance of influencing the eventual constitutional design--that is, in a low-stakes environment. As in the case of voting, though, the instrumental value of constitutional deliberation does not exhaust its significance. According to Brennan and Hamlin (1999:118), "voters are like fans at a football game: they can choose to cheer for one team or the other, but they cannot choose the result of the game, and no one individual's act of cheering has any significant effect on the result." In other words, agents may choose to engage in constitutional deliberations because of the expressive value of the activity; for instance, because of the opportunity to express their commitment to the founding of a new nation-state, unwavering support for the existing constitutional arrangements or an activist's enthusiasm for constitutional reform (Brennan and Lomasky 1989, 1993). However, if the constitutional deliberations have little or no effect on the constitution of the regime and its rules, then the lowered stakes could still undermine the motivation of agents to participate, thereby making it rational to free ride on the participation of others (Caplan 2001:13). In a situation of iterated deliberation, collective action would only occur if the future discounted returns to cooperation sufficiently outweigh the gains that can be accrued through defection in a given period. It also provides a rational incentive for citizens to remain ignorant about political and constitutional matters--an issue to which we now turn.

#4: Rationally Ignorant or Rationally Irrational Agents

Downs's thesis has found a central place in many public choice and constitutional economics analyses of political behaviour. Summarizing Downs's rational ignorance thesis, Ryfe (2005:51) states that "any rational individual will seek to forego the burden of participation [and becoming informed] because she is not likely to directly affect the result, yet will share in its benefit even if she refuses to participate." Likewise, Buchanan (1997a:182-4) interprets the lack of "constitutional understanding" by citizens of developed and developing constitutional

democracies as a sign that “we have now . . . lost our constitutional way.” In any constitutional democracy, the constitution should be prior to the democracy, reining in majorities, preventing the abuse of minority rights and interests and protecting regime stability (Ibid). In contrast, Downs’s (1957) rational ignorance thesis has been neglected by all but the most institutionally-minded deliberative democrats (Fishkin 1991; Fishkin and Ackerman 2002). Moreover, among some critics of deliberative decision-making, rational ignorance has been interpreted as a more pressing indictment of the ability of democratic citizens to engage in intelligent inquiry and deliberation. Ilya Somin (1998:415), for instance, argues that “the theory of deliberative democracy . . . is unrealistic in light of the extent and intractability of voter ignorance.”⁶⁰

Pessimism about the rational and critical faculties of the average citizen in a democracy is not a new development. As the next chapter will show, the public intellectual and democratic elitist, Walter Lippmann (1925, 1945), doubted that most citizens could raise themselves up to the level of intellectual expertise necessary to understand the ever-increasing complexity of modern political life. Likewise, the Austrian economist and democratic theorist, Joseph Schumpeter (1950:262), has expressed cynicism about the average citizen’s intellectual capacity: “the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests.”⁶¹ People also display the characteristics of what cognitive psychologists call “cognitive misers,” preferring to employ cognitive short-cuts (or heuristics) instead of earnest and intelligent investigation of the facts in order to make weighty political decisions (Nisbett and Ross 1980; Mondak 1991). Also, empirical researcher Richard McKenzie (1976) experimentally tested the relationship between university education and rational ignorance. He confirmed the counterintuitive hypothesis that students who pass courses in political science, sociology, economics and philosophy do not subsequently vote in a more

informed manner.⁶² More recently, Richard Posner (2002:2, 2003a:107) has argued that because the average I.Q. of American citizens is below one-hundred, democratic theorists should be sceptical that regular citizens have the capacity to become informed and to capably deliberate about most political issues.

As a development of Downs's rational ignorance thesis, the public choice scholar Bryan Caplan (2001, 2003, 2005a) offers an explanation for why people harbor systematically faulty and uninformed beliefs: viz., rational irrationality. Beginning with the Downsian assumption that some kinds of cognitive mistakes are personally costless, he infers that many agents will rationally choose to hold irrational beliefs for which the costs of being in error are zero.⁶³ Even though irrational beliefs are easily refuted (e.g. shown to be based upon misinformation or faulty logic), they are nonetheless ones that agents wish to be true--what Caplan (2001:8) terms "bliss' beliefs." For example, it makes little practical difference in the life of the average citizen if he wants to believe in intelligent design and refuses to accept evolution (Caplan 2005b). Other beliefs, according to Caplan (2001:11), impose costly penalties when they are mistaken, for "when the price rises, adherence to unwarranted beliefs becomes a superfluous luxury." For instance, an employee's belief that he can perform his job functions perfectly while intoxicated can prove privately costly if he decides to act on it and is consequently fired (Caplan 2005b). As Caplan notes, "the belief one chooses stays sensitive to relative price change; when a belief suddenly becomes more costly to hold, people often recant." In a similar fashion, an agent may choose not to critically inquire or deliberate about problems that might reveal the irrationality of his political preferences; as long as the costs of continuing to uncritically cultivate these preferences is negligible, the choice is perfectly rational.⁶⁴ For instance, in a fallacy that statisticians refer to as "selecting on the dependent variable," Lupia (2002:148) notes, persons will remember only evidence that confirms their general theory, but conveniently forget

evidence that disconfirms it. One possible inference that could be drawn from Caplan's theory of rational irrationality is that experts rather than ordinary citizens should be trusted with the creation of rational laws and policies.⁶⁵

So why does rational irrationality problematize the issue of how feasible theories of deliberative decision-making are? Although the private costs of holding some irrational beliefs are zero (or nearly so), the social costs can be enormous. Among them, an appreciable cost can be incurred by society as a result of the general unwillingness of citizens in a democracy to engage in the rational discussion of political issues that could jeopardize their 'bliss' beliefs. Thus, the most that could be hoped for is that participation in deliberative forums would become widely accepted (and non-participation unaccepted), such that the costs of holding irrational beliefs would rise considerably and people would be more willing to subject their beliefs to deliberative scrutiny. Or, as Wohlgemuth (2002:239) explains: "At least outside of strong-link networks of like-minded irrational members it is costly to hold personally pleasing but demonstrably erroneous beliefs or argue in favor of socially harmful policies. This does not, of course, eradicate bias and irrationality in political discourse." Unfortunately, many deliberative democrats have still to acknowledge the problems that rational irrationality and rational ignorance pose for their models of deliberative decision-making.⁶⁶

#5: Group Size and Costs

From the ancient Athenians' quandary over how to define membership in the *demos* to the U.S. founding debates over the proper size of a republic to the modern controversy over the proper scope of federalism, the feasibility constraints on the size of a democratic polity's citizen body and the scale of democratic decision-making have been matters of perennial concern.

According to Dahl and Tufte (1973:12-13), advocacy for a return to the small size and scale of Athenian direct-democracy persists: "the idea that democracy is somehow linked with smallness

has retained considerable appeal. Opponents of centralization, supporters of local government, advocates of grass-roots or participatory democracy, spokesmen for decentralization in various forms, all have continued to defend the special virtues of democracy in smaller territorial units as well as cooperatives, firms, industries, educational institutions, and the like.” Just as the question of size and scale has continued to provide a source of challenge to democratic theories, generally, so it has also informed critical commentary on the feasibility of deliberative democratic theories, specifically.

In his paper “Ethical Rules, Expected Values, and Large Numbers,” Buchanan (1965) defends the thesis that most moral philosophers have overlooked the “problem of large numbers.” To demonstrate that group size matters in ethical decision-making, he compares two scenarios: (i) three people marooned on a desert island who must choose a regime of rules to govern their ethical relations and (ii) a large group of citizens in a political forum who must likewise agree to a code of conduct (6-7). Buchanan assumes that agents would create rules based upon trust, tolerance and “mutual respect,” which resemble a “generalization principle” on the order of Kant’s Categorical Imperative. Is it possible, Buchanan then asks, that agents would choose not to obey the Kantian code of conduct? Even when the expected utility gains from defecting exceed those from conforming, members of the small group would choose to conform their behaviour to the code because of assurances of reciprocity; “subsequent adherence . . . will . . . influence the similar choices to be made and followed by the other two members” (6). However, in the second or large group scenario, the outcome is starkly different: individual agents will disobey the ethical rules so long as some combination of the following conditions obtain: (i) agents have not previously consented to the regime of rules, (ii) defection advances their personal interests (or maximizes utility gains), and (iii) under cover of large numbers, their unethical actions will escape detection.⁶⁷ So, Buchanan derives the principle, “for

any given individual who may be observed to follow what may loosely be called the rule of moral law in his small-group interactions, there is some increase in group size that will cause him to modify his ethical rule and become a private maximizer” (8). Hence, when assembled in large numbers, whether in forums for ordinary decision-making or reasoned deliberation, rational agents will tend to flout ethical norms and behave strategically.

Besides a problem of large numbers, deliberative democracy’s trouble in determining the optimal size of a deliberative body can also be framed as a dilemma over the choice of alternative institutional designs: a choice between, on the one hand, the fairness of making deliberation more inclusive of those parties affected by the decision outcome and, on the other, the efficiency of excluding some parties in order to expedite negotiations and lower decision-making costs. Buchanan and Tullock (1962) demonstrate that the transaction (or decision-making) costs increase (and decrease) in direct proportion to the number of agents involved; so by excluding potential participants (or reducing the decision rule threshold), deliberation becomes less costly and, therefore, more efficient.⁶⁸ Also, as Buchanan has shown, choosing in small groups tends to generate more ethical behaviour and less strategic behaviour than decision-making in large groups. Parkinson (2003:181) clearly articulates this dilemma for deliberative democrats as “deliberative democracy’s scale problem--deliberative decisions appear to be illegitimate for those left outside the forum, while bringing more than a few people in would quickly turn the event into speech-making, not deliberation.” Moreover, according to Elster (1995:244), the size of the group affects the style of discourse: “In closed proceedings among a small number of delegates, expressions of passion will be derided as cant. In a public forum, with large numbers of delegates, passionate argument serves both as a sword and a shield.” If the deliberative forum designer chooses the greater inclusivity horn of the dilemma, then she runs the risk that reasoned deliberations will devolve into shallow rhetoric or, on

Buchanan's account, even worse, widespread defection for strategic advantage. If, on the other hand, the institutional designer opts for the exclusivity horn, then she potentially deprives some affected parties of the opportunity to influence the deliberation's outcome. One way to resolve the dilemma is to permit representation in deliberations; another way is to connect numerous deliberative forums together in a network that would, in the aggregate, become a vehicle for direct democracy.

As part of a larger project to "re-connect that theory of [public choice] with ideas that are relatively commonplace in other traditions of political theory," constitutional economists Geoffrey Brennan and Alan Hamlin (1999:111) distinguish two separate arguments for democratic representation: (i) the second-best and (ii) the first-best. According to the second-best argument, devices which allow citizens to directly decide on policies--such as the referendum, initiative and recall--are optimal but impractical; so the ideal of direct democracy must be adapted to the less-than-ideal methods of indirect or representative democracy. Fishkin's defence of deliberative polling, Brennan and Hamlin maintain, is a case of "a second-best argument for a form of representation as a means of approximating the ideal of direct deliberative democracy in the face of costs of mass deliberation" (112). To recall, in a deliberative opinion poll, a representative sample of the target population is invited to a forum in which they hear testimony from experts and politicians, question presenters, discuss the issues and then submit their *ex post* deliberated opinions, rather than the *ex ante* unreflective opinion (as traditional polls do), for measurement. Because the sample represents a microcosm of the population (e.g. the society-at-large), the outcomes of the deliberations should represent how, *ex hypothesi*, the entire population (or society) would deliberate if it had the opportunity. However, Brennan and Hamlin (1999:111) contend that Fishkin's idea of the "'representativeness' of any particular group of agents" or statistical representation is inferior to James Madison's notion of

structural representation, whereby “enlightened statesmen” filter out the ignorance and selfishness of average citizens, “to refine and enlarge the public view” (Hamilton, Madison et al 1960 [1787]:51).

Only the Madisonian view aligns with Brennan and Hamlin’s first-best argument for representation, highlighting the virtues of agent-principal relationships and the vices of direct deliberative democracy. In terms of its virtues, the representative (agent) serves as the caretaker for his constituents’ interests, or at least those of a majority of the citizens (principals) he represents. As Buchanan (1991:227) states, “[t]he central promise of individuals as sovereigns does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as principals.” As for its vices, direct deliberative democracy permits the egoistic motives, lack of knowledge and shortage of accountability among inexperienced deliberators to influence outcomes and threaten system stability (Brennan and Hamlin 1999:111; Warren 1996a:48). Yet, the difficulty inherent in principal-agent relationships--sometimes termed the ‘paradox of representation’ or the ‘problem of agency’--weakens Brennan and Hamlin’s argument for first-best representation.⁶⁹ The principal-agent relationship partitions the public interest into three areas of interests: (i) those of the representative, (ii) those of his constituents and (iii) those of third parties who might influence the representative (e.g. lobbyists). Thus, this division of the public interest complicates the matter of whose interests representative deliberators would truly speak for. Given the commitment to *homo economicus*, public choice scholars conceive the representative as a self-interested utility-maximizer, a condition which potentially brings his interests into conflict with those of his constituents. “The division of interest arises,” Robert Barro (1973:19) writes, “because the public office-holder [or representative] is assumed to act to advance his own interests, and these interests do not coincide automatically with those of his constituents.” Therefore, it is still unclear whether

the Madisonian idea of institutional representation, even with Brennan and Hamlin's endorsement, is better than Fishkin's notion of representativeness.

Finally, the last way to overcome deliberative democracy's problem of scale or its inclusivity/exclusivity dilemma is to design a networked system of directly democratic deliberative forums. Discussion networks, or multiple inter-linking groups of agents engaged in political talk, and discussant effects, such as changes in agent preferences and behaviour, have increasingly become subject-matter for empirical research.⁷⁰ However, these networks typically resemble sites of informal and spontaneous discussion (or political talk), rather than forums for formal argumentation and inquiry (or deliberation)--a difference captured in William Gamson's (1992:28) distinction between "social" and "serious" discourse. Nonetheless, networked deliberative forums might solve the problem of large numbers. Roughly mirroring Deliberation Day, but with each discourse culminating in a vote rather than a poll, smaller groups of deliberators would jointly arrive at the appropriate solutions to policy problems. After voting, organizers would aggregate outcomes through the chain of networks in order to produce a single outcome reflecting the deliberated viewpoints and judgments of citizens, not those of their representatives. "In order to provoke discussion and deliberation focused on concrete problem solutions," constitutional economist Michael Wohlgemuth (2002:242) claims, "direct democracy appears to have some benefits which are directly related to the concept of democracy as an opinion creating process."⁷¹ To encourage participation and circumvent the problem of rational ignorance, the deliberative process would have to be high-stakes, that is, directly determining the content of laws and policies. In another version of this model, one that integrates the insights of Buchanan and Tullock (1962), a rule of unanimity would be adopted in order to eliminate external costs and protect against minority abuse. Where substantial diversity of perspective and disagreements among citizens persist, a unanimity decision procedure might

prove to be impractical because unreachable. However, to its credit, this variant does approximate Habermas's deliberative ideal (though not his plan for arriving at it), in which citizens by their own consent become the authors of the laws. As Robert Wolff (1970:23) notes: "Each man, in a manner of speaking, encounters his better self in the form of the state, for its dictates are simply the laws which he has, after due deliberation, willed to be enacted." In short, a network of deliberative forums, whether incorporating a less than unanimity or a full unanimity voting rule, would very nearly approximate the ideal of direct democracy.

#6: No Substitute for Constitutionalism

One of the shortcomings of the proposal for a society-wide network of directly-democratic deliberative forums is that it could potentially undermine the stability of a democracy and its institutions. This danger is especially pressing if institutional designers understand deliberative democratic procedures as acceptable substitutes for constitutionally limited democratic government. At least one deliberative democrat, John Dryzek, argues that networks of overlapping discourses can replace constitutions as effective ordering devices.⁷² In response, Viktor Vanberg disputes the claim that deliberation could ever provide an adequate stand-in for constitutionalism on the ground that the substitution would generate unnecessary instability. Summarizing the stability objection, Gutmann and Thompson (2004:53) state that "the concern is that even legitimate and reasonable principles are at risk in a democracy that is in a constant state of deliberative enthusiasm." Since "deliberative enthusiasm" places substantial demands on the political system, it can exacerbate existing tensions between groups in society and empower ambitious majorities to punish minorities by enacting policies and laws which adversely affect their interests. Therefore, preservation of order in a democratic polity requires not only deliberation, but also adequate constitutional constraints on the democratic process.

Whether written or unwritten, a constitution does function as a higher-level ordering device. Constitutional designers “postulate that if societies were indeed ordered in the stipulated manner, beneficial results would ensue for most, if not all, of their members who would . . . accept such an arrangement as natural and legitimate” (Schmitter and Streeck 1985:1). According to Aristotle (1958:118-20), a constitution is a *modus vivendi* or way of life that codifies the normative principles widely accepted within a specific society.⁷³ This definition supports the view that a written constitution’s touted advantage of increasing political stability is slight. Although the United States’ constitution is written and Britain’s is unwritten, the norms that order Britain’s democracy can be found in the broader practices, customs and historical documents (particularly the Magna Carta and Bill of Rights) of the British society and its people’s way of life. According to a second definition, a constitution, constitutional economist Stefan Voigt (1996:182) claims, is “a system of rules specifying the allocation of resources used for the provision of public goods within the collectivity called the state.”

The differences between Aristotle and Voigt’s definitions of a constitution roughly correspond to Habermas’s (1996b:21-3) account of the differences between the “‘republican’ view” and the “‘liberal’ or Lockean view” of the relationship between politics and society. Aristotle’s republican account of the constitution neglects to distinguish the rules of the state from the ethical norms of society. In contrast, Voigt’s liberal account distinguishes them too sharply, confining constitutional matters to what he sees as the state’s essential function: distributing primary goods. To embrace Voigt’s view and eschew Aristotle’s could undermine political stability, since the constitution’s legitimacy depends on its being compatible with society’s mores and traditions. To reject Voigt’s view and accept Aristotle’s would also jeopardize stable relations in society, since tolerant pluralism cannot be maintained in the face of a singular conception of the good or a perfectionist way of life, which is state-sanctioned and

constitutionally-protected.⁷⁴ However, by conceiving the constitution as a system for ordering social relations, Voigt and Aristotle's constitutions can be successfully harmonized. Whereas Aristotle emphasizes the constitutional inputs, particularly how social custom and tradition influence the creation of higher-level political rules, Voigt focuses on the constitutional outputs, that is, how these meta-rules facilitate the state's role in creating policies that regulate the distribution of public goods.

This systems-account informs the constitutional perspective of constitutional economists and their critique of deliberative decision-making. "Constitutionalism," Brennan and Hamlin (1995:187) explain, "revolves around the simple idea that political and social life can be broken down into constituent elements--the constitution and the day-to-day actions/interactions of individuals." So, rather than analyzing political and social life into the dualistic realms of politics and society--as Habermas (1996b) does--constitutional economists offer a functional distinction between, on the one hand, constitutional rules and, on the other, decision-making within those rules. "If we were confident that these day-to-day decisions were themselves deliberatively reached," Gauthier (1993:315-316) notes, "we should have no need of higher law [i.e. a constitution]." So, the purpose of the distinction is to reinforce the idea that a constitution functions as a device for ordering the ordinary (or post-constitutional) processes of law- and policy-making, and its legitimacy as a higher-level ordering device derives from the deliberative process by which it was constituted. Yet, despite claims such as Ackerman's (1999:191) that deliberative enthusiasm is greatest during constitutional moments, the adoption of a constitution does not necessarily imply that the process was either democratic or deliberative. "A constitution may be imposed from above or from outside," Elster (1998:98) claims, "without any element of deliberation or democratic participation." However, in the situation that an autocratic regime does adopt a constitution, it is unlikely that the regime will

comply with limits on its authority (even when self-imposed) unless there is “a credible threat by a sufficiently large number of citizens in case it [the regime] tries to cross the constraints of the constitution” (Voigt 1998:198). When the threat value is substantial, it is more often the case that the government is democratic rather than autocratic, in at least the minimalist sense of “a system in which parties lose elections” (Przeworski 1991:10). Thus, the existence of a democratic government does not necessarily imply widespread deliberation among its citizens, even at the constitutional stage. Alessandro Ferrara (2001:790) argues that deference to elite-level decision-makers and experts more commonly occurs during constitutional founding and pervasive discourse ensues later, usually with the advent of popular demands for constitutional reform: “A distinction could be drawn between understanding the constitutional project and working out its implications on the one hand and changing or redirecting the project on the other. The first practice is best conceived as the prerogative of a body of appointed specialists, whereas the second cannot but remain a prerogative of the democratic political will.” Nevertheless, Ferrara’s observation is consistent with both the systems-account, in which the democratic demands of citizens serve as inputs, and a two-level process of choice, in which both experts and lay-persons participate.

Here I rehearse Dryzek’s argument that contestational discourses are superior to constitutions as ordering devices and then evaluate the tenability of Vanberg’s rebuttal. Citing empirical evidence in the cases of Russia and Yugoslavia, Dryzek (2004:48) contends that these fledgling constitutional democracies have sunk into a state of disorder and mafia capitalism because they have only succeeded in emulating “the constitutional surface of the liberal state.” Furthermore, he claims that, “to the extent that they do not recognize the ordering force of discourse, and deliberation,” liberal constitutionalists and constitutional economists will have to rely on coercive means if they wish to employ constitutions as guarantees of political stability

(Ibid). As Karl Popper (1971) warned, authoritarianism creeps into any process by which elites attempt to politically engineer social relations in advance. No differently, liberal constitutionalists and constitutional economists risk introducing dictatorial measures by constitutional mandate--a possibility wholly incompatible with the latter's libertarian commitments. Whether in the informal public spheres of civil society or the formal institutions of political society, deliberation allows citizens to contest each other's conceptions of the good and to critically reconstruct their stable, ongoing relations. Dryzek (2004:57) concludes that "the future of the pursuit of democratic authenticity (the key to the deliberative turn in democratic theory) can be sought not in getting the constitution right, but in attending to the contestation of discourses." So, on one interpretation, Dryzek favours unqualified substitution of discourses for constitutions. On another and more defensible interpretation, he argues for qualified substitution or, better yet, supplementation of constitutions with deliberation.⁷⁵ "[D]iscourses help to order collective affairs in more constitutionalized settings too," Dryzek asserts, "partly because functioning constitutions require a supportive discourse in order to work" (55). Therefore, the belief that constitutional economists share with liberal constitutionalists, i.e. that constitutions are the best and only ordering devices for maintaining stability in democratic polities, is, as Dryzek argues, unwarranted, for "the precise strength of the state cannot be both specified and limited through purely constitutional means" (49). In other words, limited government requires not only a properly designed constitution, but also a network of competitive discourses.

In response to Dryzek's argument, Vanberg (2004) convincingly refutes the first interpretation, viz. that networks of discourses can provide adequate proxies for constitutions. He begins by questioning how deliberation could possibly constrain the excesses of majoritarian democracy better than constitutions do: "What constitutional economists and liberal

constitutionalists would like to know, however, is by what specific measures or provisions the ‘deliberative turn’ that Dryzek advocates is supposed to improve the prospects for ‘substantive democratic control,’ compared to the, if only modest, achievements of what Dryzek, in a derogatory tone, refers to as ‘the constitutional surface of the liberal state’” (65). While basic interests and entitlements of minorities could be protected through clever institutional design and incentive schemes—such as Shapiro’s (2003:47-9) recommendation that weaker parties to a deliberation be granted rights of veto and delay—there is nothing about deliberation or the deliberative procedure per se that would require substantive protections of minority rights. If the constraints are themselves revisable through the process of deliberation, then they will resemble relatively unstable guidelines for obtaining just results. In contrast, constitutionally protected minority rights provide relatively stable parameters for determining which outcomes are to count as legitimate. Indeed, the constitutional rules that secure those rights are what Buchanan (1989:32-3) terms “relatively absolute absolutes.”

In order to demonstrate that deliberation as an ordering device is tantamount to constitutionalism, deliberative democrats would have to address their arguments for particular substantive constraints on the deliberative process to a democracy’s citizenry. Vanberg (2004:71) contends that, “[a]dvocates of deliberative democracy who are prepared to submit to the same discipline [as constitutional economists] would need to argue to citizens what measures they should take in order to enhance discourse and deliberation, and why these measures promise to work out to their common benefit.” By placing substantive limits on acceptable decision outcomes, theorists effectively preempt the expression of preferences by deliberating agents and eliminate their opportunity to freely decide. What would be more acceptable to citizens than having constraints decreed by political theorists would be having such constraints (or constitutional rules) selected by citizens in a popular election or deliberative forum, an

elected legislature or a constitutional convention.⁷⁶ Hence, the only alternative, Vanberg claims, is for deliberative theorists to try to persuade citizens to voluntarily accept as justified and legitimate those constraints theorists propose to place on deliberation.⁷⁷

As a stability-enhancing institution of actual democracies, constitutions are also capable of reinforcing deliberative norms and practices. “A constitution, as the basic legal institution,” deliberative democrat Rainer Forst (2001:370) states, “has the double task of fixing a list of basic rights . . . and of laying down the principles and rules of fair deliberative procedures.” Likewise, the contractarian thinker David Gauthier (1993:320) understands deliberation and constitutionalism as compatible, both in theory and practice: “We give content to both justice and the common good by establishing a constitution through the procedure of deliberative politics.”⁷⁸ Similarly, Habermas argues that the basic function of a constitution is to institutionalize the conditions necessary for discourse among free and equal agents (1996a:295). So, even though it is clear that Vanberg successfully rebuts the first interpretation of Dryzek’s argument, a strong case for the second interpretation--namely, that constitutions can be fruitfully supplemented with deliberative institutions and also support deliberative practices--has been made.

Summary

In this chapter, I have presented the three key postulates of the public choice and constitutional economics programmes--methodological individualism, rational choice and politics-as-exchange. Also set forth were six criticisms of deliberative decision-making models by constitutional economists and empirical researchers. Despite the force of their objections, both deliberative democratic theory and constitutional economics stand connected by their mutual concern with the legitimacy of democratic institutions and the extent to which consensual agreement and norms of interaction contribute to this legitimacy. Nevertheless, their

deep differences persist. The striking incompatibilities between economic and deliberative theories of democracy are often reduced, according to Elster (1997:26), to the issue of whether the political forum should be identical to or distinct from the economic market. However, the most suitable solution to this quandary is not to identify the market and the forum (as Buchanan's "closed behavioral system" does) or to unqualifiedly distinguish them, but rather to locate a point somewhere in between these two extremes. For example, Shapiro (2003:43) discovers an intermediary position when he construes the intrinsic value of deliberation as a good that citizens should voluntarily demand, but that should not be imposed upon citizens by governmental fiat: "Deliberation that is defended for its inherent benefits is best seen by government, then, as a consumption good; people should be free--but not forced--to engage in it." Although commodifying deliberation is often thought to invite the less desirable features of market relations into political relations, the political status quo is such that these features have already infiltrated the "real world of politics . . . of partisanship, inequality, self-interest, ideology, strategizing, deceit, and the raw exercise of power" (Dryzek 2004b:72). Unfortunately, deliberative democrats have been all too slow to recognize these features in the "real world of politics" and to accommodate or overcome them in their models of deliberative decision-making. Practical restraints on deliberative decision-making--such as time, group size, opportunity costs, rational ignorance, rational irrationality, majority cycling and the choice among decision rules--have become almost the exclusive concern of constitutional economists. So in order for deliberative democracy to truly "come of age" (Bohman 1998), deliberative democrats must acknowledge the additive value of economic approaches for analyzing group decision-making processes. Therefore, by borrowing instruments in the constitutional economist's tool-kit, deliberative theorists and researchers can move their research programme into the next stage of development: institutionalizing the deliberative ideal.

To bridge the divide between constitutional economics and deliberative democracy, as well as to advance the latter towards this new and exciting stage, calls for a more thorough synthesis of their root assumptions and operative methodologies--a task which will be taken up in the following chapter.

CHAPTER 5

DEWEY ON DEMOCRATIC DELIBERATION AND PUBLIC SPIRIT

In the present chapter, a debate ancillary to the central one is taken up. This dispute has more historical and less contemporary significance than the debate between constitutional economists and deliberative democrats, concerned as it is with the status of democracy in the United States during the 1920s. Nonetheless, it contributes to the central argument of the present project.¹ My purpose in the following exposition and analysis is to prove that despite recurrent misunderstandings of the debate by contemporary commentators a proper reconstruction of Dewey's role in it establishes his credentials as a proto-deliberative democrat.² Such a reconstruction also demonstrates continuity between Dewey's democratic theory and the transactional view, which he and Bentley develop in the 1940s in *Knowing and the Known* (1949). Over twenty years prior, Dewey formulated a rudimentary account of the transactional approach in *The Public and Its Problems* (1927), his only complete work on democratic theory, "one of his best books . . . [yet] least appreciated" (Lamont 1959:87). This chapter-length presentation and analysis of the debate provides further insight into the political application of Bentley and Dewey's approach, and more specifically into how the transactional notion of public spirit can assist in bridging the divide between constitutional economics and deliberative democracy.

Reconstructing the Dewey-Lippmann Debate

In the 1920s, a debate took place among several public intellectuals concerned about the proper role of citizens in a democracy. Walter Lippmann authored two books, *Public Opinion* (1945) and *The Phantom Public* (1925), and John Dewey wrote reviews of these books, besides his

own book-length contribution to the debate, *The Public and Its Problems*.³ Commentators have seen these works as pitting Dewey against Lippmann, and some have argued that Lippmann got the better of it and some that Dewey did.⁴ However, I contend that these commentators have fundamentally misunderstood the exchange; that in fact Lippmann had another target in mind, and Dewey stepped in to mediate, and did so by anticipating the notion of contemporary deliberative democracy.

Commentators on the Dewey-Lippmann debate have split over who deserved the victory laurel. Dewey's biographer, Robert Westbrook (1993:505), sides with Lippmann, reluctantly admitting "that Lippmann had the better of Dewey in their debate in the 1920s on the implications of the eclipse of citizenship and the collapse of public life in the United States." The most ardent defenders of the view that Dewey triumphed in the debate are Michael Eldridge (1996:16-17) and Raymond Boisvert (1998:75-77). However, the commentators have misconstrued the debate's origin and dynamic. The debate in fact took place not between Lippmann and Dewey, but instead between Lippmann and American Progressives committed to the majoritarian creed. According to this creed, democracy demands vigilance against the concentrated power of elites and deference to the decisions of majorities. To translate public opinion into government policy, patrons of the creed favour majoritarian methods--such as majority-decided polls, votes, and elected representation--because these methods arouse the least suspicion of elitism. Besides questioning non-majoritarian methods, proponents of the creed also doubt the average citizen's capacity for sound judgment, and thus whether majoritarian methods translate raw preferences into anything other than collective irrationality. Therefore, almost paradoxically, the sceptical bent of the majoritarian creed risks undermining its own presumptive faith in majoritarian decision-making.

Regarding its dynamic, the debate occurred amidst a unique set of historical circumstances, when the rise of America's third political party had already reached its zenith and had since begun a spiraling decline. Progressive optimism about achieving the 'public good' or 'common interest' ebbed, and many members either left the Party or teetered on the brink of defection.⁵ This sea-change in Progressive attitudes prefigured a later movement among political-scientific 'realists' of the 1950s, a movement to conceive democracy in minimalist terms and to doubt the existence of a 'common good' or 'general will.'⁶ As a member of their swelling ranks, Joseph Schumpeter (1950:251) declared that "[t]here is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument." Although Lippmann had been a devoted follower of the Progressive leadership, including Theodore Roosevelt and Herbert Croly, he would soon come to express similar dissatisfaction with their optimistic platform for achieving the public good, "shifting his allegiance more completely to the experts--the objective, scientific minds who uncover facts, weigh consequences, and devise techniques for action" (Wellborn 1969:54). Hence, the 1920s, similar to the 1950s, were a propitious period of time for a fundamental transformation in people's philosophy of democracy, and Lippmann stood ready to persuade the disillusioned Progressives to adopt his own.⁷

In order to convert them, Lippmann aimed in *Public Opinion* to exploit the most apparent weakness in their majoritarian creed: their scepticism about the average citizen's capacity to make sound judgments.⁸ According to Lippmann, citizens of existing democracies lack the time, interest and knowledge to make informed political decisions.⁹ Since popular opinion is generated by the free association of words, images and ideas, majoritarian methods merely register these dominant, and often irrational, associations--what Lippmann (1945:79) calls "stereotypes" or "pictures in our heads." Following the dictum that bad-input-makes-bad-

output, these stereotypes distort the citizen's understanding of the real political environment and, consequently, frustrates his efforts to impartially judge its features. Therefore, citizens of actual democracies live in what Lippmann calls a "pseudo-environment"--their judgment influenced by arbitrarily acquired stereotypes, not purposeful intelligence, about the world-at-large.

To achieve accuracy and intelligence in surveying the political landscape, the public requires at least two kinds of elites. According Lippmann (1945:383), the first, experts, record information and coordinate research about the environment, thereby "making the invisible visible." The second, leaders, make and execute public policy decisions based on the findings of experts. In this scheme, little opportunity is left for deliberation by the average citizen (400). "[I]t is on the men inside, working under conditions that are sound, that the daily administrations of society must rest" (132-3). Moreover, to preserve popular support for government policies and leadership, elites must also "manufacture consent," or produce propaganda that manipulates the dominant stereotypes in the minds of citizens.¹⁰ So, if the will of the majority is dependent on the direction given to it by propagandizing elites, then there is little difference between having a majority of citizens decide electoral outcomes and having a small body of elites, such as "the members of the editorial staffs of large media concerns," decide (Offe 1985:273). In other words, the elites, rather than the average citizens, of a democracy effectively dictate the contents of all of the government's policies. Therefore, Lippmann's picture of "a democratic public [is] as an object of deft persuasion rather than as an autonomous participant in political deliberation" (Kaufman-Osborn 1984:1157).

In *The Phantom Public* (1925), Lippmann arrives at even more nihilistic conclusions than in *Public Opinion*. Not only is the "public" in traditional democratic theory ultimately a fiction or "phantom," citizens of real democracies have a negligible role to play in practical politics, and

when they do exercise their political functions, these exercises are circumscribed heavily by the authority of elites (126-9, 162-3). Since, for Lippmann (1925:59), elections represent sublimated or mock battles, the ritualistic trip to the voting booths functions to reduce the conflict between elites, but never to uplift or edify the citizen-voter. In the end, Lippmann hoped that Progressive democrats would acknowledge this dismal reality, abandon their majoritarian creed and, in their final act of conversion, substitute for it a newfound faith in the sagacity of elites--or what would later become known as the theory of "democratic elitism."¹¹

Particularly prominent among the old-guard Progressives who embraced the majoritarian creed was the American jurist Learned Hand, to whom Lippmann dedicated his book *The Phantom Public*. The dedication was itself symbolic of Lippmann's desire to sway Hand's intellectual sympathies to his elitist position.¹² However, if the case of Learned Hand is representative, then Lippmann's efforts to convert Progressives *en masse* failed. Among the Progressives who embraced the majoritarian creed, Hand could not have made a firmer denunciation of Lippmann's elitism, and a more resounding battle cry in favour of the majoritarian creed.¹³ In the end, despite his effort to exploit the critical weakness in their majoritarian creed, Lippmann did not achieve the widespread conversion of American Progressives that he had planned.

Dewey's role in the debate between Lippmann and the Progressives was not in the capacity of a disputant. Rather than engaging directly with Lippmann, Dewey mediates a debate between Lippmann and majoritarian Progressives. In so doing, he navigates a safe course between two flawed alternatives: on the one hand, the Progressive or majoritarian way, which defends majoritarian procedures as the sole method for gauging the public's preferences and, on the other, Lippmann's elitist way, which disregards public preferences and entrusts policy decisions to the judgment of experts and elites. Dewey proposes a third way in the form of a

mediating concept known as public spirit. One of Dewey's biographers, Alan Ryan (1995:217), laments that the "difficulty for readers of *The Public and Its Problems* . . . is that Dewey accepted most of Lippmann's complaints against the existing order of things." While Ryan's observation is astute, it poses a challenge to readers only if the debate is understood as between Lippmann and Dewey. Appreciated as it should be, that is, as a debate between Lippmann and American Progressives committed to the majoritarian creed, we can comprehend Dewey's rationale for conceding so much and then confessing an intellectual debt to Lippmann: namely, Dewey's role in the debate was that of a mediator, rather than that of a disputant.¹⁴

As all proficient mediators do, Dewey must first acknowledge the strengths of both disputants' positions. First, to Lippmann, he echoes his criticism that the theory and practice of democracy admit of increasing disparity.¹⁵ In addition, Dewey acknowledges how the growing complexity of modern, industrialized society has made the workings of modern democratic governance incomprehensible to all but the very few.¹⁶ Also, as Lippmann does, he recognizes the power of propagandists to manipulate public opinion by "enlisting upon their side the inertia, prejudices and emotional partisanship of the masses" (LW 2:341; Peters 1989). But, most revealing of all, Dewey concludes, "the democratic public is still largely inchoate and unorganized" (LW 2:303). However, the inability of citizens to organize themselves into a public (or publics) does not mean, as Lippmann concludes, that their only alternative is to blindly entrust the governing apparatus to elites, as if to benevolent despots.¹⁷ This kind of either-or thinking Dewey will eventually reject, although he initially concedes that there is merit in many of Lippmann's complaints.

Switching to the Progressives, Dewey stresses the importance of elected representation and social experimentation. Given Dewey's definition of the "public," that is, as "all those affected by the indirect consequences of transactions," those publics *qua* publics must be

empowered to select “representatives of . . . [their] interests, created by these perceived consequences and to define the functions which they shall possess and employ” (LW 2:255). Note that Dewey employs the term ‘transaction’--an earlier and less developed version of the notion deployed in *Knowing and the Known* (1949)--to signify the interaction of members of publics and the consequences of their activities on other individuals and publics. The transactions of publics have indirect consequences on the activities of other publics and individuals, consequences which modern economists refer to as externalities. This account mirrors Bentley’s theory of group politics insofar as the activities of groups and their valuations of those activities, i.e. their interests and the interests of other groups, are interdependent. For both Dewey and Bentley, the designations ‘group’ and ‘politics’ have no ontological status--any more than buyer or seller in an economic transaction do--apart from the complex of activities, or transactional knowings and knowns, of which they are a part.¹⁸ In addition, Dewey’s definition of the “state” as “the organization of the public effected through officials,” introduces an agency that can effectively regulate the consequences, or externalities, of transactions (LW 2:256). Elected officials become the caretakers for their constituent publics, seeking to represent the majority’s interests as well as to initiate state-sponsored social experiments.¹⁹ Therefore, Dewey affirms the value of the majoritarian method of elected representation and the experimental process of social reform, two conventions prized by Progressives committed to the majoritarian creed.

Besides citing the strengths, Dewey also critically examines the weakness of those positions taken in the debate. First, with Lippmann, Dewey pinpoints the Platonic epistemology at the root of his critique of modern democratic society. *Public Opinion* begins with an extensive passage quoted from Book VII of Plato’s (1992) *Republic*, the well-known allegory of the cave. From this passage and the related notion of a pseudo-environment, it is easy to adduce that

Lippmann assumes the bipolar “spectator-object” framework of classical epistemology (Boisvert 1998:35-6). According to this framework, knowledge is an analogue for sight, and the spectator--in Lippmann’s (1945:56-7) case, the citizen--views the illusory appearances of the world, “the pictures in our heads,” but cannot access its real or “really real” objects--which, in Lippmann’s estimation, demands “intelligence work.” According to one of Lippmann’s biographers, Charles Wellborn (1969:55), the author of *Public Opinion* had by 1922 “entered a distinctly Platonic stage,” and during this stage he believed that the great mass of people “do not comprehend objective truth for they are still in the shadows of the cave.” Almost identical to Plato’s solution in the *Republic*, Lippmann grants access only to the sagacious few, the experts.²⁰ In preparation for a critical examination of this borrowed epistemology, Dewey characterizes Lippmann’s elitism as “the revival of the Platonic notion that philosophers should be kings . . . [wherein] the idea of experts is substituted for that of philosophers” (LW 2:363).

Not only does Dewey disagree that the masses would willingly bequeath the ruling power to experts, he also rejects the faulty epistemological framework that Lippmann uncritically inherits from Plato. Organisms do not passively intellectualize the appearances of their environment for the sake of discovering hidden objects. Instead, they actively engage--as well as transact--with it through the process of inquiry. As dynamic inquirers and problem-solvers, Dewey’s citizens can thus more faithfully be compared with scientists or artists than with spectators.²¹ Nevertheless, inquiry into political subject-matter is a human or social scientific endeavour, not a physical or natural scientific one; so inquirers must be sensitive to the vagaries of human purpose, action and social practice.²² Rather than bending to deceptive stereotypes, a community of inquirers collectively investigates its shared problems. When faced with obstacles to coordinating their efforts, inquiry becomes reflexive, aiming to reconstruct the

terms of their association in the expectation that, in time, they will come nearer to approximating a communally shared ideal.²³

Lippmann's opponents in the debate also receive critical treatment from Dewey. Dewey indirectly criticizes the Progressives for failing to appreciate the significance of non-majoritarian methods, such as debate and discussion.²⁴ Despite the Progressives' push for legislative experimentation, they ignored the educative and community-building effects of the activity that precedes majority decision-making: namely, deliberation.²⁵ As MacGilvray (1999:559) notices, "precisely at the point where Lippmann turns away from the public as a source of guidance, Dewey pursues the matter further, seeking to identify conditions under which public interest in and intelligent engagement with politics might be rekindled." If reformers remove the structural barriers to free inquiry, discussion and debate, as Dewey recommends, then they will foster more than an increase in the quantity of citizen deliberation. Dewey also foresees a corresponding increase in the quality of deliberation.²⁶

More and better deliberation educates average citizens. It improves their capacities for clear judgment and intelligent inquiry; it allows them to express enlightened voting preferences; and, most importantly, it empowers them to take part in political debates and contests as political equals.²⁷ The Progressive reformer can then substitute a more optimistic vision for Lippmann's: elections conceived not as sublimated battles, but as opportunities to deliberate as equals in a shared political community. Walzer (1993:304) eloquently states this point: "Citizens come into the [deliberative] forum with nothing but their arguments. All non-political goods have to be deposited outside: weapons and wallets, titles and degrees." Contemplating the Progressive expression that "the cure for democracy is more democracy," Dewey judges that it "is not apt if it means that the evils may be remedied by introducing more machinery of the same kind as that which already exists" (LW 2:325). However, introducing more democratic

institutions to repair democracy's defects--or the "concept of the 'democratic fix'" (Cunningham 1994:42)--does not necessarily magnify the status quo. Rather, "the phrase may also indicate the need of returning to the idea itself of clarifying and deepening our apprehension of it," Dewey notes, "and of employing our sense of its meaning to criticize and re-make its political manifestations" (LW 2:325). By reconstructing our existing notion of democracy, we may in turn gain added insight that will allow us to intelligently re-design our existing democratic institutions. In sum, acknowledging the value of deliberation rewards the Progressive democrat two-fold: one, it ameliorates his scepticism about the citizen's capacity to make sound judgments; and, two, it reinforces his faith in majoritarian methods, specifically because he can "criticize and re-make" these methods, reinterpreting them to meet the changing needs of a democratic community.

Dewey as a Proto-Deliberative Democrat

To resolve the conflict between the elitist position, defended by Lippmann, and the majoritarian position, held by Progressives such as Hand, Dewey does more than simply cite their respective advantages and disadvantages. He proceeds to postulate a positive concept that effectively mediates the debate between majoritarian Progressives and Lippmann-inspired elitists, a concept that firmly establishes Dewey's status as a forerunner of modern deliberative democrats. As will be seen, this concept is, in a rudimentary form, also a transactional notion, for it "see[s] together, extensionally and durationally, much that is talked about conventionally as if it were composed of irreconcilable separates" (LW 16:66).

Public Spirit

Dewey proposes a hybrid concept that helps the disputants on either side of the debate imagine their respective ideals realized in practice and harmony with each other. In *The Public and Its Problems*, Dewey introduces the concept of public-spirit with the shoe analogy:

The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied. Popular government has at least created public spirit even if its success in informing that spirit has not been great” (LW 2:364).

According to this analogy, not only does self-government begin with citizens, who know the problems of their environment best, but it also involves experts and leaders, who have mastered those tools and techniques for resolving such problems.²⁸ Indeed, the lack of citizen concern and efficacy, which Lippmann and other democratic elitists complain of, can be ameliorated if, as James Campbell (1993:22) argues, government officials “make the material of expert inquiry and the activity of inquiry itself more attractive.”

As a result, citizens would consult experts and experts would consult citizens, thereby avoiding the tyranny of either, and promoting the associated activity of both.²⁹ Hence, the relationship between citizens and experts is a transactional one, involving a reciprocal interplay between citizens and experts struggling to overcome the inherent difficulties in solving public problems, such as limited foresight, incomplete information and irrationality. Moreover, the concept of public spirit fits with our lived experience and the observed conditions of democratic transformation.³⁰ For instance, social reforms that make the government more representative and stimulate citizen deliberation tend to generate the instrumentalities to manage this change; that is, they result in the growth of expert bureaucracies that, in the spirit of public service, should consult with citizens.³¹ As Kraft and Clary (1991:325) confirm in their empirical study of NIMBY (Not In My Backyard) movements and radioactive waste disposal siting, “agencies

often would profit by designing effective programs for citizen involvement.” Therefore, Dewey’s concept of public spirit harmonizes the majoritarian commitment to populist change and the elitist commitment to institutionalize the mechanisms of change in effective mechanisms for policy-making and policy administration.

Yet Dewey’s argument in favour of public spirit as a mediating concept between majoritarianism and elitism does not constitute what Lippmann (1925:160) derisively calls the “sophistry that the public and all its individuals composing it are of one mind, one soul, one purpose.”³² Nor does public-spiritedness represent any single entity or set of institutions. Instead, like democracy itself, it is a lived experience, one guided by a regulative ideal, but one whose concrete manifestations--the voting booth, the public meeting hall, the state or national legislature--are only temporary means for the satisfaction of intermediate ends.³³ In *The Public and Its Problems*, Dewey effectively harmonizes two conflicting positions, the elitism of Walter Lippmann and the majoritarianism of American Progressives, for the sake of showing that, in practice, the ideal of open and fluid deliberation in a democracy can motivate intelligent inquiry and empower citizens to restructure their institutions as they see fit.³⁴

The Deliberative Ideal

The reconstruction of the Dewey-Lippmann debate that I have argued for here is consistent with the deliberative ideal. I have aimed to demonstrate that by reconsidering accepted interpretations and reconstructing new ones it is possible to see how Dewey anticipates the more recent notion of deliberative democracy. Jack Knight and James Johnson (1996), among others, call attention to the connection between Dewey’s democratic theory and deliberation: “[P]ragmatism is committed to ensuring free and equal access for all relevant actors to all relevant arenas of public deliberation and decision.”³⁵ He offers both individuals and communities a way to engender a better understanding and use of “methods and conditions of

debate, discussion and persuasion” (LW 2:365).³⁶ Dewey stresses the intimate connection between human spirit and community in *The Public and Its Problems*’s closing chapter, declaring that “the human spirit will return to seek calm and order . . . [and it] can be found only in the vital, steady, and deep relationships which are present only in an immediate community” (LW 2:369).³⁷

As a mixture of majoritarianism and elitism, public-spirit is a hybrid concept that begs for a model of how public-spirited deliberation ought to manifest in actual democratic institutions and communities. In this way, Dewey’s notion of public spirit not only anticipates the contemporary deliberative ideal, but it also foresees what Bohman (1998:401) calls the ideal’s “coming of age” as a theory of institutional design. Specifically, public spirit reveals how to reconstruct the meaning of expertise relative to the deliberative ideal and institutionalize it in partnerships between members of publics and public policy experts.³⁸ One of Dewey’s contemporaries, Mary Parker Follet (1924:29), writes, “[w]e have not to choose between becoming an expert on every subject ourselves and swallowing whole the reports of experts.” As a third option, community members working in concert with experts can discuss, debate and collectively decide how to interpret the notions of deliberative democracy and public-spiritedness in their best possible light, that is, as best suits the communal and institutional values. Hence, when seeking to restructure shared institutions, members of a community do so in accordance with these interpretive conceptions.³⁹ In a “remark” made during his ninetieth birthday party, Dewey stated that, “Democracy begins in conversation” (Lamont 1959:58, 88). Rather than a one-time event, then, deliberation about the best conceptions of democracy, community and public-spiritedness is an on-going process, a “conversation.” In other words, one conception, or set of conceptions, replaces another as the plans and projects of the community change. According to Dewey, these conceptions are ideal in the sense that they “are

not intended to be themselves realized but are meant to direct our course to the realization of potentialities in existent conditions” (LW 12:303). Therefore, conceptions of democracy formed through deliberation and conversation function as regulative ideals, guiding efforts at implementation and institutionalization toward the outermost limits of feasibility.

As part of that process, theorists of deliberative democracy continue to make critical and constructive contributions, arguing for and against particular models of public-spirited deliberation in a democratic community. Yet the final test of all these contributions is both a practical and a pragmatic one--particularly, how well they play out in the social experiments of deliberative communities and in the lived experience of actual democratic citizens. Therefore, in addition to successfully mediating the debate between Lippmann and American Progressives committed to the majoritarian creed, Dewey’s concept of public spirit anticipates the contemporary notion of deliberative democracy.⁴⁰ Although some scholars have retrospectively labeled Dewey a deliberative democrat, it would be fairer to call him a progenitor of the deliberative democracy movement, or a proto-deliberative democrat.⁴¹ As Robert Westbrook (1998:139) confirms, “he was anticipating an ideal that contemporary democratic theorists have dubbed deliberative democracy.”

Why Public Spirit Matters

There is little doubt that pragmatists have created a bountiful legacy of ideas for deliberative democrats to draw upon (Habermas 1996; Dryzek 2004; Festenstein 2004; Misak 2004; Talisse 2005). While it has been shown that Dewey’s notion of public spirit is likely a fore-runner of the notion of deliberative democracy, which thereby establishes Dewey’s credentials as a proto-deliberative democrat, the question still looms: Why does public spirit matter in the attempt to bridge the divide between deliberative democracy and constitutional economics?

There are at least three sources of comparison between Dewey and public choice theorists, and particularly those who work in the sub-programme of constitutional economics. One point of resemblance is their mutual interest in reconstructing institutions. While the concept of public spirit provides a method for communities to reinterpret and reform their institutions in the image of a more deliberative democracy, “public choice theory,” in Buchanan’s (1984:21) words, “offers an analytical setting that allows us to discuss genuine reconstruction in our constitutions.” Another similarity between the works of Dewey and constitutional economists is a concern for symmetry in understanding the political and economic realms of action. If moral and political phenomena are to be studied with thoroughness and exactitude, then their economic dimension must receive similar attention.

Dewey writes:

Upon the whole, economics has been treated as on a lower level than either morals or politics. Yet the life which men, women, and children actually lead, the opportunities open to them, the values they are capable of enjoying, their education, their share in all things of art and science, are mainly determined by economic conditions. Hence we can hardly expect a moral [or political] system which ignores economic conditions to be other than remote and empty (LW 4:225).

In other words, economic subject-matter is as important as political subject-matter, and therefore deserving of equal treatment, in conducting social inquiry. As we saw in the last chapter, one interpretation of equal treatment offered by Buchanan (1972) involves “closing the behavioral system,” i.e. assuming that humans behave identically, or similarly, in their capacities as economic and political agents.⁴² The third point of contact between Dewey and public choice scholars concerns the function of governments. In *The Public and Its Problems*, Dewey explains that the purpose of the state is to regulate the consequences that flow from transactions between citizens and groups and affect third-parties, either negatively or positively (what in economic terminology are called ‘externalities’) (LW 2:243-4). Likewise, Gordon Tullock (2005

[1997]:20) states that public choice theorists have, ever since the inception of the programme, espoused “[t]he idea that government exists primarily to deal with externalities”--an idea that is now a standard assumption in political inquiry.

However, Dewey would not agree with all of those assumptions central to the constitutional economics programme. While Dewey apprehended the significance of collective action, which constitutional economists likewise acknowledge, he saw it as a means to liberate the potentialities latent in human beings, rather than as a way to aggregate preferences and secure maximally efficient outcomes. The constitutional economist utilizes the metaphor of the production function, which, as Brandl (1988:419-20) explains, “is the economist’s name for the relationship by which the firm makes outputs of production--efficiently.” By maximizing profits, the firm succeeds in anticipating the preferences of consumers in the economic market-place; and analogously, by maximizing votes for a political platform, the politician prevails in predicting the preferences of citizens in the political market-place.⁴³ According to Judith M. Green (2001:263), “Dewey’s insightful conception of democracy differs from presently dominant economic institutional models in . . . [that] Dewey focuses on participatory and educative requirements for . . . ongoing social and institutional transformations . . . [while] economic liberal and libertarian models of democracy simply aim to coordinate the unexamined preferences of . . . individuals.” Thus, it can be inferred that Dewey begins with a set of assumptions about human agency and motivation that differ remarkably from constitutional economists.⁴⁴ Rather than focusing on individual competition for material ends, humans instead aim to pool their individual resources and judgments, to reach shared understandings, to solve common problems and to “take part in directing things which are common, things for the sake of which men and women form groups--families, industrial companies, governments, churches, scientific associations and so on” (MW 12:199).

While Dewey did not give an explicit defence of deliberative democracy or a direct critique of constitutional economics, more contemporary authors offer accounts of public spirit parallel to Dewey's which do accomplish these tasks. Jane Mansbridge (1994:147) conceives public spirit as "a political form of altruism" which helps to resolve problems of how agents cooperate and collectively act, such as prisoner's dilemma situations. Among those solutions, "[w]ell-designed deliberative processes have," Mansbridge (1994:156) notes, "the potential for fostering public spirit."⁴⁵ Steven Kelman (1987b:81) adds that the conclusions of public choice analysis have had a deleterious effect on public spirit, neglecting "the ability of ideas to defeat interests, and the role that public spirit plays in motivating the behavior of participants in the political process." In the following analysis, Kelman's rendition of public spirit will receive considerable attention because of its accompanying critique of the public choice approach.

By understanding self-interest as the primary motive for state action, Kelman argues, public choice and its offspring, constitutional economics, are responsible for perpetuating a cynical view of collective action and public service. Accordingly, growing acceptance of the assumptions and conclusions of public choice advocates has begun to undermine the basis for public spirit. Although admitting it is "an old-fashioned term," Kelman (1987b:81) defines public spirit in a contemporary fashion, as "behavior motivated by the desire to choose good public policy." Unfortunately, Kelman argues, public choice theorists and constitutional economists have contributed to the decline of citizen confidence and trust that political institutions and actors work to promote the public weal and not to advance private pecuniary interests. One example is George Stigler's (1975:139) thesis that the motivational stimulus to collectively organize and act will grow in direct proportion to the advantage that is accrued by each member and in inverse proportion to the size of the group (Kelman 1987b:76). As a result, producers will tend to be significantly more organized than consumers and thus better equipped

to lobby government. Another is William Niskanen's (1968, 1971) portrayal of government bureaucracies as engaged in a process of budget-maximization (Kelman 1987b:77). Since legislators have no way of knowing what each marginal unit of production costs, bureaucrats will request larger appropriations than needed so that they gain more personal prestige in administering the bureau (Wilson 1989:118). In both examples, public choice theorists model agents--whether producers, consumers or bureaucrats--as rational and self-serving seekers of personal benefits, regardless of whether they are acting in their private or public capacities.

While Kelman's definition of public spirit does not perfectly mirror Dewey's, it does have sufficient similarities to merit comparison. Dewey's notion does not directly address the issue of motivation, unless one imagines that the cobbler-expert's motive is to make a profit by fixing the shoe and the customer-citizen's is to make the shoe fit. However, if these self-interested motives were those of the principal and agent, then they would support at least a rational choice, if not a public choice, analysis of collective and state action. Instead, given Dewey's twin focus on communication and inquiry, government experts and private citizens who confront complex issues of common concern would be motivated to divide the labour, depending on the balance of requisite outsider's expertise and insider's wisdom, in a cooperative process of problem solving (LW 2:350). In short, there is "more than a verbal tie between the words common, community, and communication" (MW 9:7). However, barriers to group inquiry--or what Olson (1965) referred to as "problems of collective action"--are bound to afflict the process. Dewey realistically appreciates these barriers, identifying them as formidable obstacles to the reconciliation of physical and social inquiry: "In the case of social inquiry, associated activities are directly involved in the operations to be performed; these associated activities enter into the idea of any proposed solution. The practical difficulties in the way of securing the agreements in actual association that are necessary for the required activity

are great” (LW 12:496). Unfortunately, Dewey fails to specify these “difficulties in the way of securing agreements,” though he does criticize the exclusive use of majoritarian methods and recommends that they be supplemented with prior communication and inquiry. Further on, Dewey does assert that the problem of self-interested motivation, or what he terms “self-love,” is not among these difficulties, but is instead an expression of convention and habit: “the idea that men are moved by an intelligent and calculated regard for their own good is pure mythology. Even if the principle of self-love actuated behavior, it would still be true that the objects in which men find their love manifested, the objects which they take as constituting their peculiar interests, are set by habits reflecting social customs” (LW 2:335-6). Self-interest dictates the limits of human behavior only if it is habituated through social conventions and ethical norms. In the case that it is, the citizen and expert would need to overcome such obstacles to associated activity, to transform their motivations on the way to becoming democratically engaged partners (Warren 1992:8). And then, once absent or overcome, self-interest would give way to public spirit, providing the conditions for agreement and cooperation and ensuring that the shoe *does* fit, or that their common problems do become the subject-matter for joint inquiry--and, if successful, for joint resolutions.

Two deliberative democrats, Amy Gutmann and Dennis Thompson, are not so sanguine as Dewey and Kelman about the potential for public-spirited deliberation. “We do not need to make the optimistic assumption,” Gutmann and Thompson (1996:42) claim, “that most citizens will suddenly become public-spirited when they find themselves deliberating in the public forum . . . All we need to assume is that citizens and their representatives are more likely to take a broader view of issues, and to consider the claims of more of their fellow citizens, in a process in which moral arguments are taken seriously than in a process in which assertions of political power prevail.” So long as citizens are sensitive to the moral claims of their fellow deliberators

and do not valorize the strategic advantages of power politicians, they need not ascend to the status of saintly, other-regarding possessors of public spirit in order to deliberate. So, it is clear that Gutmann and Thompson understand public spirit much differently than Dewey--as more akin to an exalted virtue of moral character than to a naturalized feature of citizen-expert problem-solving partnerships.⁴⁶ Thus, Gutmann and Thompson reject an account different than Dewey's--an account that fails to translate public spirit into operationally clear terms--as an unworkable ideal for democratic citizenship.

Although Kelman does not explicitly advocate for deliberative democracy, his suggestions for cultivating public spirit parallel positions taken by deliberative theorists. Similar to Joshua Cohen (1997:77), Kelman (1987b:93) states that "political argument inevitably must be formulated in terms broader than that of the self-interest of the individual or the group making the claim, since there is no reason for others to support a claim simply based on my self-interest." Instead of producing reasons that point to selfish motives, citizens would have to frame reasons that appeal to more generalized interests, such as what is for the common good or public interest. Expressing agreement with Samuel Freeman (2000:375), Kelman (1987b:93) claims that considered judgments about generalized interests cannot result purely from the aggregation of individual choices, or by "an accidental agglomeration of individual decisions to regard public spirit as the appropriate motivation for political action." Consistent with Jürgen Habermas's (1984) position, he affirms that morally-motivated action (or action based on a claim of rightness) is superior to strategic action, due to "the continuing existence of a social norm that declares it appropriate for people to try to do the right thing in public behavior and inappropriate for them simply to seek to advance their personal interests" (Kelman 1987b:86).

By overemphasizing the rational and utility-maximizing motives of agents, Kelman (1987b) argues, public choice theorists and constitutional economists have done more harm

than good for the prospects of realizing public spirit. What they neglect is a “sense for the importance of making a good argument, of having the facts on one’s side, of being able to present an appealing public vision, or of having a reputation for seriousness and commitment” (87). In other words, their explanations of collective action fail to consider how other motivational tools--cogent arguments, hard facts, a persuasive ideal or a strong character--facilitate cooperative actions between citizens and state officials. Thus, Kelman fears that public choice cynicism could potentially undermine citizen trust and confidence in the political system; “that failure to show public spirit indeed can hurt . . . people [such as citizens, bureaucrats, and elected officials], in their own eyes and in those of others” (88). Indeed, if it were widely accepted that state actors and interest group organizers were motivated solely by self-interest--perhaps resulting from ubiquitous agreement with the conclusions of public choice and constitutional economics analyses--it is doubtful that Dewey’s publics and citizen-expert partnerships would ever materialize. Cynical public choice prognoses of human motivations pose the risk that widespread acceptance could make them self-fulfilling, turning public-spirited collaboration into self-interested competition. In this counterfactual scenario, “public-spirited individuals are,” Peter Boettke (1994:247) acknowledges, “at a comparative disadvantage in political markets.” So, if constitutional economists and deliberative democrats wish to preserve and promote citizen-expert partnerships, then assumptions about human agency and motivation cannot merely model or describe human behaviour; they also need to prescribe a normatively valuable account.

However, to the discredit of Kelman’s argument, construing public choice and public spirit as incompatible opposites, or entrenched positions in an irresolvable debate, is unnecessary. By following the same logic as Dewey did in resolving the tension between majoritarianism and elitism, Kelman could have constructively integrated aspects of public

choice and public spirit into a mid-level interpretive concept. Since he did not, it is left to us to speculate how this might be accomplished.⁴⁷ Similar to Dewey's shoe analogy, the metaphor of a contract or agreement, as employed by some advocates of participatory policymaking, establishes a model for well-functioning citizen-expert partnerships. In the area of policy studies, cooperative or participatory policy-making is also defined using a stage-by-stage heuristic, similar to Dewey's circle of inquiry--sometimes referred to as "the policy cycle" (Lester and Stewart 2000:5-8). Thus, the function of public spirit in problem-solving aligns with its function in policy-making. For instance, Frank Fischer (1993:163) writes:

Conferring authority, status, and legitimacy on the professional, the relationship [between the professional policy expert and the citizen client] functions as a two-sided agreement or understanding, formal or informal. On the professional side of this understanding, experts agree to deliver their services to the limits of their competence, to respect the confidence of their clients, and not to misuse for their own benefit the special powers accorded to them by the relationship. In return, the clients agree to accept the professional's authority in specific areas of expertise, to submit to the professional's ministrations, and, of course, to pay for services rendered.

Appealing to Donald Schön's (1983) comparison of expert-citizen partnership with an "informal contract," Fischer (1993:163) likewise concludes that "clients are expected to accept and respect the professional's autonomy as an expert."

Participatory policy scholars other than Fischer and Schön also utilize the central device of the constitutional economist--i.e. the contract or agreement--as a metaphor for the trust-based client-professional relationships which are a condition (if not *the* condition) for public-spirited problem-solving (and policy-making).⁴⁸ Jenkins-Smith (1990:116) refers to the relationship between the citizen and expert as that of the client and his advocate, such that "the advice of the analyst provides the client with a strategy and with ammunition for the struggle." In addition, Heifetz and Sinder (1987) characterize the function of experts as that of leading and managing the problem-solving activity of citizens. Whether by informal agreement or

contractual consent, cooperative policy-making (and problem-solving) should produce mutual benefits for policy advocates and their clients in excess of costs.⁴⁹ Moreover, in the process of deliberative decision-making, clients and advocates may persuade leaders, public managers and policy-makers to become parties to the contract, thereby formally committing themselves to “abide by the outcomes” (Friedman 2006:10; Evans 2000). So, as this contractarian support for public-spirited partnerships proves, constitutional economists have more to contribute to deliberative democratic theory’s “coming of age” than Kelman’s public choice critique would lead us to believe.

It is important to stress the central point of this chapter: namely, that the concept of public spirit, as employed by Dewey, Kelman, Gutmann, Thompson, Dryzek, Fischer and others, does matter. If we are to affirm Robert Talisse’s (2004:6) conclusion that “the deliberative turn in contemporary democratic theory is as yet incomplete,” such mid-level concepts must be invented or revived in order to quiet the criticism that realizing (or institutionalizing) the deliberative ideal is impracticable. In addition, the concept of public spirit helps us to decide how to bridge the deep divide between constitutional economics and deliberative democracy. At this stage, we turn to the task of connecting the assumptions and methodologies of these rival research programmes by employing the tools of the transactional approach, as presented in chapter two, in addition to Dewey and Kelman’s transactional notion of public spirit, as elaborated in the present chapter.

CHAPTER 6

TRANSACTIONAL MEDIATIONS AND INSTITUTIONAL CHOICES

In this pivotal chapter, I accomplish the central task of the present project, that is, bridging the deep divide between the constitutional economics and deliberative democracy research programmes. As explained in chapter one, the differences between the two approaches first reveal themselves in their divergent solutions to the problem of majority cycling. However, this point of dissimilarity is only a superficial indicator of much deeper tensions.

As argued for in chapter two, John Dewey and Arthur F. Bentley's transactional view contributes a set of instruments for resolving these kinds of incompatibilities between methodological approaches in an array of disciplines. In the third chapter, I outlined three views of deliberative decision-making, modeled after three actual theories; followed in chapter four by a presentation of the constitutional economics programme and its six trenchant criticisms of deliberative democratic theory. In chapter five, I demonstrated that John Dewey was a proto-deliberative democrat, and that a reconstruction of a historical debate reveals the transactional concept of public spirit and how it operates in contemporary theories of deliberative policy-making.

In the present chapter, the plan for mediating the underlying tensions between the two programmes begins with an exposition of six points of opposition between the approaches of constitutional economists and deliberative democrats. Next, I employ Dewey and Bentley's transactional approach as an instrument to show how these can be mediated. In a procedure parallel to the one employed to bridge the four interactional separations in chapter two (inquirer/inquired, true/false, theory/observation, and induction/deduction), the transactional

view will serve to mediate these five oppositions, and thereby bridge the deep divide between constitutional economics and deliberative democracy.

In the second half of the chapter, I consider how the deliberative ideal has been, and should be, extended to the domain of institutional design.

Five Oppositions

The oppositions are as follows: (i) theory versus interest, (ii) methodological individualism versus methodological collectivism, (iii) procedure versus outcome, (iv) preference versus constraint, and (v) strategic action versus communicative action. In the section following this one, the challenge will be to mediate these by employing the transactional approach.

Opposition # 1: Interest versus Theory

The first opposition to be discussed manifests in the psychological preferences and moral disagreements of deliberating agents. According to Vanberg and Buchanan (1989:51), “[t]here is, one may say, an interest-component and a theory-component in almost any choice [and] . . . [f]or many ordinary market choices the theory-component may play a minimal role, while others may be heavily theory-laden.” While interest-based preferences encourage choices which express private and exogenously-formed tastes (e.g. about one’s favorite brand of a consumer product), theory-based preferences direct their holders to inquire and deliberate at length as part of an endogenous process of belief formation and transformation (e.g. about the best candidate to hold a political office). Political decisions differ from market decisions in that they reflect not only interest-based preferences, but also theory-based preferences; not only tastes, but also beliefs. The question then becomes, which kind of preference takes priority in those democratic decision procedures referred to as political deliberation or discourse? To answer this question, we will examine a parallel problem in meta-ethics and one theorist’s solution.

Charles L. Stevenson (1963) identifies a similar tension between beliefs and attitudes as factors in explaining moral conflicts. Disagreements of belief depend on differences of opinion about facts, such as medical practitioners disagreeing about the causes of a patient's sickness or acquaintances disputing when they last saw each other. Disagreements in attitude, on the other hand, involve subjective dispositions to like or dislike, approve or disapprove, such as when two people disagree about where they would prefer to have dinner. "The difference between the two senses of 'disagreement,'" Stevenson claims, "is essentially this: the first [or disagreement in belief] involves an opposition of beliefs, both of which cannot be true, and the second [or disagreement in attitude] involves an opposition of attitudes, both of which cannot be satisfied" (2). While conflicts over values often encompass both disagreements in belief and attitude, "the distinguishing feature of ethical arguments" is that they predominantly involve disagreements in attitude (3).¹ Stevenson concludes that it is only possible, though never guaranteed, that exposure to previously unknown facts will change a moral agent's mind, first, by altering a belief and, second, by effecting a consequent transformation in attitude (4).

Just as conflicts between interest-based preferences, analogous to disagreements between two opposed attitudes, cannot be reconciled, so incompatible theory-based preferences, similar to disagreement between two beliefs, cannot be equally warranted. When interest-based preferences conflict with theory-based preferences, the problem is magnified because the two involve distinctly different standards of evaluation. While cognitivists assert that all preferences are theory-based judgments (or matters of belief), subjectivists argue, to the contrary, that all preferences are either interest-based expressions (or matters of attitude) or can be deflated into such expressions. Consistent with most constitutional economists, Vanberg and Buchanan (1989:52) endorse the subjectivist approach, but concede some ground to the cognitivist outlook: "A person's constitutional theories are about matters of fact, [because] [t]hey are his

predictions (embodying assumptions and beliefs) about what the factual outcomes of alternative rules are.” The degree to which beliefs about the consequences of adopting particular rules are warranted depends on the degree to which these beliefs can be confirmed as factual through observation and experimentation.² This cognitivist standard is reflected in the presuppositions of Habermas’s ideal discourse situation. So long as the rules of discourse are nearly met, Habermas (1990:89) contends, deliberation should resemble a “cooperative search for truth,” a rational endeavor to reach consensus through argumentation.³

However, in the same way that ethics for Stevenson does not, at bottom, implicate doxastic (or belief-based) disagreement, so politics for Buchanan does not predominantly involve a quest for truth.⁴ Instead, it more closely resembles a contest of strategies, not of arguments, in which conflicts of interest are settled through bargaining and eventual compromise. Since politics is a competition of interests and not a search for truth, interest-based preferences trump theory-based preferences. So ultimately, subjective tastes or attitudes, not beliefs supported by objective facts, dictate the content of decision outcomes.⁵

Opposition # 2: Methodological Individualism versus Collectivism

Yet another disagreement arises between constitutional economists and deliberative democrats over the issue of what the appropriate unit of analysis is in inquiry. According to Lynn Sanders (1999:12), “the question of what the real unit of interest is is always, or at least always should be, far from easy.” In short, selecting the units of analysis is a difficult choice--often referred to by social scientists as the ‘locus problem’ (Kaplan 1968:78). In making this difficult decision about the appropriate locus of study, constitutional economists select the single individual, while deliberative democrats specify the deliberative body or group--what is termed ‘methodological individualism’ and ‘methodological collectivism,’ respectively.

The postulate of methodological individualism lies at the hard core of the public choice research programme. Although dispute over its meaning arises at the margins, methodological individualism is accepted in some form or another by every constitutional economist, including its founder James Buchanan.⁶ To recall, the postulate states that the individual is the proper unit of analysis; and, consistent with Buchanan's symmetry thesis, this is true not only in economic inquiry, but also in social and political inquiry. To illustrate the differences between methodological individualists and methodological collectivists, we may look to Buchanan's (2003a:151) criticism of the accepted units of analysis in political theory and philosophy: "From the beginning of any philosophical inquiry, political theorists have commenced with the collective unit, the polis, the city, the state, and the discussion has been concentrated on the discovery of that which is 'good' for such an entity."⁷ From the methodological individualist's perspective, the collective unit is not the appropriate unit of analysis. Why? Buchanan argues that collectivities, such as "the polis, the city, the state," do not possess, and could never possess, the same dispositional attitudes and sense of agency that individuals do. However, with methodological individualism comes the risk of committing the reductive or individualistic fallacy, that is, making inferences about collective entities (e.g. groups, societies, or nations) based on evidence gathered about individuals.⁸

Among sociologists and deliberative democrats, and in contradistinction to constitutional economists, treating individuals as the primary units of interest is not nearly as widely accepted.⁹ "As opposed to this [methodological individualist] view," the sociologist Herbert Blumer (1969:84) writes, "sociological conceptions generally lodge social action in the action of society or in some unit of society [e.g. the political group or social class]." Although sociologists do not entirely refrain from noticing individuals, their concern is less with individual choice and rational action (as it is with economists), and more with how groups of individuals

function in norm-regulated collectivities.¹⁰ The sociological focus on the collective unit, rather than the individual unit, is also shared by many deliberative democrats. Group activity and the dynamics of that activity change individual preferences and behaviour to such an extent, methodological collectivists argue, that to study them as mere aggregations of individuals would be insincere to the phenomena.¹¹ In Follett's (1923:6) words, "[t]he craving we have for union is satisfied by group life." Deliberative theorists contend that deliberation is *the* group activity that fundamentally transforms individual preferences and behaviour. As a consequence of these group interactions and communications, agents are more likely to achieve mutual understanding, agreement and a shared plan for collective action. Therefore, deliberative democrats embrace methodological collectivism, for "[i]t is precisely these non-individual entities [viz., groups] that are potentially most interesting to students of deliberation" (Sanders 1999:12). Yet, methodological collectivism also introduces the threat of making the ecological fallacy, that is, drawing inferences about individuals given previous observations about collective entities.¹²

Also, some deliberative democrats object to methodological individualism on the ground that its core motivational assumptions are descriptively inaccurate. In disputing the economist's model of *homo economicus*, they claim that not all individual decisions fulfill the requirements for rational choice, such as being goal-directed, self-interested and utility-maximizing; some are, to the contrary, non-instrumental, other-regarding and not aimed at maximizing utility.¹³ Consequently, public choice theorists have lost sight of the complexity of collective action, and particularly how agents' motivations overreach simple self-interest.¹⁴ In response to the methodological collectivist's charge of descriptive inaccuracy, Buchanan (1972a:175) replies that methodological individualism and *homo economicus* constitute only models, not descriptions, of human agency; and, as such, they are intended to highlight some behavioral features and neglect others for the sake of "erect[ing] conceptually refutable hypotheses."¹⁵

Opposition # 3: Procedure versus Outcome

Residing in the interstices between the assumptions of the two programmes, another tension is manifest between the procedure and the outcomes of deliberation. Does the procedure of deliberation or the substance of its outcomes ultimately legitimate deliberative decision-making processes?

According to constitutional economists, a Leviathan-like state should not be emboldened to tyrannically impose final outcomes or end-states on its citizens. Ostrom (1987b:85) asserts that “[n]o one is fit to exercise the prerogative of a Hobbesian sovereign.” This worry begins with the insight that he who frames the issue in a debate tends to determine the outcome. As Schauer (1997:1326) observes, “government power is systematically more dangerous than the concentrations and distortions of private power” because government can influence how the public understands issues with greater success than most private organizations. If a state dominated by a single group could frame issues to suit its interests, then constitutional economist fear that it could also manipulate the results of formal deliberations to fit its own normative criteria. The unwelcome outcome could then be that Leviathan-like government would curtail individual freedoms and selectively oppress the dominant group’s enemies, particularly members of minority groups. So, on their protectionist (or Madisonian) view of democracy, constitutional rules should be designed to prevent the consolidation of state power in the hands of a single group or faction and to encourage fair rule-making procedures. “[W]e can talk normatively about ‘process’ or ‘procedure,’” Buchanan (1979:180) insists, “while staying clear of normative discussion of end-states.” The main concern of constitutional economists, such as Buchanan, is that engineered outcomes, such as heavily redistributive tax schemes, will reflect the normative standards and interests of government actors--standards which are independent of, if not wholly adverse to, the interests of most of those who are

affected, viz. the citizen tax-payers. Likewise, Brennan (1984:129) asserts that, “the end-state approach, necessarily involves criteria for distinguishing ‘good’ and ‘bad’ outcome . . . [whereas] in a more constitutional approach . . . the domain of direct normative concern is the alternative set of rules from which those social outcomes emerge.”¹⁶ Instead of engaging in end-state engineering, governments should grant decision-making authority to citizens *qua* autonomous agents, allowing them to select the structure of constitutional rules that will constrain their subsequent political choices.¹⁷ So, in a constitution-making context, the implication is that the framers will establish second-order rules for how the game of ordinary politics will be played; or, alternatively stated, these citizens will choose the method by which later generations will choose.

While constitutional economists embrace rules and reject patterned outcomes, it would be inaccurate to describe deliberative democrats as either rule-sceptics or end-state engineers. For instance, Habermas’s (1990, 1993) discourse ethics highlights the pragmatic presuppositions immanent within discourse that operate in ways analogous to rules. These discourse rules regulate the communicative behaviour of agents in a procedure designed to reach agreement and understanding. Nevertheless, constitutional economists are troubled by how deliberative procedures potentially imperil individual liberty in a non-constitutional choice situation under a less-than-unanimity decision rule. In ordinary politics, they fear, the struggle to achieve the grandiose ideal of deliberative democracy might happen at the expense of minority freedoms and interests.

Opposition # 4: Preference versus Constraint

According to Vanberg and Buchanan (1989:50), “[t]he economist’s standard interpretation of choice behavior is in term of preferences and constraints.” What this means is that in any choice situation agents will decide according to a pre-given set of desires (or preferences), and if explicit limits (e.g. rules) are imposed on procedures and outcomes, then the agents will conform

their choices to those limits (or constraints). However, most constitutional economists and deliberative democrats do not treat preferences and constraints as equal partners in the process of choosing. Instead, they privilege either preferences or constraints as the ‘prime mover’ in motivating deliberative choice.

Although, in principle, constitutional economists treat constraints and preferences as interacting factors in choice, in practice, they favor constraints over preferences. Following the tenets of neoclassical economics, they claim that choice is an interaction between sets of preferences and constraints—a view that “fits [well with] what Dewey and Bentley . . . called ‘interactional theories’” (Khalil 2003:2). However, on the model of *homo economicus*, agent motivations are stipulated apart from the revelation of preferences, making any concerted inquiry into the content of those preferences superfluous.¹⁸ Moreover, preferences are treated as private and stable features of the agent’s inner psyche, subjectively held to such a degree that they cannot be disputed by others—as is conveyed in the economist’s saying, “de gustibus non est disputandum” (Stigler and Becker 1977). Another way to state this assumption is that individuals are presumed to be the best judges of their own personal interests (Ostrom 1987b:77). So, with preferences held constant, constitutional economists conduct their inquiries by modeling alternative schemes of institutionalized constraints in order to predict how constraints influence choice.¹⁹

In contrast to constitutional economists, deliberative democrats privilege not preferences but reasoned judgments over constraints in their models of deliberation. Some deliberative democrats, such as Habermas, entirely exclude external constraints from the process of deliberation, relying exclusively on the internal presuppositions of discourse in order to control outcomes.²⁰ Others, such as Gutmann and Thompson (1996, 2004), Fishkin and Ackerman (2002) as well as Benhabib (1994), are considerably more tolerant of constraints on

the condition that they are discursively tested.²¹ Different than constitutional economists, deliberative democrats treat preferences as public and malleable dispositions to choose. At least potentially, these dispositions can change as a consequence of being tested through serious deliberation and public justification. Preference transformation results from hearing other deliberators publicly state their preferences (e.g. “I oppose abortion”) and their reasons offered in defence of those preferences (e.g. “The foetus has a right to life”); as well as declaring one’s own preferences (e.g. “I support abortion”) and defending those preference against other deliberators’ objections (e.g. “But then you must support murder”) with good reasons (e.g. “No, I do not because the foetus is not a person) (Pearce and Littlejohn 1997:71). Once two or more agents partake in deliberation, the reciprocal exchange of preferences and supportive reasons can lead deliberators to change their minds, that is, to revise either their preferences or their rationale for holding them.

Opposition # 5: Strategic versus Communicative Action

This last opposition is inspired by Habermas’s seminal distinction between strategic and communicative action. To reiterate Habermas’s distinction, strategic action encompasses the instrumental and competitive pursuit of material ends (e.g. money or power) under a recognizable scheme of incentives. “The model of strategic action,” Habermas (1985:155) explains, “contents itself with explicating the constitutive features of success-oriented action.” Standing opposite strategic action, communicative action involves rational argumentation oriented toward the achievement of mutual understanding. Although communication occurs in everyday experience, Habermas (1985:235) differentiates communicative action from “naïve communication” by the former’s capacity to generate consensual agreement and coordinate social action. Communicatively-acting agents abide by a set of implicit discursive rules or constraints prohibiting illegitimate forms of persuasion, such as deception and coercion, and

guaranteeing the discursive validation of claims and norms in case they are criticized. According to Habermas (1985:183), the only “legitimate power arises [in communicative action] among those who form common convictions in communication free from coercion.”

The strategic/communicative action opposition constitutes a fundamental cleavage between deliberative democrats and constitutional economists for at least two reasons. First of all, although both strategic and communicative action can contribute to collective decision-making outcomes, the coordination mechanism for each is different. In communicative action, it is consent; whereas in strategic action, it is influence or force.²² Thus, Habermas contends that stable consensual agreements are best achieved through communicative action and discourse, whereas unstable (compromise) agreements are better served by strategic action and bargaining. In addition, both sides hold incompatible views about how to resolve problems related to strategic action. While some deliberative democrats (e.g. Habermas and Elster) trust that rules implicit in language or norms immanent in social relations will minimize and possibly eliminate strategic action, constitutional economists are much less sanguine. They insist that explicit constitutional rules must be created in order to constrain strategic actors in both ordinary and deliberative politics. Otherwise, these actors will exploit unsophisticated agents (e.g. through cheap talk) and manipulate the political process (e.g. by logrolling, strategic voting and rent-seeking) until eventually the cumulative effects of their advantage-taking converts all agents into strategic actors.²³ Therefore, constitutional economists reject the position of deliberative democrats that constraints are embedded in language and norms, and insist instead that security against strategic actors can only be had through the imposition of explicit rules.

Since strategic action is an expression of instrumental rationality, both concepts are closely tied to rational choice theory and the model of “economic man.” Deliberative democrats wish to distance *homo economicus* from *homo communicans* (van Aaken 2004:19). Thus, it

is unsurprising that constitutional economists, such as Vanberg and Buchanan (1990), see the dominant form of action in human affairs as strategic; and deliberative democrats, such as Habermas (1989, 1996a) and Dryzek (1989), claim that the only acceptable kind of rational action in deliberation is communicative. According to Bohman and Rehg (1997b:xx), “[d]eliberative theorists are in general agreement on at least this: the . . . rejection of the rational-choice model”—and, by implication, the notion of strategic action.²⁴

Five Mediations

In this section, we employ the transactional approach to accomplish two tasks: (i) mediating the oppositions presented in the last section and (ii) refining those rough solutions suggested by both constitutional economists and deliberative democrats.

#1 Theory vs. Interest: Experience

The prior discussion of C.L. Stevenson’s meta-ethical analysis of belief-based and attitude-based disagreements and its similarity to Vanberg and Buchanan’s distinction shows how deeply rooted subjectivism is in constitutional economics. For Vanberg and Buchanan, changes in interests (attitudes for Stevenson) permit the resolution of ethical-political disagreements because, in the end, differences in value orientations cannot be settled by rational argumentation alone. Although beliefs about particular theories (or facts) may influence subjective attitudes, agents must be capable of altering their subjective valuations of the theories (or facts) if they are to, in turn, change preferences. One argument typically recruited against this position—which I will call the ‘commodification’ objection—is that it narrowly conceives ethical-political preferences as tantamount to tastes for consumer goods.

To some extent, the commodification objection is warranted. Some preferences about ethical, political and policy matters are not based on subjective interests (or attitudes), but reflect

core beliefs that an agent has developed, either alone or through her group involvements. “[A]s we experience having beliefs of fact and value with differing degrees of firmness,” Schauer (1999:17) notes, “we also experience a world in which there is more or less disagreement [about those beliefs] within the political community.” Second, since these commitments construct personal identity, or identity relative to a group or community, they are often held firmly, even inflexibly, in the face of countervailing evidence.²⁵ As Dewey observes, “[w]e do not, any of us, think out all of our standards, weigh independently our values, make all our choices in a rational manner, or form our characters by following a clearly conceived purpose” (MW 5:162). So, contrary to Stevenson’s account, changes in facts do not always force corresponding changes in these identity-based beliefs.²⁶ In addition, these commitments are not typically what Caplan (2001, 2003, 2005a) terms “rationally irrational,” for the private costs of holding them can be very high. Third, these identity-based beliefs can be highly resistant to rational criticism and revision, because they lie at the center of a person’s belief structure.²⁷ Choosing to act in accordance with such a belief is definitely not analogous to a “social picking situation” in which a choice presents itself between two or more commodities that are, for all intents and purposes, indiscernible in terms of the chooser’s intensity of preference and reasons for selection.²⁸ Therefore, in support of the commodification objection, to treat preferences which are a function of core beliefs as arbitrary tastes for consumer goods misrepresents the strength of an agent’s commitment to these beliefs.

Although identity-based commitments (or beliefs) could be made to support a thoroughly subjectivist (or non-cognitivist) interpretation of preferences, it would be unjustified to argue, as some neoclassical economists do, that preferences are universally fixed, stable and immune to rational revision through deliberation--that is, that all preferences are a function of identity-based commitments. As each of the deliberative democrats surveyed in chapter three

contend, what differentiates the collective activity of deliberation from its monological counterpart--or what Goodin (2000, 2003) refers to as "internally reflective deliberation"--is that agents give reasons in defence of their claims and, by exposure to other agents' arguments and criticisms, risk changing their preferences as a consequence. For Shapiro (2002:238), "[t]he unifying impulse motivating [deliberation] is that people will modify their perceptions of what society should do in the course of discussing this with others." So, if the motivation to deliberate reflects a desire to expose one's preferences to contestation and possible change, then we would expect agents with identity-based preferences to be unwilling to enter a deliberative forum where their invariant preferences would be challenged by others. Hence, participation in the deliberative process must resemble a voluntary enterprise, not a forced march toward the unwelcome goal of preference transformation.

Also, the process of deliberation should not be conceived as an entirely rational endeavour. In opposition to Habermas, Elster contends that the force of norms does not lie in the norm-follower's ability to rationally validate them, but in their capacity to stimulate affective responses in the norm-follower.²⁹ Likewise, Laslett (1956:182-3) asserts that "the psychology of face to face co-operation is not wholly ratiocinative, and that because you share a situation and are confident you know how to respond to it, you do not therefore understand it in the properly rational fashion." One group of constitutional economists (Brennan and Lomasky 1993; Brennan and Hamlin 1998, 1999) agree that even the choice to vote can be understood in non-instrumental and expressive terms (e.g. as an expression of support or protest), rather than as an instrumentally rational calculation.³⁰ So, to make their models of deliberation both more realistic and more attractive to constitutional economists, deliberative theorists should consider how emotion and other non-rational factors influence choice. Sometimes emotional appeals improve deliberation and its outcomes; at other times, they severely undermine the quality of eventual

decisions.³¹ However, a rational dimension to deliberation persists insofar as deliberators give reasons in defence of their claims. So, a balanced approach, as Mansbridge (1993:99) insists, is a better option than a thoroughly non-rational approach: “The processes of deliberation, action, and reflection require a mixture of emotion and reason. Although in ordinary speech the words ‘deliberation’ and ‘reflection’ have strong rational overtones, actual deliberation and reflection require emotional investment, even if only in the minimal sense that one’s emotions must be engaged in order to address a problem.” Dewey echoes Mansbridge’s insistence that the affective dimension of human experience should not be lost, for “[a]ny doctrine that eliminates or even obscures the function of choice of values and enlistment of desires and emotions in behalf of those chosen weakens personal responsibility for judgment and for action” (LW 13:184-5).³²

Nonetheless, Dewey’s acknowledgment of experience’s affective dimension should not be mistaken for an endorsement of a thorough-going subjectivism or non-cognitivism. “Non-cognitivism means,” Dryzek (1992:406) explains, “simply that values and preferences are like emotions, beyond the reach of rational argument.” In point of fact, Dewey disputes the claim that the difficulty or doubt felt in the initial phase of inquiry indicates a private psychological or mental state that is immune from rational scrutiny.³³ Experience is objective and cognitively-rich for Dewey, and the degree of its objectivity and cognitive-richness is reflected in a distinction he makes between two kinds of experience: (i) primary and (ii) secondary. Only when humans are confronted with an entirely novel and problematic situation do they shift from “primary experience,” which is habitually “had” and mediated by previously formed habit, to “secondary experience,” which demands genuine reflection, “knowing” and inquiry.³⁴ “The distinction [between primary and secondary experience],” Dewey writes, “is one between what is experienced as a result of a minimum of incidental reflection and what is experienced in

consequence of continued and regulated reflective inquiry” (LW 1:3-4). While the dominant mode of experience for Dewey is what Langsdorf (2002:151) calls “a complex affair of doing and undergoing . . . that is ‘felt’ rather than ‘known,’” experience is nevertheless a cyclical, ebb-and-flow movement between pre-cognitive (or felt) havings and cognitive knowings.³⁵ “The suggestion here,” Goodin and Niemeier (2003:641) explain, “is that we lead our ordinary lives largely on auto-pilot, doing routine things in routine ways without much thought . . . [until] we come across something ‘new’, [at which time] we update our routines--our ‘running beliefs and procedures, attitudes and evaluations--accordingly.” Once learned through focused inquiry (i.e. as knowings in secondary experience), these experiential lessons are stored or funded as meaningful data and tools (i.e. as settled objects or knowns in primary experience) for use in future inquiries. Henceforth, they can be accessed and acted upon easily, framing our ongoing experiences in cognitively less demanding and more effective ways as “is required by the common habits of everyday practice” (Chandler 1977:47).³⁶

Besides emotions, experience also comes to us permeated with values. Stated differently, the factual or existential conditions of a situation are never entirely value-free. According to Bentley and Dewey, “the logical distinction [between value judgments and existential judgments] which is supposed to be drawn rests upon denial, by assumption, that values and valuations are themselves factual or ‘existential’ [which] is the fundamentally . . . [flawed] matter” (LW 16:313). So, the transactional view eschews a strict fact/value dichotomy, for experience in its existential richness always comes to us in full, that is, with values infused--or in Putnam’s (2002) words, “inextricably entangled”--within it.³⁷ It therefore becomes difficult, if not impossible, to sort out those preferences revealed in experience as either belief-based, and thus determined exclusively by facts, or interest-based, and therefore a function entirely of values (or value commitments). Thus, if a strict dichotomy between facts and values

cannot be maintained, then the separation between theory-based and interest-based preferences likewise dissolves.³⁸ And, even if some value-free facts could be isolated and agreed to by the deliberators, it is unlikely that such an accord would be sufficient to settle extremely divisive moral conflicts. As Schauer (1999:18) affirms, “even total agreement about the nonmoral facts and implications would leave much deep moral disagreement remaining.” So, Dewey’s theory of experience acknowledges the complexity of preferences, whether the invariance of some, the malleability of others or the undeniable entanglement of facts and values within almost all.

In an interactional model, preferences are both a function of interests (or attitudes) *and* a function of beliefs. So, interests are not entirely determined by non-cognitive elements, such as emotion or values; nor are beliefs wholly the result of cognitive factors, such as hypotheses, information or facts. Instead, facts and values, beliefs and interests, reciprocally influence each other, and they do so through the medium of language.³⁹ However, the problem with this interactional interpretation is that it conceives the factors upon which preferences are based as reified and dyadic opposites, or dualisms, outside of the movement of experience. In correspondence with Bentley, Dewey warns that “interaction is dangerous, as it is easily taken to imply two or more prior existences” (Ratner and Altman 1964:115).

In a transactional model, on the other hand, the objective and subjective entities grounding preferences become wholly objective, moving phases and subtle points of emphasis within experience. Through the activity of appraisal or valuation, private preferences, or what Dewey terms “prizings” (e.g. what is valued or desired), readily convert into publicly shared values (e.g. what is valuable or desirable) (LW 13:216-8, LW 4:207). For Dewey and Bentley, the “irreconcilable separates” of facts and values, beliefs and interests, must be seen “extensionally and durationally” (LW 16:66). What this means for deliberation, Dewey notes, is that

communication has spatiotemporal qualities, such as rhythm and momentum, which imitate the cyclical flow of experience:

The experience [of conversation], like that of a storm reaching its height and gradually subsiding, is one of continuous movement of subject-matters. Like the ocean in the storm, there are a series of waves; suggestions reaching out and being broken in a clash, or being carried onwards by a cooperative wave (LW 10:45).

Similar to experience's "grasshopper-like movement" (LW 8:150), dialogue ebbs and flows in path dependent channels, alternating between "clash[ing]" and "cooperative waves."⁴⁰

According to Kosnoski (2005:662), these momentum and rhythm-generating qualities "can carry conversation forward in the face of uncertainty." By exploiting the tempo of conversation, shifting it back and forth between more and less cognitively-demanding tasks and forms of communication (e.g. from argumentation to narrative and back again), a skilled facilitator of a deliberative forum can continually re-energize the interest and motivation of participants, as well as create and maintain their openness to preference clarification and change.⁴¹ Therefore, tension between interest and belief can thus be overcome by appealing to Dewey's notion of experience. "[A] universe of experience," Dewey states, "is a precondition of a universe of discourse. Without its controlling presence, there is no way to determine the relevancy, weight, or coherence of any designated distinction or relation" (LW 12:74).

#2 Methodological Individualism vs. Collectivism: Methodological Pluralism

Although methodological individualism and methodological collectivism have their advantages, the choice presents a false dichotomy.⁴² Dewey argues that the conceptual "relation between the individual and the social" is *not* "the first and last problem which must be solved"--rather, it constitutes a pseudo-problem (LW 2:351). To recall Dewey's argument (summarised in chapter five), a more productive and straightforward standpoint from which to understand the relationship is in terms of the "transactions" between particular individuals and particular

groups, as well as their indirect consequences for other individuals and groups (LW 2:255).⁴³

Understood in this way, the relationship between the concepts of the individual and the social becomes no more problematic than the claim that humans are social creatures.

In their separate works on political subject-matter, Bentley and Dewey expose those problems and abuses that nonetheless emerge when methodological individualists understand collective action as a mere aggregation of individual actions. In *The Process of Government*, Bentley (1967) critically questions the thesis, so central to neoclassical economics and formal political theory, that the individual should be the primary unit of analysis. Appealing to ideas in Dewey's 1896 lectures on logic and ethics (which Bentley had attended at the University of Chicago), Bentley argues that the designation of a unit of analysis as 'individual' can more easily grow out of a designation of the 'social' than the social can emerge from the individual.⁴⁴ In other words, individuals are the products of their diverse group involvements, and not vice versa. Bentley claims that as the basic unit, "[t]he individual stated for himself, and invested with an extra-social unity of his own is a fiction" (215). In a similar though more pointed and contemporary critique, deliberative democrat Seyla Benhabib (1996:71) contends that methodological individualism is a "fiction" because individuals rarely possess the rationally ordered preferences economists claim. The exception is when preferences are reflexively criticized and tested through dialogue and argument. Therefore, the quality of an individual's preferences--specifically, their degree of clarity and their consistency of ordering--reflects not a set of stipulated assumptions about human motivation, but rather the character of an individual's social involvements, doings and discoursings.

Another defect of methodological individualism is the reductionist account it gives of human agency. At the outset of *The Public and Its Problems*, Dewey writes:

We have asserted that all deliberate choices and plans are finally the work of single human beings. Thoroughly false conclusions have been drawn from this

observation. By thinking still in terms of causal [or interactional] forces, the conclusion has been drawn from this fact that the state, the public, is a fiction, a mask for private desires for power and position (LW 2:249).

In Dewey's rendition of methodological individualism, the individuals composing social aggregates bring about the behaviour of those fictional constructs to which they belong, such as states, institutions, and organizations. According to the methodological individualist's reductionism, the same self-interested behaviour postulated of the individual (e.g. power-seeking) is also postulated of the collective unit because the latter reduces to the former. However, empirical evidence provides plenty of counterexamples, from the contrast between the individual's isolated behaviour and his frantic involvement in a mob, or his more sober activities as a "cog" in a bureaucratic machine (Weber 1946:228) and a decision-maker in a democracy.⁴⁵ As an alternative, Cunningham (1995:120) proposes a model of "*homo democraticus*," wherein agents having "values . . . compatible with democratic progress" work to advance their ends through collective political action, not through individual economic exchange. Simon et al. (1950) and Simon (1976) postulate "administrative man," whereby individuals jointly act to advance their membership organization's interests and objectives. Despite evidence of such non-reducible collective behaviour, methodological individualists insist that the motivations of groups must be conceived as identical with the motivations of their constituent individuals. So, unless its proponents relax the strict tenets of *homo economicus*, this model of human agency easily succumbs to the charge of unrealism.

Methodological collectivism also suffers from several salient defects. First of all, it ignores the warranted assertion that, in Dewey's words, "all behavior proceeds in ultimate analysis through individual human beings" (LW 2:246). As a result, these sociologically-based models of action and deliberation cannot appreciate the insight that group action and choice are, ultimately, constituted by individual action and choice. As Blumer (1969:85) rightly contends,

“[g]roup life consists of acting units [e.g. individuals] developing acts to meet the situations in which they are placed.” Second, methodological collectivism fails to grasp the advantage of employing limited reductive analysis to better understand the function of social aggregates.⁴⁶ “The way to find out how a thing [e.g. a group or an organization] works is to take it to pieces and examine the parts,” Bentley (1967 [1908]:254) writes, “[and ask] just how are they brought into one system, what is the functioning of one with reference to the other; such are the questions that must be answered.” The third and final defect is that methodological collectivists do not admit that there is, to use William James’s (1977) expression, a “pluralistic universe” of acceptable units of analysis.

Methodological pluralism offers both deliberative democrat and constitutional economist a principle of tolerance, whereby the operative units of analysis can be of any size. As Blumer (1969:85) assures us, “acting units may be separate individuals, collectivities whose members are acting together in a common quest, or organizations acting on behalf of a constituency.” Consequently, on the transactional account, the “genuine problem” for social inquiry becomes that “of adjusting groups and individuals to one another,” not of reconciling the concepts of the individual and the social (Dewey LW 2:355). That is not to say that the problem is entirely non-conceptual.⁴⁷ As demonstrated by the reconstruction of the Dewey-Lippmann debate (in chapter five), shared interpretive conceptions of democracy, community and public spirit (as well as other concepts) serve as guides for effectively and fallibly coordinating individual actions into successful collective actions.⁴⁸ Also, methodological pluralists avoid the individualistic (or reductive) and ecological fallacies by clearly defining the meaning of concepts, thereby producing operational definitions at each level of analysis: “the concept ‘democratic’ does not mean the same thing at the two levels of analysis (i.e. individual and collective). Applied to the individual, it refers to values, attitudes, and behavior; applied to

the political system, the concept refers to the system's structure, institutions and methods of decision making" (Frankfort-Nachmias and Nachmias 2000:49).

As an alternative to methodological individualism and collectivism, methodological pluralism is a transactional concept. "Human group life is," Blumer (1969:116) states, borrowing Dewey and Bentley's terminology, "a process of formative transaction." First of all, methodological pluralism helps us to productively model the open-ended debate about agent motivations as a systemic inquiry undertaken by deliberating individuals and groups.⁴⁹ Secondly, depending on the observed conditions of the situation, the methodological pluralist can flexibly alter her assumptions about agent motivation in order to make them more consistent with observed behaviour, both individually and collectively.⁵⁰

#3 Procedure vs. Outcome: End-in-view

In order to calm constitutional economists' worries that deliberative democracy aims to engineer end-states that are offensive to individual liberty, we must first examine the question of whether non-deliberative bodies should be permitted to review the decisions of deliberative bodies. Next, I argue that in order to make the deliberative procedure more suitable for achieving substantively just outcomes, that procedure should be analyzed into a stage-by-stage process resembling the pattern of inquiry (see chapter two). Finally, a presentation of Dewey's concept of an "end-in-view" demonstrates how ends should be treated as tentative and revisable goals in both inquiry and deliberation.

Constitutional economists are troubled at the prospect that deliberative democrats, under the pretence of striving for an unattainable ideal, would model deliberative procedures that engender outcomes abhorrent to individual liberty. As we saw in chapter three, Gutmann and Thompson (1996:199-229) proposed three principles--basic liberty, basic opportunity, and fair opportunity--to insure against substantively unjust outcomes. The same degree of

protection was not afforded to those economic liberties (e.g. freedom from excessive taxation) that libertarians and constitutional economists hold dear. Nevertheless, the authors of *Democracy and Disagreement* sought to guarantee that the results of deliberation did not offend basic liberties. Constitutional economists also object to a scenario in which a purportedly benevolent tyrant or dominant agenda-setter intervenes in a democratic procedure for the sake of producing results consonant with her own personal ethical standards. Similar to deliberative democrats, constitutional economists insist that this interventionist policy is illegitimate because it frustrates autonomous choice.

Would deliberative democrats and constitutional economists permit non-deliberative bodies to correct the outcomes of a fair deliberative process? In a response to this question, Forst (2001:374) argues, “deliberative democracy is a self-correcting institution . . . [where] self-correction means that the authority to question its authority always remains within the realm of reasons among citizens. There is no rule of reasons apart from the self-rule of citizens by justified reasons.” So, the struggle to design deliberative institutions that approximate the deliberative ideal does not warrant any means necessary, such as end-state engineering and the abridgment of individual liberties. Instead, the pursuit of the deliberative ideal is a long-term and reflexively critical process of subtly improving democratic practices (373). More concretely, Forst’s position forbids non-deliberative institutions from appraising the decisions of deliberative institutions--as when, for instance, in municipal decision-making a city manager reviews the acceptability of decisions arrived at through the deliberations of a citizen commission. Instead, accountability requires deliberative bodies to evaluate the decision outcomes of other deliberative bodies through a parallel process of reason-giving deliberation.

However, this requirement falls short of clarifying the way in which the process of deliberation is, and should be, related to acceptable outcomes. Just as the indeterminate

situation is connected to the settled situation by five phases in the circle of inquiry (see chapter two, **diagram 1**), so the logical connection between deliberation's process and its outcome should resemble, from its inception to its objective, a series of generic steps or stages.⁵¹ As a result, analyzing deliberation into its constituent phases or stages suggests a process analogous to Dewey's "inquiry into inquiry"--a process that could be termed 'inquiry into deliberation' (LW 12:12).

While inquiry into the generic pattern of deliberations might appear to be a novel technique, it has been repeatedly employed by constitutional economists and deliberative democrats alike. Among constitutional economists, Buchanan (1991c:226) has inquired into how choices in an earlier deliberative event (e.g. a constitutional convention) give rise to appraisals of the products of that initial choice (i.e. constitutional rules) in later deliberative events (e.g. in ordinary legislative politics). As we saw in chapter four, the result is a two-level distinction between periods of constitutional choice and post-constitutional choice. Likewise, the deliberative democrat Bruce Ackerman (1988:288-290) distinguishes between periods of historical crisis that spawn high-intensity deliberation and the intervening periods characterized by low-intensity deliberation. The failing of both these two-stage analyses of deliberation is that they exclusively differentiate between temporally consecutive or periodic deliberative events. What they neglect is the analysis of the stages *within* a single deliberative event.

Remedying this shortcoming are several models of deliberation developed by deliberative democrats and empirical researchers. In each of them, the stages correspond not only to successive temporal stages within a single deliberative event, but also to specific functions fulfilled within each stage. Similar to Buchanan and Ackerman, Habermas (1993:36) proposes "a two-stage process," but unlike their models his applies to a single deliberative episode "consisting of justification followed by application." Whereas in the first stage claims

and norms are validated through the test of rational discourse, deliberators in the second stage employ a “principle of appropriateness” to adapt the justified claim or norm “in light of the salient features of the situation” (37). To the detriment of Habermas’s two-stage model, however, it implicates the highly abstract theory of discourse ethics, as already discussed (see chapter three), without giving concrete guidance for the conduct of practical deliberation. In their study of an Australian deliberative forum, Goodin and Niemeyer (2003:633) also construct a two-phase account of the deliberative process, with an ‘information phase’, including “site visit[s], background briefings, presentations by and interrogations of witnesses”, and a ‘discussion phase’, wherein “collective conversations among a group of coequals [takes place] aiming at reaching (or moving toward) some joint view on some issues of common concern.” Although this account does not comprehensively describe the deliberative process, it does have the merit of modeling some features of an actual deliberative event—in this case, a Citizen Jury—and in a way that assists them in experimentally testing a working hypothesis about the effects of each phase on preference change.⁵²

Among empirical researchers, David Ryfe and James Hyland propose more complex multi-stage models of deliberation. Ryfe (2005:50) recommends “three moments of the deliberative process: [(i)] the organization of the deliberative encounter; [(ii)] the practice of deliberation within an encounter; and finally, [(iii)] the product of deliberative talk.” The benefit of Ryfe’s account is that, in contrast to Habermas’s, it does deploy an actionable—although perhaps over-simplified—procedure for programming deliberative events: viz., plan, participate, and decide. James Hyland (1995:56-7) presents a model wherein “every [deliberative] decision has four logically distinct stages or ‘moments’”: namely, (i) agenda-setting or “the identification of both the necessity of choosing and the set of available options for choice,” (ii) debate and discussion which “involves explicit deliberation,” (iii) the decision itself or “the choice to

implement one of several available alternative courses of action,” and (iv) implementation, when “the choice arrived at is translated into action.” The advantage of Hyland’s model is that it captures two features of deliberation which are conspicuously absent in Ryfe’s model: first, the very important (and most easily manipulated) stage of establishing the agenda and, second, the final stage of acting on the deliberated decision (Kingdon 1984; Avio 2000).

The connection between process and outcome also resembles the relationship between means and ends. Intelligent inquiry, according to Dewey, involves “technical skill in selecting and arranging means to realize . . . ends” (MW 6:310). Similarly, in the economist’s rational actor model, means and ends are operationalized as categories for analyzing the efficiency of action. Rather than being content with this theory of action, though, Dewey’s instrumentalism reformulates the meaning of the category ‘end,’ construing it “[i] as end-in-view and [(ii)] as close or termination” (LW 12:15). In distinguishing these two senses, Dewey asserts that ends are not simply anticipations of future conditions or outcomes—that is, end in the second sense.⁵³ Also, they resemble open-ended goals formed by agents in advance of outcomes and under present conditions, “goals [that] belong to the present”—that is, an end in the first sense or an end-in-view (Joas and Beckert 2002:2). Contrary to orthodox economic modeling strategy, these objectives have not been exogenously determined, and therefore do not display what Dewey calls the “vice of externally imposed ends” (MW 9:115).⁵⁴ Instead, ends-in-view emerge in a process endogenous to inquiry, action and even deliberation. They start as general and hazy plans of action and become progressively more refined, specific and lucid procedures for goal achievement.⁵⁵ Ends-in-view can be revised, rejected and even transformed back into suitable means. Ends-in-view also delineate sets of operations or procedures for surveying the situation, as well as criteria for discriminating between better and worse means to accomplish the objective of inquiry.⁵⁶ Moreover, built into the concept of an end-in-view is a feasibility test, Kaufman-

Osborn (1985:843) notes, for “the intelligent formulation of a hypothetical end-in-view presupposes assessment of the availability of the means that are the conditions of its realization.” In deliberation, a decision is not a final end, but an end-in-view, meaning that deliberators may always register their dissent (for instance, question the feasibility of implementing the decision) and revisit the issue at a later stage (Barber 2003; Gastil 1993). Indeed, given the interpenetration of means and ends in Dewey’s theory of agency, these categories for analyzing deliberation and other forms of action become distinguishable only by degrees along a means-end continuum.⁵⁷

The separation between procedures and outcomes can also be closed through the employment of a particular end-in-view: viz., the cultivation of civic competence through a learning process. By civic competence, what is meant is the capacity of persons to carry out their role as citizens, including the functions of voting, deliberating and serving on a jury. Arthur Lupia (2002:148) argues that a fallacy of “selecting on the dependent variable” is operative in popular civic competence theories. To recall, this fallacy states that untrained inquirers, and this includes most people, will remember the evidence that confirms, and forget that which disconfirms, their own pet theories:

In every person’s memory, times of not knowing what they now know are accompanied by *moments of discovery*--times when they are presented with new information that contradicts and then changes their prior beliefs. [. . .] Take ignorance, add information, and then gain competence at tasks . . . ability to recall such sequences is nearly universal. So is the ability to describe them. As a result, the folk theory is easy to communicate.

Even though many people can remember more cases in which they developed competencies through exposure to new information than those in which they did not, this fact does not mean that new information necessarily generates greater competence. Instead, a person’s acceptance of the formula ‘ignorance plus information equals competence’ reflects a miserly tendency to conserve cognitive resources and to avoid the intellectually demanding task of imagining the

counterfactual, namely, not knowing what we now know even after being exposed to novel data. However, to do no more than Lupia and merely label citizens who hold this “folk theory” as cognitive misers or rationally irrational is clearly unsatisfactory. Unfortunately, Lupia’s negative thesis does not provide a positive plan for how to cultivate civic competence through education.

The main reason for Lupia’s failure is that his analysis treats civic competence as an exogenous end, or what Dewey refers to as an “aim,” instead of as an endogenous end-in-view. In *Democracy and Education*, Dewey writes: “[T]he external idea of the aim leads to a separation of means from end, while an end which grows up within an activity as plan for its direction is always both ends and means, the distinction being one of convenience. Every means is a temporary end [i.e. an end-in-view] until we have attained it” (MW 9:113). Not only does Lupia unjustifiably separate the means of information dissemination from its end--viz., the development of civic competence--but he also overlooks how civic competence serves double-duty, that is, as both means and end. On the one hand, deliberation imparts information. On the other, information transmission does not exhaust the function of deliberation. According to the empirical researcher Lucio Baccaro (2001:245), “the process of rational persuasion, which *does* take place [in deliberation], requires more than the circulation of information.” In addition to this function, partaking in public discussion presents participants with a momentous educational opportunity, that is, the opportunity to develop greater fitness to deliberate by participating in the activity itself (Price 1998; Conover 2002; Gastil 2004).

So, how does education assist in connecting deliberative procedures to acceptable outcomes? According to the empirical researchers Pelletier, Kraak et al. (1999:123), “the application of practical reason alone can lead to social learning and actions that run counter to the dual goals of fair and efficient outcomes.” In other words, it is possible to mis-educate citizens so that their deliberations secure unacceptable results. So, conversely, it must be

possible to properly educate citizens to achieve just outcomes. On Cooke's (2000:949) account, the process of learning is just an externality, or unintended consequence, of iterated deliberation: "the educative effects of participation in public deliberation are at best side-effects, they cannot be the main point of, or provide the sole justification for, such deliberation." Even as a mere side-effect, though, the educational consequences of participating carry forth their benefits from one deliberative encounter to the next, progressively funding the habit background of deliberative situations with "the resources necessary for deliberation, particularly cognitive, verbal, and social skills" (Burkhalter et al. 2002:416). In Dewey's terminology, this process of learning by doing is one of growth in the ordered richness of experience: "Since life means growth . . . education means the enterprise of supplying the conditions which ensure growth, or adequacy of life" (MW 9:56). Thus, learning-by-doing or, alternatively, learning-by-deliberating progressively enriches the experiences of citizens with each successive doing-deliberating activity. Second, in the lead-up to a deliberative event, citizens actively prepare themselves by debating and inquiring about related public issues. Because of this phenomenon, which Ackerman and Fishkin (2002:135) call the "leveraging strategy," the sophistication of deliberators and the quality of their discourse in the upcoming deliberative event can dramatically increase. Third, as a background condition, citizens should be afforded the opportunity to avail themselves of deliberation-specific education, such as theoretical and practical training in critical thinking, rhetoric, social psychology and group communications. In the Laboratory School of Education, which Dewey founded and oversaw at the University of Chicago, students were encouraged to pool their existing competencies and develop new ones for the sake of solving common problems (Westbrook 1991:106-8; Mayhew and Edwards 1966). Thus, the objection made by democratic elitists, political realists and constitutional economists that citizens are too obtuse (or rationally irrational) to engage in public policy-making and

political inquiry is overcome when competency--or what Dewey terms "intelligence"--is construed as a collective resource (LW 14:367).⁵⁸ As Deborah Morris (1999:618) reminds us, "[t]he whole point of his [i.e. Dewey's] famously progressive educational program is just . . . to equip citizens to participate in all manner of experimentation, questioning [,] . . . inquiry"--and, one might add, deliberation.

If as Dewey claims, "[c]apacities are limited by the objects and tools at hand" (LW 2:366), then citizens must be provided the necessary means, "objects" and "tools" to properly deliberate as free and equal agents. General objectives and instruments for the task-at-hand would have to be taught so that agents develop deliberation-specific competencies, including (but not limited to) the ability (i) to develop and respond to cogent as well as faulty arguments, (ii) to detect and expose strategic behaviour, (iii) to design and propose rules of engagement (including familiarity with extant conventions, such as *Robert's Rules of Order* (1967)), (iv) to identify and object to rhetorical techniques (e.g. the informal fallacies of reasoning), (v) to find common ground with members of a group through the telling of personal narratives and the specification of shared values and mission, and (vi) to patiently assist less tutored or experienced deliberators in cultivating these competencies (Robert 1967; Ryfe 2005:63-4; Wilson 1989:95). "It is not the belief that these things [i.e. the arrangements for democratic engagement] are complete," Dewey notes, "but that if given a show [i.e. experimentally implemented] they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action" (LW 11:219). Therefore, as a set of operations and an end-in-view, the process of educating to develop civic competence parlays the benefits of experience and training into the achievement of more acceptable deliberative outcomes in the future.

So, how does Dewey's concept of an end-in-view relate to the process of deliberation? Flexible goals that facilitate exact observations and the selection of appropriate means would

also be expected to assist deliberators and deliberative institution designers. How so? First, by formulating better short-term goals, deliberators can detect the motivations and interests of fellow agents, give better reasons in support of their own claims and more effectively criticize others' positions. Second, institutional designers can more expertly craft schemes of constraints and incentives to promote citizen engagement in fruitful discourse, the clarification and transformation of preferences as well as the achievement of just outcomes.⁵⁹ Third, researchers can also name (or re-name) the phases of deliberation as a means of exerting greater control over the deliberative process. For example, integrating Ryfe and Hyland's accounts results in the naming of five stages of deliberation: (i) organizing, (ii) agenda-setting, (iii) debating and discussing, (iv) deciding and (v) implementing.⁶⁰ By naming the steps of the deliberative procedure in this way, the implication is that the stage of deciding no longer constitutes the terminative outcome or final end of deliberation, but rather a phase or end-in-view within the larger process. According to Saward (1998:57), "[t]he moment of decision itself is just one part of the broader process by which collectivities makes decisions [or arrive at decision outcomes]." Once the procedure/outcome separation is seen through the prism of the means-end continuum, procedures and outcomes become nearly indistinguishable phases within the overall process of deliberation.⁶¹

#4 Preference vs. Constraint: Context

The disagreement between constitutional economists and deliberative democrats over how to conceptualize preferences and prioritize them relative to constraints does not admit of an easy resolution. Neither side has the right answer because both sides embrace one of two mistaken views. Deliberated decisions are a function of (i) the power of preferences or constraints over decision outcomes or (ii) the influential relation between constraints and preferences in directing outcomes (Schwartz 1989:33). According to Elias Khalil (2003:4), these two ways of conceiving

the connection between constraints and/or preferences and outcomes roughly correspond to Dewey and Bentley's (1949) two inferior modes of action: (i) the self-actional mode, in which constraints or preferences directly determine deliberative choices, or (ii) the interactional mode, whereby constraints construct preferences and are, in turn, reconstructed by constraints in order to produce deliberative choices. In this section, closing the separation between preferences and constraints involves remedying the problems associated with self-actional and interactional accounts of their relationship. To accomplish this task, I bring the social context or background conditions within the broader society--such as cultural mores, traditional ways of life and norms of association--into the foreground of deliberative situations.⁶²

Between deliberative democrats and constitutional economists, dispute also arises over the related issue of whether the *frame* of preferences or the *category* of constraints determines deliberative choice. The difference between a frame and a category is that once an agent becomes aware of the frame, he will not change his actions as a consequence; but if alerted to a category, he will.⁶³ In other words, awareness of a category, but not a frame, engenders behavioral modification.⁶⁴ Whereas deliberative democrats stress that preferences are frame-dependent, constitutional economists emphasize that constraints are category-dependent. What this means is that, for deliberative democrats, informing an agent about the content of his preferences (especially if they are strongly held or closely tied to identity-based beliefs) will not necessarily lead that agent to change his mind or his actions; while for the constitutional economist, exposure to information about situational constraints (as well as incentives) will generate corresponding changes in an agent's strategic behaviour.

However, communicating information about preferences and constraints does not exhaust those activities that occur during deliberation. What deliberation also demands is that participants provide reasons for why their preference for the chosen outcomes is normatively

superior to preferences for alternative outcomes. “In the case of a choosing situation, where the agent selects A rather than B,” Ullmann-Margalit and Morgenbesser (1977:767-8) maintain, “we are generally licensed to say that the agent (must have) had reasons for selecting A rather than B; and this is further unpacked into saying that the agent’s overall reasons—in terms of his beliefs and utilities—for the selection of A outweighed his overall reasons for the selection of B; hence the preference for a choice of A.” As previously mentioned, though, many deliberative democrats insist that others cannot know the content of an agent’s preferences better than the agent himself, and therefore cannot presume to know what an agent’s preferences should be.

Yet, if reason-giving affects agents’ perceptions of their own preferences, then it is possible for others to expose an agent to what his preferences would be if conditions that initially formed those preferences, such as prejudice and ignorance, were absent. Consider an actual incident from Fishkin’s (1995:191) deliberative polls:

[A]t the beginning of one small group discussion on the family, an eighty-four-year-old conservative from Arizona expressed the view that “a family” required that there be both a mother and a father in the home. After three days of dialogue in a group that included a forty-one-year-old woman who had raised two children as a single parent, the Arizonan came up to her at the end of the weekend and asked her what the three words in the English language are that ‘can define a person’s character.’ He answered his own question with the three words—‘I was wrong.’ ‘At that, the mother of two got out of her chair, crossed the room and hugged him.’ A dialogue of several days over the contested meaning of ‘family’ permitted people from different backgrounds to come to a degree of understanding that overcame the simplified stereotypes.

Acknowledging those stereotypes that had previously influenced him, the Arizonan shifted his preference to reflect his newfound emancipation from their influence. Although he could have preserved his initial preference for the narrower definition (particularly if this preference was a function of a strong identity-based commitment), instead he revised it as a consequence of his experience of the deliberations. In this case, other deliberators *did* know what his preferences should be better than he did, and thus could provide external reasons for shifting his

preferences in that direction. Through discourse, agents who are made aware of the errors in their existing set of preferences can transform the content to preferences they would have had under distortion-free conditions.⁶⁵ Mansbridge (1990b:136) echoes this point: “Preferences themselves, let alone interests, are not [exogenously] given. They must be tentatively voiced, tested, examined against the causes that produced them, explored, and finally made one’s own.” At the very least, even if the experience of deliberation does not lead to the wholesale transformation of preferences, it can assist citizens in clarifying and ordering their existing preferences.⁶⁶

While preferences and constraints do influence deliberative choice, what deliberative democrats and constitutional economists fail to appreciate is how the *context* of their presentation and usage also affects choice. In inquiry, and particularly during the first and last phases, transactional surveillance of the situation requires attention to context, or the “functional observation of the full system” within which the problem and possible future experimentation occur (Dewey and Bentley LW 16:70). In deliberation, the context of presentation, including the style of speech and the following of cultural cues, can influence the form that preferences take, without affecting their content. For instance, in citizen negotiations with government agents, if citizens speak in the vernacular, then deliberations may break down due to miscomprehension and distaste among the more sophisticated speakers. So, context alone *can* determine the form of preferences, which in turn can dictate decision outcomes.⁶⁷ By paying attention to contextual factors and not simply modeling constraints, institutional designers can undermine the tendency for deliberators to act strategically. For example, structuring deliberative forums so that they are, similar to most social relations, repeated—in the idiom of game theorists, iterated rather than one-shot events—can reduce the incentive to dissimulate or mischaracterize preferences for strategic reasons (Fung 2003:345).⁶⁸ Also, as

Ackerman and Fishkin (2002:133) claim, incentive-compatible systems of constraints can be fashioned to curb the problem of rational ignorance: “political economists are on the right track in their understanding that one way of getting at the root of our present predicament [in which it is rational for citizens to remain ignorant] . . . is to change incentives.” This is consistent with the neoclassical economist’s position that context-dependent preferences (e.g. to respond to a cultural cue to remain ignorant) are fungible, or replaceable, by artificial preferences (e.g. to not remain ignorant) induced under a scheme of suitable incentives (e.g. money or esteem). However, the substitutability (or fungibility) of context-dependent preferences with artificial or incentive-induced ones is not always so easily accomplished for the simple reason that the original preferences, similar to identity-based commitments, are inflexibly held. Drawing upon a deeply-ingrained habit background, choice itself is couched within a broader social context, wedged between thick descriptions of a community’s culture, tradition and history. Hence, preferences which are a function of these rich contexts should be viewed not as fungible (or replaceable) by institutional constraints, but rather as fortifiable through the adoption of incentive-compatible systems of constraints.⁶⁹ According to James Kloppenberg (1994:77), Dewey believed that “the sole restriction on individual choices lay in the challenge of testing them in the long run in a social context”--that is, on seeing how choices stand up to the experimental imposition of changed conditions, including differing regimes of constraints.

While models of how constraints and preferences interact do offer significant advantages over self-actional models,⁷⁰ they still fail to reveal how context affects deliberation. Constitutional economists argue that explicit constraints and revealed preferences should be favored over implicit contextual factors (such as morality, culture, and tradition) as instruments for coordinating political choices.⁷¹ However, conceiving the constitution exclusively as a mechanism that makes and shapes choices, as Buchanan (2003a) and Ostrom (1987) do, is far

too limited a view of constitutionalism. Objecting to “Ostrom’s vision of a constitutional system,” Stillman (1989:83) states that it “seems distorted and simplified to the point that it leaves out much that it is normally included in constitutional frameworks, at least as described by constitutional scholars.” Vaughn (1984:244) demonstrates that contextual factors do influence the ways in which citizens come to view the constitutional constraints on their political activities: “[A]s people live with the consequences of a particular constitutional choice, their very notion of what is just and what is efficient may change.” Moral norms that once commanded widespread assent, particularly when the constitutional founders agreed on rules to codify them, may at some later date no longer hold sway over the body politic. Thus, the opportune time for constitutional reform may rely on contextual factors—even on, contrary to the position of most constitutional economists, the gradual change of public morals.⁷² So, just as some preferences are a function of context, some constraints—particularly constitutional ones—also depend heavily on contextual factors. Here, context means a thick background of cultural assumptions, drawing on the traditions, habits, morals and values of whole societies as well as specific groups and organizations (Berne 1963, 1964; Ott 1989).

Also implicating contextual factors is the issue of how to conceptualize the link between the right, or justice, and the good, or happiness. Contemporary Kantians, such as Rawls (1971, 1996, 2001) and Habermas (1990, 1996a, 1996b) strictly distinguish the good from the right. Whereas the good embodies those reasonable life plans of individuals (Rawls) or the ethical commitments of community members (Habermas), the right is constituted by those just principles reflective of an “overlapping consensus” (Rawls) or those just outcomes from a fair process of rational discourse (Habermas). According to many neo-Aristotelians, Rawls and Habermas sidestep thick ethical descriptions of the good by privileging the right and articulating it in deontological terms, that is, as an absolute duty of rational and autonomous agents.

Communitarians and civic republicans criticize contemporary Kantians, particularly Rawls, for ignoring the rich context of community life, its traditions, culture and public morals, in their thin accounts of the human good.⁷³ In his *Ethics*,⁷⁴ Dewey strikes a balance between the positions of contemporary Kantians and neo-Aristotelians, understanding the difference between the good and the right transactionally, that is, as a matter of degree or emphasis, not a matter of strict demarcation:

Justice as an end in itself is a case of making an idol out of a means at the expense of the end which it serves . . . [J]ustice is not an external means to human welfare but a means which is organically integrated with the end it serves. [. . .] There is . . . an inherent difficulty in the conception that justice can be separated from the effect of actions and attitudes upon human well-being (LW 7:249-50).

Similar to the means-end continuum, Dewey's continuum of the good and the right does not privilege the right over the good, as an intrinsically rather than instrumentally valuable category. Instead, the right is just a more expanded perspective from which to view the good, a perspective Dewey refers to as that of the "ideal spectator," whereby an agent examines "his proposed act through the eyes of this impartial and far-seeing objective judge" (LW 7:246).⁷⁵ From this vantage, an individual with a "broaden[ed] . . . conception of the Good" can consider the interests of all those affected, not just himself, so that "nothing is good for himself which is not also good for others" (LW 7:225).⁷⁶ Thus, factors within the broader social context, such as moral norms and cultural cues, may serve to pressure agents toward accepting a more expanded perspective on the good. And, by adding explicit institutional design features, such as schemes of rules and rewards, these contextual factors may be further reinforced. Resembling G.H. Mead's (1934) notion of ideal role-taking, as well as Habermas's (1990, 1996a) appropriation of that notion, Dewey's ideal spectator helps to explain how deliberators take other deliberators' concerns into consideration, that is, through the widening of their perspective on the good.

By acknowledging the context--such as the form of communications, culture and tradition and the functional relationship between the right and the good--it is possible to imbue the reified elements within an interactional model with the living character of phases in a transactional process. In *K & K*, Dewey and Bentley claim that “when a context of use is present, it is always a question of emphasis [of phases in process], never of separation [of interacting entities]” (LW 16:247). Likewise, according to political scientist Harold Laswell (1976:218), “[t]he meaning of any detail depends upon its relation to the whole context of which it is a part.” Thus, from a transactional perspective, these interactional accounts exact an unacceptable price from the subject-matter undergoing inquiry (i.e. the knowings). They treat agents’ preferred choices and the limits on those choices as reified entities interacting together, rather than as transitioning stages within a context of usage--whether inquiry, deliberation, action or a sequence of all three.⁷⁷

In designing deliberative forums, enabling preference transformation and clarification as well as constraining strategic action are not mutually exclusive goals, or ends-in-view. To the contrary, they can be combined within the same institutional design process, and they should be in ways that reinforce contextual factors, such as public morals, folk speaking styles and pervasive cultural cues. As Torgerson (1985:24) asserts, “[t]he project of contextual orientation . . . is highly ambitious because it seeks knowledge of the whole; at the same time, it is rather modest because it does not expect complete success.” However, any transactional process for designing sufficiently stable and deliberative institutions cannot guarantee successful outcomes solely in virtue of being context-sensitive. Sometimes it is necessary to change the context, particularly if citizens lack political efficacy, feel mistrust of government and are, in general, alienated from the political process (Morrell 2005). From a practitioner’s perspective, “among the most important things we can do to transform the social and political context for

deliberative public engagement is to do more and better public engagement work” (Friedman 2006:27).

#5 Strategic vs. Communicative Action: Deliberative Transaction

In this fifth and final transactional mediation, I mediate the two programmes’ opposed views of strategic and communicative action by casting doubt on Habermas’s inspirational distinction. I also argue that deliberation construed as a transactional-communicative process can substitute for the economist’s simple signaling model. Habermas’s widely accepted version of the distinction states that, on the one hand, strategic action is premised on the success-oriented pursuit of material ends by egoistic agents acting under alternative schemes of inducements. On the other hand, communicative action relies on a procedure of consensus-oriented rational argumentation by other-regarding individuals who communicate and act under a set of rule-like presuppositions immanent within linguistic discourse.

It is fairly uncontroversial to take the position that rules should restrict the opportunities for strategic action in deliberations. However, on Habermas’s very different view, following Apel, pragmatic-transcendental presuppositions in discourse completely exclude the opportunity for strategic action. As I see it, Habermas’s position is, at best, dubious and, at worst, viciously circular--or so I will argue. Apel (1980) was the first to claim that fair and meaningful discourse is governed by a set of communicative presuppositions--for instance, that discourse aims towards the truth and that participants in discourse each deserve equal respect. Following Apel, Habermas (1990:79-80) similarly contends that a list of normative presuppositions constitute our communicative practices “in an indisputably valid manner.” As pragmatic-transcendental presuppositions of discourse, Habermas (1993:31) states, their pragmatic credential derives from how they “must always be made by participants when they enter into argumentation,” and their transcendental credential from how they “point beyond actually existing conditions in an

idealizing fashion.” Yet on its face, Habermas’s position is doubtful because the work of empirical researchers and constitutional economists reveals ubiquitous evidence, particularly in legislative politics, of strategic behaviour, such as cheap talk, logrolling and rent-seeking. These widespread strategic practices cumulatively demonstrate that Habermas’s presuppositions are not universally true or binding. As Kevin Mattson (2002:327) adduces, “[i]f we expect anything like a mythical ‘Habermasian ‘ideal speech situation’ or the glories of ‘communicative action,’ we’ll probably be fairly disappointed when we bring ourselves back to earth and listen to ‘actually existing’ discussion where citizen talk about political and social issues.” So, it can be concluded that in Habermas’s theory of communicative action the pragmatic-transcendental presuppositions would function better if they were reconstituted as conventional norms or explicit rules, not as universal truths immanent within language and discourse.⁷⁸

However, the previous critique of Habermas’s pragmatic-transcendental presuppositions of discourse is preliminary to a more damaging objection to his strict distinction between strategic and communicative action. Habermas defines communicative action in entirely non-strategic terms. Since the very notion of communicative action presupposes these internal-normative restraints, it comes as no surprise that when communication is directed toward understanding and consensus it not only approximates the demands of the ideal speech situation, but also crowds out any and all strategic considerations. Given that deception and coercion are strategically motivated, discourse involving these tactics would never constitute a search for truth, and thus would cease to resemble a struggle to satisfy the pragmatic-transcendental presuppositions of discourse. Nonetheless, the success notion, or thick ethical concept, of communicative action begs the question, ‘Is it impossible for deliberating agents to strategically pursue the goals of understanding and consensus?’ Since everyday discussion cannot approximate the presuppositions of the ideal speech situation, then it can never be

oriented toward both understanding and success--only success. Therefore, the strategic dimension of real-world talk is not permitted to enter the stream of communicative discourse, and consequently Habermas's normatively-loaded definition of communicative action ensures the virtual impossibility of a mixed communicative-strategic model.

One way to resolve this problem is to challenge the "strict distinction" Habermas (1985:235) makes between day-to-day communicative practices and communicative discourse, "between communicative action in the naive attitude and reflectively achieved understanding in regard to hypothetical validity claims." Bentley and Dewey would resist an exclusive dichotomy between ordinary discussion and communicative discourse for two reasons. One reason is that ordinary discussions and communicative discourse are transactionally related. In a paraphrase of Bentley's account of the transactional relation between science and common sense, science is a form of doing for the sake of knowing, while common sense is a form of knowing for the sake of doing (LW 16:254-255). 'Common sense' as Dewey and Bentley employ the expression encompasses "the pretheoretical language of ordinary discourse" (Kaufman-Osborn 1984:1147; LW 16:270-80). So, by substituting "ordinary discourse" for common sense and communicative discourse for science, two normative-practical implications can be inferred from this transactional observation: first, institutional designers should acknowledge the value of permitting folk communication styles, such as narrative, to find expression in deliberative forums as way of promoting greater inclusivity; second, they should appreciate the worth of formal discourse and its critical techniques, such as rational argumentation, for testing claims made in deliberation through a rigorous process of public justification.

The second reason that the dichotomy between ordinary discussion and communicative discourse cannot be defended implicates another distinction Habermas makes, following J.L. Austin (1962), between perlocutionary and illocutionary speech-acts. In communicative action

but not in everyday communication, speech-acts have illocutionary force, meaning that they are accompanied by an implicit warranty that if the claim is criticized the speaker can provide reasons that validate the claim as true, right and truthful (Habermas 1984:302, 1985:269-70). Strategic action, on the other hand, only has perlocutionary force because it can produce exclusively instrumental consequences in the world, such as forcing, deceiving, and influencing others (Habermas 1984:328, 1985:157; Austin 1962: 109, 121). However, instead of a functional distinction, the illocutionary/perlocutionary dichotomy resembles a dualism between saying-to-do and doing-by-saying. "Much of the contemporary discussion of discourse and deliberation trades on the normative and valuational dimensions of these terms," Schauer (1999:25) argues, "enabling their advocates to disassociate themselves from the seamier side of real-world political and moral talk." Assuredly, on the "seamier side" of political discussion, a claim that implies a guarantee that it can be validated could also strategically influence others to act in a way consonant with the speaker's intentions--for instance, when a speaker's claim is intended to provoke a listener to challenge it. In another of his writings, Schauer (1997:1329) infers that Habermas's distinction is, indeed, a distinction without a significant difference: "Discourse, dialogue, discussion, communication--these are not activities that take place apart from and alongside the rest of our existence. More plausibly, these activities are so intrinsic to and constitutive of our existence that trying to carve out a unique political realm for communicative action seems, when put that way, counter-intuitive." Therefore, the difference between communicative action and ordinary discussion is one of degree, not of kind--and therefore, the distinction is not a defensible basis for categorically differentiating communicative and strategic action.

Although not a constitutional economist, Jon Elster provides a version of Habermas's strategic/communicative action distinction which has had greater appeal among constitutional

economists: strategic versus parametric rationality. According to this distinction, “[t]he parametrically rational actor treats his environment as a constant, whereas the strategically rational actor takes account of the fact that the environment is made up of other actors, and that he is part of their environment, and that they know this, etc.” (Elster 1979:18). Elster’s notions of parametric rationality and strategic rationality resemble Dewey and Bentley’s two inferior action-types: self-action and inter-action. Similar to self-action, parametric rationality demands that the agent treats other humans not as similarly-equipped agents, but as objects that she acts upon because she conceives herself as the only self-originating source of intentional actions. The defect of such an approach is that in scenarios of organizing for collective action it proves self-defeating to attempt to act in concert with objects, rather than fellow agents. Strategic rationality and inter-action, on the other hand, require that the agent understand herself as well as others as rational actors, just like herself. In light of Elster’s distinction, Habermas (1985:174) appears to confuse strategic with parametric rationality when he claims that in strategically acting, “one actor treats the other as an object to be influenced.” To the contrary, Elster (1979:19) argues, strategic actors attempt to gauge and anticipate the actions of their competitors by imagining what those actors’ expectations and intentions might be. So, Habermas’s strategic/communicative action distinction mistakenly characterizes parametrically rational agents as strategically acting agents.

Any successful model of deliberation must capture both the strategic and the communicative dimensions of discursive activity. According to Rehg (1997:361), argumentation combines strategic and communicative techniques, for “in presenting an argument, a participant is simultaneously competing with other disputants and communicating with an audience.” . Similarly, Landwehr (2005:60) claims that, “[w]hile there may be strictly deliberative forums . . . and pure bargaining meetings . . . many such processes are at least partly public and display

instances of both strategic and communicative action.“ In a model of deliberative transaction, not only must the strategic and communicative phases to deliberation be acknowledged--as Rehg and Landwehr surely do--but they should also suggest feasible ways for designing stable institutions. However, Rehg and Landwehr’s solutions prove unsatisfactory because, in attempting to integrate both dimensions, they fail to consider that either the reality or the possibility of strategic behaviour could reduce the motivation of agents to seek mutual understanding.

One way to remedy the deficit in Rehg and Landwehr’s account is to understand the need for constraints as a function of the temporal structure of a deliberative event. Trust and understanding require a period of gestation. At the outset of the deliberative process, the prospect of strategic action poses a significant threat to the tenuous stability of group relations because trusting relationships have yet to be formed. As is the case in a single-shot game of prisoner’s dilemma, lying and advantage-taking in the early-going of a deliberative encounter can easily undermine the development of group cohesiveness.⁷⁹ As a result, in the initial phases of deliberation, the need for institutional constraints on strategic action becomes especially pressing. In some situations, the activity of forging initial agreement on shared values might also need to be foregone. This is especially the case if the group members’ ends are so heterogenous and conflict-ridden that agreement on basic values would prove impossible. As Lindblom (1959:83-4) comments, the alternative activity, often observed in labour negotiations, is to seek agreement on means, not ends: “the contestants cannot agree on criteria for settling their disputes but can agree on specific proposals. Similarly, when one [. . .]’s objective turns out to be another’s means, they often can agree on policy.” In the later phases of the deliberative process, as deliberators discover common ground and forge consensus on specific policies and proposals, communication oriented toward mutual understanding comes to the fore and

strategic action, along with rule-based schemes for restraining such action, should recede into the background. In addition, it is expected that as deliberation proceeds, agents will indicate their intention to act communicatively, not strategically. As the empirical researcher Baccaro (2001:245) recommends, “[w]here a potential conflict of interest is involved, speakers need to provide evidence that they are animated by a ‘communicative’ as opposed to ‘strategic’ intent, that is, that their goal is not advancing their own self-interests but rather reaching understanding on what they believe to be the best possible course of action for everybody.” Although the strategic dimension of deliberation retreats, it never entirely disappears. For instance, in response to restrictions on overt appeals to self-interest, strategic deliberators can change their communication style by making disguised appeals to the public interest (Elster 1995, 1998b; Mendelberg and Oleske 2000; Burkhalter, Gastil and Kelshaw 2002:410). Therefore, protective constraints must be designed and continually adapted to guard against the possibility of emergent patterns of strategic action.

Also, economic models of communication fall short of depicting a complete picture of deliberation. To recall (from chapter four), game theorists and economists understand communication in collective action situations as a process of ‘signaling,’ “where[by] an informed agent takes costly actions that (according to a somewhat complex and inexorable logic) reveal the agent’s information or ‘type’” (Farrell and Rabin 1996:104). Likewise, for the constitutional economist, discourse resembles a “simple signaling system” within a language conceived as “a large, commonly recognized message space” (Sally 1995:87).⁸⁰ Instead of merely signaling preferences, deliberation conceived as a transactional-communicative process transmits that which has been learned and funded through series of prior deliberations for use in successive deliberations. In *K & K*, Dewey and Bentley affirm the value of communication and its dependability in inquiry. The source of all description through observation lies in language, and

through language inquirers are able to construct hypotheses and deliberate about resolutions to problematic situations. Indeed, the development of all instrumentalities or knowings in inquiry is dependent on the reliability of linguistic conventions: “Our belief that the future advance in knowledge about knowings requires dependability of communication is integral with the transactional point of view and frame of reference we employ” (LW 16:3-4).

To sum up, if there is one general pattern common to all forms of life, it is *not* a pattern of rational argumentation. Not all humans rationally connect propositions together as premises and a conclusion. However, common to all life is a patterned process of problem-solving or inquiry.⁸¹ As Dewey proclaims in his *Logic*, problem-solving “enter[s] into every area of life and into every aspect of every area” (LW 12:106). Moreover, problem-solving for humans, Dewey claims, occurs through the medium of linguistic communication, or “dialogue”:

Signs and symbols, language, are the means of communication by which a fraternally shared experience is ushered in and sustained. But the winged words of conversation in immediate intercourse have a vital import lacking in the fixed and frozen words of written speech. Systematic and continuous inquiry . . . and its results are but tools after all. Their final actuality is accomplished in face-to-face relationships by means of direct give and take. Logic in its fulfillment recurs to the primitive sense of the word: dialogue (LW 2:371).

Dewey confirms that there is an integral—even a transactional—relationship between inquiry and deliberation; that logic, or inquiry in communicative terms, reaches its “final actuality” and “fulfillment” through the nose-to-nose, back-and-forth encounters of deliberating agents. For Dewey, deliberative dialogue is not a fixed concept in the same way that communicative action is for Habermas. Patterns of both strategic or success-oriented action and communicative or understanding-oriented action animate agents within dialogical or deliberative situations (Leighninger 2005:17). Once the contextual factors (e.g. moral norms, traditions, culture, and folk communication styles) are factored into our understanding of these situations, then it becomes possible to construe them in their totality, that is, as deliberative transactions.

Institutionalizing a Transactional Middle Way

In the first half of the present chapter, it was suggested how to mediate oppositions between deliberative theory and constitutional economics. In this second part, we test the result. We will test the five previous solutions (experience, methodological pluralism, end-in-view, context and deliberative transaction) by applying them to two broad categories of institutional designs: (i) town meetings and (ii) policy-making councils.

In general, the argument for testing the feasibility of the deliberative ideal has still to be made. If a basic presupposition of normative argumentation is that 'ought' implies 'can,' then deliberative democratic theorists must do more than propound counterfactual normative conditions for how agents should reach consensus through deliberation. They must also address how the ideal can be feasibly implemented given a set of limiting factual conditions.⁸² Although this does not necessarily require deliberative democrats to give up their six core commitments, I argue, it does mean that they ought to extend the reach of their ideal theories to the creative design of institutions through committed and intelligent inquiry.⁸³

Approximating the ideal of deliberative democracy presents some daunting challenges for institutional designers. It demands more than that decisions simply flow from the discussions of participants. Given the core commitments of deliberative democracy (see chapter three), it also requires institutionalized procedures that provide (i) a public test of the justifications for claims, (ii) constraints that are legitimate, (iii) the protection of basic rights and liberties for all those affected by the outcome, (iv) a way of identifying and cultivating shared interests and values (v) mechanisms for selecting participants that result in more inclusive and diverse forums and (vi) a process of rule-making that is reflexively critical and open-ended. In spite of these daunting challenges, Button and Ryfe (2005:20) take note that "a growing chorus of practitioners seeks to institutionalize deliberation in actually existing society."

Project #1: Town Meetings

Organizing town meetings has become more than the customarily suggested ad-hoc process of putting together community gatherings. To the contrary, designing these local forums has evolved to meet the needs of concerned citizens wishing to discuss local, national and global issues and, in some cases, to translate their decisions into collective action. Even though the process has changed, some continuity persists between the classic town meetings (e.g. of eighteenth and nineteenth-century New England communities in the U.S.) and their modern equivalents.⁸⁴ In this section, I examine two updated versions of the parochial town meeting in which institutional designers attempt to grapple with the formidable difficulties in designing deliberative forums: (i) 21st Century Town Hall Meetings and (ii) Citizen Juries.

In general, town meetings are thought to be superior to other kinds of deliberative forums because of their small-scale. Because they are smaller than national events (such as Fishkin and Ackerman's Deliberation Day), they prove more feasible to implement and to replicate in multiple contexts. In other words, they serve not only as immediate opportunities for citizens to deliberate together in a structured environment, but also as 'pilot' studies or prototypes for experimentally testing novel institutional designs.⁸⁵ Unfortunately, this advantage also gives rise to further difficulties, such as how to negotiate the problem of scale and how to make town meetings more inclusive.⁸⁶

21st Century Town Hall Meetings. Organized by *AmericaSpeaks*, 21st Century Town Hall Meetings are deliberative forums that generate citizen engagement in public decision-making processes, such as policymaking, budget-making and resource planning.⁸⁷ Each forum is sponsored by an authoritative body--e.g. a public official, a municipal government, or a non-governmental organization--requiring input or feedback from the affected public in order to complete its decision-making process (Lukensmeyer et al. 2005:157). Consistent with their

function as prototypes, the design and implementation of Town Hall Meetings is intended to “create a model to promote citizen engagement and to affect policy making” (Parasie 2003:3594).

The innovative format of the Town Meetings also addresses the problem of scale. First of all, organizers work with the sponsor to choose how many participants would allow “the event to have sufficient credibility with three audiences: the public, decision makers and the media” (158). Secondly, even with numbers in excess of a thousand, the design and technology of the Town Meeting permit these quantities of participants to engage in small group discussions that feed into large plenary session deliberations:⁸⁸

As the day begins, individuals at each of the hundreds of tables across the room start to discuss critical issues facing the community. With the help of skilled facilitators, participants at each table learn that they care about many of the same things. They type their common ideas into a computer and send them off to the front of the room. Then, minutes later, participants look up and see that the ideas supported by their table are shared throughout the entire room. [. . .] The process of moving from ‘I’ to ‘we’ has begun (157).

Thirdly, the procedure by which participants are selected navigates the middle-ground between methods of self-selection and random sampling.

As discussed in chapter three, the issue of how to choose who will participate in deliberative forums is a very contentious matter. As Button and Ryfe (2005:31) note, “[i]f the public is to meet, as John Dewey might put it, the public must first be formed.” Unfortunately, John Dewey’s concept of a public appears to provide little guidance in addressing how, in concrete terms, such a deliberating public could be assembled. To recall, one method is for participants to self-select, that is, to choose themselves to participate in response to a call for deliberators.⁸⁹ However, the result is usually a demographically homogenous group of participants, typically ideologues from a privileged and affluent socio-economic background. In his design of the deliberative poll, Fishkin takes a random sample of the affected population and

then invites this statistically representative group to the forum. The result is “a microcosm” of the larger society, that is, a group of participants who would be expected to deliberate *as if* the entire population were deliberating (Fishkin 1995:173). Since there is no guarantee that the people who compose a random sample will have a stake or interest in the outcome, a better selection method might be, as Dewey’s theory suggests, to choose those persons who would either directly or indirectly be affected by the decision outcome--a process captured in the techniques of “stratified random sampling” and “stakeholder selection.”⁹⁰ In the selection process for Town Meetings, *AmericaSpeaks* advances a similar solution to the problem of selection, “actively recruiting” participants who, based on a demographic profile of the community, are affected by the decision and belong to “groups [that] may need additional representation” (Lukensmeyer et al. 2005:158).

The design of 21st Century Town Meetings also overcomes the theory/interest and methodological individualism/collectivism separations. Deliberation in these forums neither resembles a competition of interests, nor a quest for belief-based truth. Instead, participants begin their deliberations by deciding what ideals and values they share (“vision- or values- based discussion”); having established some common ground, they move on to collaboratively discuss and agree upon issue dimensions (what are called “themes”); and discourse is balanced with information updates through the use of diverse media (“highly accessible participant guides . . . supplemented by presentations and videos”) appealing to the participants’ rational and emotional faculties (Lukensmeyer, Goldman et. al, 2005:158-9). These small group exercises afford plentiful opportunities for deliberators to reconsider their pre-deliberative preferences and, consequently, transform or clarify these earlier attitudes. As themes are “presented back [from the small groups] to the whole [plenary session] for clarification and modification,” this

process continues “as many times as needed to develop recommendations” before “finally . . . voting.” (ibid).

Although not intentionally modeled after the Deweyan pattern of experience, this “move[ment] back and forth between intimate small-group dialogue and the collective work of thousands of people” imitates the cyclical ebb and flow of experience between its secondary and primary phases, between cognitive inquiry and active deliberation (i.e. in small-group sessions) to non-cognitive response and passive consideration (i.e. in large plenary sessions) (159). In addition, rather than choose between the individual and the collectivity as the primary unit of interest, Town Meeting designers conceive the forum as a “process of moving from ‘I’ to ‘we,’” from the perspective of “distinct individuals” to that of a decision-maker who can “contribute to the collective wisdom of everyone who has been convened” (156-7). Nevertheless, participants do not lose their identity as individual decision-makers in the process. Thus, the methodological approach which informs the Town Meetings is decidedly pluralist in its orientation.

As for mediating the separation between procedures and outcomes, *AmericaSpeaks*’ Town Meeting designers have crafted a six-stage process, called the “strategic management cycle.” The strategic management cycle connects procedures of deliberation with acceptable outcomes vis-à-vis realistic goals, or ends-in-view. Also, the cycle of managing relations between means and ends is ‘strategic’ not in Habermas’s negative sense of strategic action, but in the more positive sense found in studies of organizational management and decision-making, known as ‘strategic planning.’⁹¹ According to John Bryson (2004:6), strategic planning is “*a disciplined effort to produce fundamental decisions and actions that shape and guide what an organization (or other entity) is, what it does, and why it does it*” (author’s original emphasis). Beginning in 1999, Washington D.C. Mayor Anthony Williams assembled three thousand community members as

part of the Citizen Summit. Modeled after the 21st Century Town Meetings, the Summit assisted municipal planners in developing a city budget and a strategic plan for delivering services and programs that citizens wanted. Williams's original goal for eliciting this public input in decision-making procedures normally reserved for city staff was to recover the public's confidence after a corruption scandal (Potapchuk 2002). However, as time passed, it transitioned to the desire to give the public a genuine voice in prioritizing projects in the city planning process: "Every two years since 1999, Williams presented a draft strategic plan for comment to the thousands of residents who attended the unique public forum" (Lukensmeyer et al. 2005:154). In the strategic management cycle, the presentation of the draft strategic plan to the Citizen Summit is followed by the Town Meeting, whereby citizens evaluate programs and services suggested by the mayor to deal with the city's problems. Decision outcomes arrived at in the Citizen Summit direct the mayor and his staff's choices about how to amend the strategic plan, which once finalized will be submitted back to the citizens for their approval at a forum two months later. Finally, two mechanisms maintain accountability and transparency in the implementation stage: first, a "performance management system" that publicly tracks the award of government contracts and external audits and, second, an on-line "public scorecard" that allows citizens to regularly rate the quality of municipal programs and services they receive (155). Consequently, the Citizen Summit "has shifted millions of dollars of public funds to programs prioritized by the public" (156)

Before turning to a discussion of Citizen Juries, two disadvantages in the design of 21st Century Town Meetings should be mentioned: (i) the prohibitive cost of conducting these deliberative forums and (ii) the fact that citizens' recommendations are not binding on policy-makers.⁹² Despite these shortcomings, Town Meetings do constitute a significant improvement over the standard techniques policy-makers use to elicit input from citizens--such as city council

meetings, public hearings, focus groups, initiatives and referenda--all of which demand minimal or no sustained engagement from citizen decision-makers.⁹³

Citizen Juries. Like 21st Century Town Meetings, Citizen Juries congregate a representative group of concerned citizens to deliberate on a particular issue.⁹⁴ However, unlike Town Meetings, their format resembles a legal proceeding, in which the deliberators function alternatively as jurors and as lawyers: “[I]n common with the legal jury, the citizens’ jury assumes that a small group of ordinary people, without special training, is willing and able to take important decisions in the public interest” (Smith and Wales 2000:56, quoting Coote and Mattinson 1997:4). Over a period of three to five days, deliberators in a single or multiple juries hear a series of testimonials and cross-examine witnesses who either represent the interests of those parties affected by the issue or have specific expertise on the issue.⁹⁵ Jurors have significant control over the course of the proceedings: to request further information, call additional witnesses and recall prior witnesses for follow-up questioning.⁹⁶ After the testimonials and deliberations, jurors render a verdict or “citizens’ report,” detailing a series of actionable recommendations (Smith and Wales 2000:55). Finally, jurors receive payment equal to an average wage for every day they participate in the Citizen Jury process.

In a noticeable improvement over Town Meetings, Citizen Juries require sponsoring agencies to commit themselves in advance of the process. In accordance with a “pre-jury contract,” either the sponsor must follow the recommendations of the Citizen Jury or justify their choice not to follow those recommendations with acceptable reasons (Smith and Wales 2000:60). Although the jury’s decisions are not wholly binding on the sponsoring agency, this slightly weaker constraint proves more feasible and invites the sponsor to participate in the final stages of the deliberative process. Also, pre-jury contracts utilize contractual obligation, a coveted instrument of constitutional economists, as a legitimating factor in the process of

deliberation.⁹⁷ As a result, juror-deliberators receive assurances that “their deliberations will be taken seriously” (61).

Another advantage of Citizen Juries lies in their resemblance to legal proceedings. In societies with a strong rule of law tradition, many legal rules operating in the courtroom--such as standards of proof, procedural rights and oaths not to perjure oneself--inform the broader social context. Moreover, cooperative inquiry and deliberation are facilitated in citizen juries by “rules of conduct’ that emphasize the need to respect and listen to the arguments of others” (58). So, rather than Habermas’s implicit rules or presuppositions of discourse, with all their previously cited difficulties, Citizen Jury designers introduce explicit constraints to promote respectful and other-regarding relations between jurors. Even if not straightforwardly invoked, these rules function as background constraints on the deliberation process and, therefore, would be expected to have the effect of suppressing strategic behaviour.⁹⁸ For instance, witnesses are expected not to lie while testifying. However, jurors’ trust in the veracity of their testimony is not blind, but rather balanced by a healthy dose of scepticism. As O’Neill (2002:263) explains, there is “an understanding of the conditions in which trust in the authoritative utterances of others is rational” and the “tools of scepticism . . . are employed in citizen juries where they [jurors] interrogate the testimony of experts.” Through questioning, jurors seek to test the reliability of witnesses’ testimony given previous testimony and independent evidence--a procedure familiar within a rule of law culture. Also, jurors are encouraged to alter their initial preferences over outcomes, making for more informed preferences after they have considered new information and deliberated at length. As Hecl (1993:375) notes, “political institutions . . . provide the means for changing ideas about our interests and preferences.” Even though the trial process is partially public and the verdict is eventually disclosed publicly, jury deliberations are, similar to their legal counterparts, secretive. Although not fulfilling Gutmann and

Thompson's procedural constraint of publicity, the secretiveness of Citizen Jury deliberations is thought to be justified as a way of guarding against jurors being treated as delegates for specific interests and the media inordinately influencing the outcome (Smith and Wales 2000:59).

Some problems do arise in virtue of the comparison between legal and citizen juries. One difficulty pointed out by Schroeder (2002:113) is that the design of Citizen Juries conflates two tasks separated in the legal process: petitioning and decision-making. In law, "both civil and criminal legal systems separate their advocacy and judicial functions, assigning one to lawyers and another to advocates, while assigning the other to judges, magistrates and other decision-makers." Since both functions are effectively combined, jury deliberations risk becoming adversarial struggles between juror-deliberators, instead of the collaborative inquiries that designers intended them to be. What Mansbridge (1980:3-5, 8-22) terms "unitary democracy," or deliberations between agents with a common interest then reverts to "adversarial democracy," or contestations between agents with conflicting interests. Not unlike legal juries, the pressure to reach consensus in Citizen Juries can obstruct the flow of critical discourse, leading a minority of jurors to exert disproportionate control over the deliberations in order to achieve the demanding objective. As a result, "particular perspectives dominat[e] the agenda and defin[e] the consensus" (Smith and Wales 2000:59).

However, when constraints, preferences and context are conceived transactionally, as either knowings (i.e. objects undergoing inquiry) or knowns (i.e. objects having undergone inquiry), these complications becomes more tractable. In *Knowing and Acting*, Dewey and Bentley argue that "instead of inserting gratuitously an unknown something as foundation for the factually known," such as a unified account of human nature or a simplifying model of human motivation (e.g. *homo economicus*), "we are taking the knowledge in full--the knowings-knowns as they come" (LW 16:60). Taken as a whole, and particularly in the context of a rule of law

culture, juror deliberations and the activity of cross-examination have been defined in consensus-seeking and adversarial terms, respectively. Thus, these definitions have already been firmed up or established as knowns through prior inquiry. So, saving the Citizen Jury model from dominant agenda-setters and strategic competition demands an investigation and reconstruction of the meaning of jury deliberations--that is, making them subject-matter, or knowings, for subsequent inquiry. In reconstructing their meaning, inquirers would have to jettison the overly demanding expectation of reaching consensus as well as the pressure to compete as adversaries--both characteristic of the legal setting, but problematic in a deliberative setting.⁹⁹ Hence, designers of Citizen Juries would aim to fashion incentives and constraints that generate mutual respect and shared understanding among all juror-deliberators, instead of the consensus and victory that would benefit only some deliberators.

To the sceptics who worry that deliberative democracy is an impractical ideal, Citizen Juries provide a compelling example of how designers might approximate the deliberative ideal. For constitutional economists, sceptical worries arise because they observe widespread cases of strategic action, such as cheap talk, strategic voting, and logrolling. As Button and Ryfe (2005:22) confirm, "ostensibly deliberative forums can be dominated by nondeliberative talk, strategic behavior, and elite opinions." However, strategic action's high incidence rate may be a function of the conditions under which deliberation occurs, including circumstances of recurrent disinformation, groupthink, rational irrationality and distrust (Greene 2005:140; Janis 1982; Mansbridge 1980). "Until secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry," Dewey asserts, "we may have no way of telling how apt for judgment of social policies the existing intelligence of the masses may be" (LW 2:366). After substituting conditions more favorable to intelligent inquiry and deliberation, the Citizen Jury could more closely approximate the deliberative ideal than it would under the status

quo conditions.¹⁰⁰ Consequently, participants and observers of the Citizen Juries might realize how restricted and passive democratic citizenship currently is, as well as how empowered and participatory it could be (Leighninger 2002:143).

One way to accomplish this change of conditions to those more favorable for deliberation would be to re-engineer systems of education and information dissemination on a society-wide basis. However, such a strategy would offend constitutional economists and strain the bounds of feasibility. As an alternative, which proves more practicable and less offensive to constitutional economists, conditions within actual deliberative forums could be altered on a small-scale experimental basis. According to Schauer, “pushing on the quality of public deliberation will yield more fruit than pushing on other parts of our nonideal world.” For instance, in their study of an Australian Citizen Jury, Goodin and Niemeyer (2003:633) document how the ordering of the forum’s conditions, from “the first phase” of receiving jury instructions onward “establish[ed] the preconditions for genuine deliberation: attentiveness, openness, willingness to change one’s position as appropriate.” Therefore, in the process of deliberative transaction, the need for restraints on strategic behaviour recede as the bonds of good faith between fellow citizen-deliberators cement themselves, giving way to conditions under which participants can engage in “genuine” communicative discourse.¹⁰¹

Project #2: Policy-making Councils

Although Town Meetings and Citizen Juries successfully institutionalize many features of the deliberative ideal, critics may find it doubtful that these deliberative forums could occur in societies that are not affluent, pluralist and liberal. According to Button and Ryfe (2005:21), deliberative forum designers “are perfectly willing to mold their models to the needs of local communities. Such customization, however, may obscure the fact that the local ways in which they model deliberation offer more general, culture-wide lessons.” By summarizing the lessons

learned in the design and implementation of policy-making councils in São Paulo and Porto Alegre, I will show how the transactional approach can also guide the design of deliberative institutions in underdeveloped countries, such as Brazil.

The pluralist solution to the problem of stability--that is, the competition of political groups in which citizens belong to multiple groups and no single group is always victorious--no longer functions as it was intended to in divided societies such as Brazil. In egalitarian and multicultural societies, individuals commonly have multiple group memberships--or, in the language of critical realignment theorists, 'crosscutting cleavages' (V.O. Key 1955; Sundquist 1983). In contrast, persons inhabiting divided societies such as Brazil are segmented along long-standing, uncrossed cleavages, including socio-economic class, religion, race and ethnicity.¹⁰² In these societies, Shapiro (2003:93) explains, "divisions . . . overdetermin[e] . . . racial, ethnic, religious, social, economic, and all other differences in the population [so that they] are mutually reinforcing rather than crosscutting." Therefore, the threat of strategic action that constitutional economists warn of is even more pressing in this highly "polarized" economic and political environment.

In spite of these unfavorable conditions for deliberation, reformers and institutional designers have developed deliberative institutions that address the specific challenges found within Brazilian society. Replicating some features of neo-corporatist and consociational democratic arrangements, policy-making councils assemble representatives from community organizations, citizen groups and governmental agencies to engage in intensive processes of informal and formal deliberation.¹⁰³ Delegates partake in these deliberative procedures for the sake of achieving outcomes, specifically, delivering policy recommendations to the municipal governments of São Paulo and Porto Alegre. In São Paulo, the councils are responsible for formulating health policy proposals, whereas in Porto Alegre they recommend changes to the

city's budget. According to Fraser (1992:122), "in stratified societies, arrangements that accommodate contestation among a plurality of competing publics better promote the ideal of participatory parity than does a single, comprehensive, overarching public." Therefore, it is not only their context-sensitivity, but also their capacity for mobilizing many citizens in the role of publics, or organized and affected groups, that makes these policy-making councils feasible institutions of deliberative transaction in Brazil.¹⁰⁴ Once the constitutional groundwork was laid, an institutional network for citizen engagement--and particularly, deliberative engagement--in policy affairs flourished within Brazil.¹⁰⁵

Rather than essentializing preference transformation or the imposition of institutional constraints as *the* controlling factor in deliberative choice, Brazilian forum designers emphasize how the context in which preferences are formed can reinforce the desire for citizen to accrue public goods (in the São Paulo case, healthcare, and in the Porto Alegre context, a well-planned budget) for their communities.¹⁰⁶ Coelho, Pozzoni et al. (2005:179) introduce an objection to the Health Council's design that is typically leveled by constitutional economists at deliberative democratic models of decision-making: "Inclusion can only be secured to the extent that citizen representatives are able and willing to attend the meetings of the council." They continue: "[C]itizen representatives have to request permission from their employers and negotiate with them in order to obtain time off from work, and some of them do not get paid for the hours of work forgone. For them [i.e. participating citizen representatives], therefore, attendance at council meetings entails a considerable opportunity cost" (ibid).¹⁰⁷ In Brazilian civil society, poor and disenfranchised citizens and, in most cases, the council delegates who represent them have developed a strong and inflexibly-held commitment to democratic participation--i.e. an identity-based commitment to public-spirited engagement. Health Council designers deploy weaker structural incentives because they stand already supported by a popular commitment to

deliberative policy-making and a broader social context within which public-spirited engagement is prized.¹⁰⁸ The design of the Health Council accommodates a flexible and inclusive definition of deliberation to counter the problems posed by unsophisticated or folk speaking styles associated with poorer and less educated people. Although folk styles of speech may foster confusion and misinterpretation, these consequences remain acceptable short-term costs of promoting highly inclusive deliberations.¹⁰⁹ Some informal modes of speech, such as narrative or story-telling, should therefore be encouraged in deliberative forums in order to make deliberation accessible to those citizens who are not trained in formal argumentation. In the long-term, the costs of inclusion would be expected to diminish as the educative effects of repeated deliberation produce a boot-strapping effect, eventually bringing novices up to the skill level of more experienced orators. Burkhalter et al. (2002:413) concur: “[P]articipating in face-to-face public deliberation strengthens the cognitions, attitudes, and habits conducive to future deliberation.”

Similar to the Municipal Health Council of São Paulo, Porto Alegre’s Budget Council aims to promote citizen engagement, participation and deliberation in the policy-making process. “Participatory budgeting,” according to Coelho et al. (2005:175), “is a local practice of public deliberation on budget issues.” In the participatory budget process, two levels of institutionalized forums permit citizens to deliberate as individuals and as representatives of groups.¹¹⁰ Parallel to Habermas’s (1996b:29) conception of the relation between formal and informal tracks of deliberation, informal discourses feed into formal discourses, so that public opinion translates into “communicative power” which eventually directs the state’s “administrative power”—in this case, to establish Porto Alegre’s annual budget. Since the participatory budget process moves between informal and formal phases, it imitates the ebb and flow between primary and secondary experience.¹¹¹ As a consequence, participants become

more informed about the costs and benefits of alternative schemes of public expenditures, and the budget they help to formulate reflects their informed consent and competent deliberation, not their rational choice to remain ignorant (Downs 1960:544).

Finally, in Porto Alegre, the end-in-view of developing civic competence partially overcomes the opposition between outcomes and procedures. Even though non-deliberative and coercive relations exist between the municipal government and citizens, citizen participation in the budget process is not forced.¹¹² Voluntary deliberation within the participatory budgeting meetings permits the Brazilian citizens to develop deliberation-specific competencies, such as how to form good arguments, how to effectively criticize others' claims, how to build coalitions and how to find common ground by agreeing on shared values, ideals and purposes.¹¹³ However, this design fails to provide a mechanism by which the least advantaged members of Brazilian society could be formally educated in deliberative techniques.¹¹⁴ Nevertheless, it could be argued that the widespread legitimacy of the constitutionally mandated process, the government's use of structural incentives to promote participation and the bottom-up character of the deliberative process together constitute satisfactory conditions for interested citizens to easily (though not costlessly) partake in deliberation itself, that is, as part of an active learning process. Moreover, this institutional design reinforces Gutmann and Thompson's (2004:35) point that, "[a]n important part of democratic education is learning how to deliberate well enough to be able to hold representatives accountable. Without a civil society that provides a rehearsal space for political deliberation, citizens are less likely to be politically effective."¹¹⁵ As deliberative institutions, Porto Alegre and São Paulo's policy-making councils successfully connect the informal and low-stakes deliberations of average citizens to the formal and high-stakes deliberations of municipal policy-makers through a set of corporatist institutional structures.¹¹⁶ So, it may be concluded that the lessons learned through the Brazilian experiment

demonstrate that the oppositions between deliberative democracy and constitutional economics can be transactionally mediated in a non-liberal and non-pluralist political context.

Seeing Deliberative Choice Transactionally

I would like to bring this pivotal chapter to a close by drawing some conclusions about the proper parameters for choosing deliberative institutions, as well as for employing the transactional approach.

Three lessons for deliberative democrats can be extracted from the previous discussion. One of these lessons is that when proposing innovative deliberative forums, deliberative democrats should contemplate issues of design feasibility as well as existing “empirical work on belief change in the social and cognitive sciences” (Lupia 2002:149). These issues include matters of agent motivation, incentives, opportunity costs and strategic action. What the two projects--i.e. town meetings and policy-making councils--did not show is that in every instance these feasibility constraints can be accommodated. However, they did demonstrate that, on the whole, the transactional solutions of experience, methodological pluralism, end-in-view, context, and deliberative transaction assist deliberative democrats in overcoming both the theoretical and practical obstacles to making sound choices about how to institutionalize deliberative democracy.

The second lesson is that far from being self-standing, deliberative democracy as a model of politics depends on the assumption that other institutional arrangements are in place--usually liberal and pluralist, but also corporatist and associative (which is particularly the case in Brazil). As Walzer (1999:67) confirms, “[d]eliberation does have a place, in fact an important place, in democratic politics, but I don’t think it has an independent place--a place, so to speak, of its own.” With respect to the compatibility of liberalism and deliberation, Terrance Sandalow (1989:539; quoted by Gardner 1996:451 fn. 56) notes that,

Nothing in liberal theory requires a denial of the obvious, that politics may be a process of collective deliberation in which participants, through reasoned argument, attempt to persuade and are open to persuasion by one another. Nor does liberalism deny that collective deliberation may assist in locating common ground among individuals with differing interests or views. Nor, finally, is there any reason that liberals must deny that participation in politics may be transformative, leading individuals not merely to compromise, but to alter their initial objectives.

So, not only is deliberation a suitable match for constitutionalism, but it is also well-suited to partner with liberal democratic arrangements generally. Since deliberative democratic institutions do not spontaneously evolve in existing political systems, deliberative democrats must also consider why citizens of liberal democracies would, in the first instance, choose to deliberate, rather than resort to alternative decision procedures. Similar to how constitutional economists investigate the process by which citizens in constitution-making situations choose how to choose, deliberative forum designers ought to inquire about how citizens in institutional design situations choose, or deliberate about, how to deliberate.

The third and last lesson for deliberative democrats is that listening to the concerns of constitutional economists can help them to feasibly institutionalize their models of deliberation, even though it cannot overcome some of the descriptively inaccurate assumptions of public choice. Similarly, Brandl (1988:422) notices that, “the Buchanan conception [of institutional decision-making] is half right. Yes, the task of analysts and politicians is the design and evaluation of institutions devised so as to be oriented to produce desired outcomes . . . [b]ut . . . it is not to reduce political life to aggregating the self-interested, exogenously determined preferences of autonomous individuals.” Even though aggregative and deliberative models of decision-making do not always stand opposed (for instance, there are deliberative models that incorporate voting), the notion that preferences are determined entirely independent of the process of deliberation and choice is unacceptable to nearly all deliberative democrats (except perhaps those who are heavily sympathetic to the economic modeling strategy). Providing the

opportunity for participants to experience endogenous preference formation and clarification is a key virtue of any deliberative forum design. Hence, a model of deliberation which is perfectly matched to the assumptions of the constitutional economics programme and also satisfies the six core commitments of deliberative democracy is unlikely, if not impossible, for any synthesis of the two approaches to achieve.

In both economic and transactional analyses, the standard of effective social scientific inquiry is *intelligent control* over the subject-matter. When transactional scholars and economists bring analysis to bear on political subject-matter, they first employ what Dewey calls the method of “selective emphasis” to isolate the steps, phases or stages of the process (LW 1:25). Then, they name these spatio-temporal segments to “make possible the precise symbolic manipulation” of the conceptual process and the phenomenon it represents (Chandler 1977:48; Frankfort-Nachmias and Nachmias 2000:18; Flyvbjerg 2001). Although Dewey never conceived deliberation as a dialogical and reason-giving process, he did understand it as a monological and imaginative process: “Deliberation is a dramatic rehearsal (in imagination) of various competing possible lines of action” (MW 14:132; Kaufman-Osborn 1991:194). As demonstrated, the stages of deliberation can be labeled for the sake of understanding how “various competing lines of action” operate in practice, as well as how they could be imagined to work better and more cooperatively (or communicatively). That is to say, the genuine function of decomposing deliberation into a series of named phases is to accumulate increasing mastery or systematic control over the total political situation, not just over the constituent parts.

Transactional analysis invites flexibility and experimentation in the use of terminology. Inquirers may firm up the meanings of already established terms, “perfecting the means and ways of communication of meanings so that genuinely shared interest in the consequences of interdependent activities may inform desire and effort and thereby direct

action” (LW 2:332). In the *Logic*, Dewey states that inquiry is “autonomous” because (i) it “does not depend on anything extraneous to inquiry” and (ii) things that constrain inquiry “are to be determined, if at all, by means of what is disclosed as the outcome of inquiry” (LW 12:28). Economic analyses, on the other hand, tend to appeal to subjective and “extraneous” entities, thereby offending Bentley’s (1967:18) ban against “mental ‘spooks’” and committing what Dewey calls the “philosophic fallacy” (LW 1:29; MW 2:306). According to Dewey and Bentley, “it has long been the habit of the professionals to take words of the common vocabulary, stiffen them up somewhat by purported definition, and then hypostatize ‘entities’ to fit” (LW 16:129). For example, constitutional economists convert what are ordinarily considered functional concepts applicable to some aspect (or phase) of experience--such as ‘subjective preference’, ‘methodological individualism’ and ‘politics-as-exchange’--into permanent and antecedent existents which are “normative for [all] experience” (Chandler 1977:49). However, what Buchanan, Vanberg and others fail to see is that in order for economic analysis to remain (scientifically) self-correcting and context-sensitive, the programme’s assumptions and methods must be treated as tentative and fallible within inquiry. Because of this oversight, many avenues for productive investigation--for instance, research premised on the assumption of methodological collectivism or a model of political behaviour emphasizing both communication *and* exchange (not merely exchange)--are foreclosed *ab initio* in the constitutional economics programme. In contrast, and consistent with Dewey’s notion of autonomous inquiry, transactional scholars do not invoke external authorities to normatively ground inquiry; but instead, they treat names and definitions as indigenous and revisable products of inquiry.

The prudent design of deliberative institutions requires incentive-compatible systems of constraint, context-sensitivity, creative experimentation and patience. Even though agents should ideally have an interest in deriving collective advantages from deliberation, providing

selective incentives to remedy motivational shortages and to counter exorbitant opportunity costs is practically necessary in the appropriate contexts (Olson 1965:51; Gastil 1993:157). In highly stratified and hierarchical societies with a tradition of public-spirited engagement, such as Brazil, weak structural incentives are all that are necessary; whereas in multicultural and egalitarian societies lacking a thriving civil society and a tradition of popular participation in politics, financial incentives--such as Fishkin and Ackerman's (2002:129, 133) compensation for a day's work spent deliberating--are also required. Rather than beginning anew and making large-scale institutional transformations, the designer of deliberative forums should reconstruct existing institutional arrangements through careful incrementalist decision-making and reform, as well as through small-scale experimental prototyping (Lindblom 1958, 1959; Laswell 1963:99-101). According to Dewey, we are confronted with "the necessity of maintaining the institutions which have come down to us, while we make over these institutions so that they serve under changing conditions" (EW 5:48; quoted by Campbell 1995:185). In Shapiro's (2003:95) words, deliberative institutional designers must "work at the margins" and "think about institutional redesign rather than design ex nihilo."

Finally, deliberative forum designers must treat the process of institutional design in context, as a set of meanings that are "part of some larger whole suggested by them, which, in turn, accounts for, explains, interprets them; i.e., renders them significant" (MW 6:272). For conceiving activities in context, Bentley and Dewey borrowed a term from the biological and environmental sciences, 'ecology,' to explain how subject-matter cannot be treated apart from a broader social context, including the ideas and theories in circulation.¹¹⁷ Hence, the relationship between democratic theory and democratic institutions is a transactional one, that is, a matter of "see[ing] together . . . much that is talked about conventionally as if it were composed of irreconcilable separates" (LW 16:67).

CHAPTER 7

CONCLUSION

I would like to conclude this discussion of how to integrate the assumptions and methodologies of constitutional economists and deliberative democrats by recasting the debate in terms of a distinction introduced by Daniel Weinstock (2006). We will also revisit the questions posed at the outset of this investigation: What is the proper relationship between democratic theory and stable institutional arrangements? After the deliberative turn, will democratic theory resemble a more institutionally-oriented research programme, along the lines of constitutional economics, or a hodge-podge of normative theories, similar to the current state of deliberative democratic theory?

This thesis has so far been an exercise in bridge-building. Once a transactional bridge is built between the two approaches, it can be seen how views from Dewey and Bentley positively advance the conversation between deliberative democrats and constitutional economists. Five mediating concepts were developed and applied to two broad classes of proposed deliberative forums in order to test their institutional feasibility. Whether or not it is possible to produce a perfect synthesis (or mediation) of the two programmes, the move from theory to practice, from idealizing to institutionalizing, instantiates political forms that inevitably lean more to one side of the divide than the other. For instance, the project of the town meeting (including the 21st Century Town Meetings and Citizen Juries) bent more toward the constitutional economist's favored scenario of highly structured and rule-governed deliberative events, while the project of the policy-making councils (including São Paulo's health councils and Porto Alegre's budgetary councils) was closer to the deliberative democrat's (and particularly Habermas's) two-track

model of linked informal and formal deliberations. Thus, while mostly complete, the bridge is left unstable because some scepticism persists about the claim that the ideal of deliberative democracy can be appropriately translated into a set of institutional mandates that do not offend either deliberative democrats or constitutional economists.

In an article on global democracy, Weinstock (2006) introduces a distinction between two accounts of democracy that can assist us in better understanding how to reinforce the bridge. Although we are less interested than Weinstock in how to realize global democracy, his discussion of two sets of reasons for why “we might . . . want to democratize the global public sphere” bears on the issue, more relevant to our present purposes, of why we might want to institutionalize deliberative democracy (6). The distinction he introduces is between an agency view and an interest view of justification for global democratic institutions—or, in the present discussion, deliberative democratic institutions.

According to the agency view, democratic institutions should heighten citizens’ involvement in political affairs, offering them greater command over their individual and collective lives and empowering them to become agents of social and political change. Institutionalizing global democracy, Weinstock (2006:6) writes, would be “a good thing” because “democracy’s bedrock normative commitment is to political *agency*.” On this view, “we will want more democracy” because this increases citizen engagement in the political process, an end of human existence that is an end-in-itself’ (10). In the debate over the merits of deliberative institutions, Kevin Mattson (2002:329) propounds an agency view, claiming that “[w]e certainly need more deliberative democracy.” More deliberative democracy means not only a greater number of citizens participating in deliberative forums, but also better quality deliberations, with citizens expressing their views, giving supportive reasons and seeking shared understanding about solutions to their common problems. According to Weinstock (2006:7), “for individuals

to exercise democratic agency would simply be that they participate as required in the appropriately designed democratic institutions.” As a proto-deliberative democrat, Dewey would likely agree with Mattson and other supporters of the agency view. The remedy for the ills of democracy *is* more democracy, Dewey tells us in *The Public and Its Problems*, so long as more democracy means more thoughtful experimentation with new democratic forms, not more of what already exists (LW 2:325-7).

Unfortunately, besides encouraging thoughtful experimentation, Dewey’s agency account of democracy supplies little in the way of explicit guidance for institutional designers. His account of democracy as an ideal outlet for citizen engagement, or “the participation of every mature human being in the formation of the values that regulate the living of men together” (LW 11:217), falls short of specifying the concrete means by which individual agents could create institutions that are suitably deliberative and democratic. Moreover, he disclaims any pretension to describing the ideal conditions for achieving a thoroughgoing deliberative democracy (LW 11:218). In choosing institutions, agents of change must make hard choices about contingent matters of fact and value, not necessary and universal matters of truth, choosing and experimenting with novel but always fallible design solutions. So, we might acknowledge, as Mattson (2002:329) does, “that it [i.e. deliberative democracy] is not an easy ideal to put into practice,” for the process is always confounded by doubt, uncertainty and acknowledgment of human limitations.” Among these limitations are those that constitutional economists make light of, including the recurrent threat of strategic action from participants and designers who would promote their own (or their constituents’) interests at the expense of others and of the overall fairness of the process. In other words, the agency view of democracy, to which Dewey subscribes, treats political engagement and deliberation as intrinsically valuable

activities and, as a result, succumbs to the constitutional economist's general objection that the deliberative ideal overreaches the bounds of feasibility.

In contrast to the agency view, the interest view of democracy stresses the promotion and protection of those goods valued by people who participate in the political process as well as by others who choose to abstain, but are nonetheless affected by the choices of official decision-makers. To critics who object that such interests must be clearly delineated in advance, Weinstock (2006:6-7) retorts that this objection can be easily overcome:

The precise account of what those interests are need not detain us here. It suffices for the sake of the present exercise that we suppose that all people have a fundamental interest in some combination of the ingredients included in the following non-exhaustive list: security, access to resources and opportunities, education, health care and the like. We can then ask ourselves what institutions can most reliably deliver those goods to people.

Rather than empowering citizens to become more politically active, democratic institutions designed on the interest model serve to secure goods that are more widely accepted, valued and pursued than political participation. As Weinstock recognizes, “[m]any people do not want to participate in politics, and are happy to leave the job to others, provided that they have a say in determining who those others are” (11). Hence, the fact that many citizens are willing to relinquish the power to make political decisions to their political representatives proves that a meta-preference for deliberation over indirect mechanisms of political choice does not hold sway for all, or even a majority of, those citizens in modern democracies.

Weinstock builds his defence of the interest view of democracy on the negative conclusion he reaches about the agency view. The motivation to be directly engaged in political decision-making is less than universal, and most large-scale modern societies cannot realize full participation in any other meaningful way than mass voting. So, designing democratic institutions that are well-suited for “the realization of people’s interests,” Weinstock (2006:6) argues, proves more feasible than designing them to facilitate political agency. On the interest

view, the object of institutional design is not, as it is on the agency view, to realize more democracy; rather, it is to generate “more responsiveness” among political decision-makers to the concerns of average citizens (10). If Schumpeter (1950) and later Riker (1982a) are correct and citizens can control political elites by voting them out of office, then regular, fair and free elections are sufficient for protecting their interests. Nevertheless, Weinstock (2006:11) concedes to proponents of the agency view that citizens with a meta-preference for public deliberation should be afforded opportunities to engage in the political process, “through such mechanisms as deliberative polls and citizen juries.” However, only electoral competition, Weinstock argues, can “‘operationalize’ public deliberation”--or make the value of it concrete and measurable by permitting all citizens to reveal their preferences, whether they are inclined to deliberate and then vote or solely to vote (13).¹ Therefore, on Weinstock’s interest view, the value of deliberation is thoroughly instrumental.

Public choice scholars, including constitutional economists, would probably find deliberative democracy when seen through the prism of Weinstock’s interest view more palatable than deliberative democracy on the agency view. Not only does it fit better with their view of politics as a competition of interests rather than a search for truth, it also conceives the institutionalization of deliberative democracy as instrumental to more feasible and widely accepted ends than the deliberative ideal. However, public choice scholars countenance their own brand of unwarranted optimism, viz. that “the right political institutional arrangements . . . guarantee success” (Cunningham 1995:120). Operationalizing deliberation does not, in fact, ensure successful results. It runs up against the nearly intractable problem (discussed in chapter one) of designing an electoral system without majority cycling, as well as the associated difficulties of irrational, incoherent and arbitrary outcomes. For this problem to persist, though, the difference between deliberation plus voting and voting alone, in terms of their relative ability

to introduce a majority cycle, must be significant enough to raise concern. Yet, as van Mill (1996:745) demonstrates, the same procedurally fair conditions --“equal access to debate, the absence of a powerful agenda-setter, unrestrained access to raise and object to amendments”-- can give rise to intransitive social preference orderings irregardless of whether deliberation precedes the vote. As an empirical matter, majority cycling is such a rare phenomenon that, even in the few cases that it does occur, the post hoc investigation and finding of its occurrence rarely detracts from the stability or legitimacy of the election outcome (Tullock 1981; Buchanan 1987c; Green and Shapiro 1994:114). Only limited empirical evidence supports the opposite view (Riker 1965, 1992). So, majority cycling proves to be significantly less of a threat than social choice theorists originally contended. As a result, the source of the divide between constitutional economists and deliberative democrats--that is, the social choice critique of majority rule--loses its standing as a point of legitimate disagreement. One way around this problem would be to make the design of electoral systems and their constituent rules an activity reserved for citizens and experts engaged in public-spirited deliberation, much as constitutional economists conceive the choice of higher-level rules as a matter reserved for decision-makers in a constitutional convention. Hence, mandates to deliberate would not attach to each and every moment of decision-making in a citizen’s political life. Instead, the requirement that citizens engage in deliberation would be reserved for higher-stakes choices that, as Buchanan (2003a:147) might say, stand to structure the rules of the political game.

One possible objection to the line of argument I have so far advanced is that too much attention has been paid to, and too many concessions made to, a minority viewpoint that attracts few, if any, adherents among political philosophers and democratic theorists. As Mitchell (1988:115) acknowledges, “[t]here is no immediate danger that public choice will quickly become the conventional wisdom.” Although scholars in public choice and constitutional economics do

not dominate the theoretical discourse about democracy, their works inform the thinking and actions of enough practitioners to threaten the goal of institutionalizing the deliberative ideal with a determined resistance (Kelman 1987:80). Buchanan (1984:32) observes this trend:

We [constitutional economists] have been successful in gaining a few adherents among academics and among those whose political influences are closer to the realities of practical affairs. But we are likely to remain unsuccessful in the large until and unless we win more converts in the continuing battle of basic ideas. It is in the realm of political philosophy that the struggle must be waged.

While Buchanan rightly notes that more progress must be made in persuading political philosophers to accept the views and analyses of constitutional economists, this conversion might be unnecessary so long as political philosophers acknowledge a separate but related point.² Many of the constitutional economics charges against deliberative democratic theory are shared by another group of scholars--a group closer in its assumptions to deliberative democrats than constitutional economists--that could be labeled 'deliberative institutionalists.'

Similar to the constitutional economist's first objection to deliberative democracy, deliberative institutionalists believe that the ideal terms of deliberative theory have become too far divorced from institutional reality, so that realizing these ideals in practice proves unlikely, if not wholly impossible. Deliberative institutionalist and empirical researcher David Ryfe (2005:62) contends that "deliberative [democratic] theory can only be invigorated by closer contact with empirical realities." Unfortunately, "empirical research on deliberative democracy has lagged significantly behind theory" (Delli Carpini et al. 2004:316, quoted by Morrell 2005:50). Nevertheless, deliberative democrats must confront the challenges of how to institutionalize an ideal that at first appears incompatible with a less-than-ideal world (Schauer 1997:1321-2). The third view of deliberative decision-making, modeled after Fishkin and Ackerman's accounts, also expresses the typical dissatisfaction of deliberative institutionalists with the bankruptcy of current deliberative theory in addressing practical obstacles to sound

institutional design. Another deliberative institutionalist, Jane Mansbridge (1994:165) writes: “We urgently need to understand more than we now do about the institutions, norms, principles, affinities, and sanctions that promote public-spirited behavior in political life [including public deliberation], because in many instances that public-spirited behavior is precisely what makes the collective [political] system viable.” Although constitutional economists share many frustrations, they part company with deliberative institutionalists on the issue of whether public-spirited partnerships provide the proper solution to problems of feasibility. Because of their staunch defence of the self-interested motivations of individuals, constitutional economists would rather narrowly delimit agents’ range of choices and action through the design of explicit rules and constraints than rely on an open-ended set of norms and trust-based partnerships. According to O’Neill’s (2002:262) prognosis, “[w]hat is required [to solve the problem of how to properly design deliberative institutions] is not a series of decision rules but a political epistemology concerning conditions of trust, and a corresponding social and political theory about its institutional preconditions.”

However, a political epistemology modeled on orthodox epistemic principles, as Dewey demonstrated, does not build community and public spirit, but instead generates a detached class of experts who are entirely unsuited for diagnosing where the shoe pinches, or what the nature of the problems are that directly and indirectly affect citizens’ lives. The solution to this epistemological deficit has been demonstrated in Dewey and Bentley’s transactional approach, a process-view of knowing that emphasizes patterned inquiry, the accretion of tentative knowns or tools and habits for effective problem-solving and the observation of contextual factors in a holistic fashion. Although Dewey and Bentley’s (1949) collaboration in *K & K* does not speak to the subject-matter of constitutions, deliberations, democracies or institutions, their approach readily lends itself to the mediation of conflicting assumptions and methodologies in competing

research programmes. Those scholars who define the problems of deliberation through the prism of the transactional view might be called ‘deliberative transactionalists.’³

While I have proposed several conceptual bridges between the deliberative democracy and constitutional economics research programmes, the keystone in the arch connecting deliberative institutionalists and deliberative transactionalists is their shared emphasis on experience and context. If experience and context truly matter, then theoretically defining a deliberative process so that it legitimates itself assumes a lower order of importance than designing deliberative forums that qualitatively improve the participant’s experience: “Instead of making deliberation itself the test of political legitimacy, deliberation and inquiry become tools for enriching people’s experiences” (VanderVeen 2006:12; McAfee 2004:52). Moreover, if we are to take experience and context seriously, then the existing institutions and constitutional structures, including those that establish the rules for electoral competition and those that create legal procedures for the exercise of judicial, legislative and executive power, must be accommodated. Any plan to realize the deliberative ideal in novel institutional forms must begin with a survey of current institutional arrangements. “Every new institution is,” Dewey observes, “an old one modified” (EW 4:40). Instead of sharp departures and revolutionary changes, a better approach to bridging the gap between deliberative ideals and empirical realities is to undertake some form of incrementalism--what Lindblom (1959) refers to as “muddling through” and Stillman (1996:193) defines as “small steps taken over a long period of time.” Incrementalism constitutes an appropriate strategy, conceived in a more benign sense than Habermas’s usage, that is, as “a set of tasks that are both feasible and supportable” (Wilson 1989:207). Incremental changes to existing institutional designs would, first, promote the end-in-view of political stability, not the far more presumptuous and unachievable end of regime permanence. “Democracies change,” Lindblom(1959:84) insists, “almost entirely through

incremental adjustments” for the simple reason that democratic publics and their agents (politicians and administrators) tend to be risk-averse. Second, an incrementalist strategy heeds the advice of Weinstock (2006) by operationalizing the path toward deliberative democratic reform. In other words, changes away from the status quo would only be permitted if these reforms did not inordinately restrict the liberty of those citizens who would prefer not to deliberate (or who otherwise lack a meta-preference for deliberation as the primary mechanism for testing and selecting their political preferences). Hence, a functional and stable deliberative democracy should preserve citizens’ opportunities to reveal their political preferences through less conspicuous and resource-intensive decision procedures than deliberation, such as voting by secret ballot. Of course, this conclusion does not militate against the possibility that citizens will, even in the absence of institutionalized deliberative forums, *both* deliberate and vote.

So, instead of a purely academic pursuit, transactional analysis can assist deliberative institutionalists in their efforts to influence the form that experiments in institutionalizing deliberative democracy take. When the study of deliberative democracy shifts from an entirely theoretical pursuit to a more balanced theoretical and practical endeavour, extending to institutional design and experimentation, then deliberative democratic theory truly begins to “come of age” (Bohman 1988). The future could portend that the many competing strands of deliberative democratic theory consolidate themselves into a single research programme (similar to constitutional economics), with few theorists and many empirical researchers working out the puzzles for its feasible implementation--much as Kuhn (1996:10-1) described the activity of “normal science.” However, I fear that this would only dampen the creative energies of democratic theorists. In contrast to a centrally managed research programme, a fragmented group of scholars with decentralized control of their research agendas has the advantage of producing more capacity for innovation, for comparing changes between their separate theories

and for mutually adjusting them over time (Lindblom 1958:305; Hayek 1960:21). Moreover, consolidation of deliberative democracy into an orthodox research programme might severely curtail any prospect for deliberative democratic theory to adapt and grow in a dynamic political environment. According to Hecló (1994:366), “[p]olitical events swirling around us may be a recurring tide . . . [b]ut again, they may be some deeper current taking us in a particular direction . . . [o]r they may be a passing ripple in our particular eddy of place and time.” Given its persistence in the disciplines of Philosophy and Political Science as well as the sub-discipline of democratic theory, deliberative democracy probably does not constitute a “passing ripple.” If, as we concluded at the end of the previous chapter, democratic theories are transactionally related to democratic institutions, then deliberative democrats must not only experiment with new, reconstructed and mixed theoretical accounts, but also with novel, upgraded and blended institutional designs. As Cunningham (1995:124) notes, progress in the development of democratic institutions “is sometimes best served by large-scale, society wide measures and sometimes locally, sometimes by parliamentary institutional activity and sometimes in participatory forums, and typically by combinations of such things.” Therefore, sustaining the deliberative turn in democratic theory will require reconceptualizing the deliberative ideal in ways that respond to its critics’ objections and push it in newfound directions.

In the previous pages, I have argued that the transactional view offers one possible approach to reconceptualizing deliberative democracy from a self-standing ideal to a theory integrally related to the practice of realizing deliberative democrats’ six core commitments in the form of feasible and stable democratic institutions. In this way, Dewey and Bentley’s approach gives us hope that the deliberative turn in democratic theory might be sustained despite, and perhaps in virtue of, criticisms made by constitutional economists and deliberative institutionalists.

ENDNOTES

CHAPTER ONE

¹ In his fairly comprehensive book on democratic theory, Frank Cunningham (2002:101) notes that a “survey of current democratic-theoretical literature would likely reveal, at least in the English-speaking world, a predominance of work by deliberative democrats and by social (or ‘public’ or ‘collective’) choice theorists [to which constitutional economists belong].” In his article on institutional design, John Dryzek (1996:58) provides a brief historical survey of philosophical treatments of the topic of institutional design, from those of St. Augustine to contemporary Critical Theorists.

² Efficient schemes of collective choice provide compatible incentives to agents, largely in the form of constraints or rules that stimulate self-regarding, rational utility-maximizers to work together (i.e. cooperatively) rather than against each other. According to the founder of constitutional economics, James M. Buchanan (1990:3), “Constitutional economics directs analytical attention to the choice among constraints.” In chapter four, the notion of efficient schemes of collective choice will be illustrated in greater detail through the use of game theory.

³ *Homo economicus* is a set of assumptions about human agency. Dryzek (1996:60) characterizes *homo economicus* as follows: “Microeconomics and its progeny [including constitutional economics] posit no limits to the ability of individuals to comprehend, calculate, and maximize.” In chapter four, these assumptions will be explicated in greater detail.

⁴ Note that I use the term ‘deliberation’ interchangeably with the term ‘discourse.’ So, deliberation is not a monological concept, but a dialogical one, implying collective discussion and debate rather than individual introspection and judgment. This account follows Shapiro’s (2000:2) use: “Deliberation is not an isolated activity. Rather it is an interactive one involving two or more people.” In contrast, Tschentscher (2004:73-4) distinguishes between deliberation, as “argument and reasoning among equal citizens prior to decision,” and discourse, as “any dialogue that approximately satisfies the discourse rules.”

⁵ Shapiro (2000:1) is particularly aware of the costs of deliberation and the challenge these costs pose to deliberative theory: “Some of the time, at least, deliberation . . . has costs. Wasted time, procrastination and indecision, stalling in the face of needed change, and unfair control of agendas are among its frequent casualties.” Also see Flyvberg (1988) and Uhr (1998), who address the practical obstacles to implementing models of deliberative democracy. For a recent collection of articles by deliberative democrats committed to institutionalizing deliberative decision-making, see Gastil and Levine (2005).

⁶ The branch of public choice economics to which constitutional economists belong is the Virginia School, led by James M. Buchanan and Gordon Tullock. Mitchell (1988:113) remarks that the “Virginia [school] is still . . . [confronted] with active opposition being shown by a small number of political philosophers and others.”

⁷ This approach will be partially explained in the section of this chapter, entitled “Vision of a Transactional ‘Via Media,’” and more fully explicated in chapter 2.

⁸ This distinction is also found in John Dewey’s writings on democracy. References to Dewey’s works are to the electronic edition of the Collected Works of John Dewey. There are 37 volumes in three series—the Early, Middle and Later Works. Thus, the citation, LW 2:325 refers to volume 2, page 325 in the Later Works. The distinction between the reality and ideality of democracy is particularly prominent in “Creative Democracy—The Task Before Us” (LW 14:224-230), as the difference between “democracy as a kind of political mechanism” and “democracy as a way of life” (LW 14:225-226) and in *The Public and Its Problems* (LW 2:235-2:375), as the difference between “political democracy” and the “social idea” of democracy (LW 2:325).

⁹ Social choice theorists, most of whom belong to the Chicago School of Economics, study collective decision-making, particularly the procedures for aggregating individual preferences and problems such as majority cycling that are manifest in these procedures. Public choice, which contains the sub-programme of constitutional economics, addresses similar subject-matter but belongs to the Virginia School of Economics. The Public Choice programme will be described in greater detail in chapter 4.

¹⁰ Specifically, Arrow (1951) sought to define a social welfare function for individual choosers that would reflect only their individual values or preferences when aggregated into collective choices. Pursuant to this goal, he stipulated five conditions that must be satisfied, as follows: (i) unanimity, such that the collective decision absorb any undisputed position, (ii) non-dictatorship, such that no single individual would dictate the choice outcome, (iii)

transitivity, such that if A is preferred to B and B to C, then A is preferred to C, (iv) unrestricted domain, meaning that there are no artificial limitations or restrictions placed on the preferences that individuals can form with regard to any choice options, and (v) independence of irrelevant choice options, such that if A is preferred to B, the advent of option C will leave the preference ordering unaffected.

¹¹ Duncan Black (1948, 1958) investigated the dynamics of majority voting rules in small committees, asking: How do voting outcomes result from different rankings of preferences—e.g. a preference for option A over option B, B over C and so forth—when collective alternatives (motions, proposals, etc.) are presented to a committee in pairwise choices—e.g. A and C, or B and C? Does the ordinal utility or ranking of each alternative change through a sequence of votes? Ordinal utility differs from the quantitative notion of utility, as first introduced by the classic utilitarians, Jeremy Bentham and John Stuart Mill. The economic concept that is derivative of the utilitarian notion of utility is cardinal utility, which measures an individual's preference for a commodity, but unfortunately cannot sustain intersubjective comparisons (for instance, it is impossible to say that one individual prefers coffee twice as much as another individual prefers tea if the first derives 100 units of utility and the second 50, for there is no objective utility measurement). Because of this inadequacy and a persuasive argument by Lionel Robbins (1932), neoclassical economists gave up cardinal utility as a basis for the analysis of economic behavior and, in its place, substituted an analysis of economic behavior in terms of the ordinal ranking of preferences.

¹² Arrow (1951:2) makes early reference to the “well-known paradox of voting.” Before Black and Arrow, two persons, the Marquis de Condorcet and Charles Dodgson (the Oxford logician better known as Lewis Carroll), had discovered the phenomenon of majority cycling and explicated its formal properties. Buchanan (1978:6) refers to the connection between Black, Condorcet and Dodgson in a talk before the Institute of Economic Affairs in London. Indeed, the Condorcet winner receives its namesake from the Marquis de Condorcet, who was the first to formally discuss this notion. See Young's article, “Condorcet's Theory of Voting” (1988).

¹³ To illustrate how the median voter theorem works, imagine a choice situation indistinguishable from the last (voters 1, 2 and 3 with alternatives A, B and C) except that voter preferences are arrayed solely along the dimension of ideology, such that A is liberal, B is moderate and C is conservative. So long as the only possible preference orderings are $A > B > C$ (liberal to moderate to conservative), $B > C > A$, $B > A > C$ and $C > B > A$ (not $C > A > B$), then the outcome will be single-peaked at alternative B (moderate) and so will have a Condorcet winner. If $C > A > B$ were present as a preferred ordering, then two peaks would form along the continuum, one at A and the other at C (termed “political polarization”). Indeed, to prefer a conservative to a liberal to a moderate candidate or policy purely based on the issue dimension of ideology would seem to be a bizarre ordering of preferences. The unlikelihood of such a preferred ordering in ideologies is the basis for Anthony Downs' (1957) thesis that electorates and political parties will tend to gravitate toward the ideological center.

¹⁴ To give an example based on the previously stated model, imagine that voter 3, a peace activist, evaluates the options along a different dimension than cost—for instance, how each alternative contributes to the mobilization and success of the peace movement. In this case, what previously appeared as an absurd rank ordering ($C > A > B$) makes sense along this new issue dimension. She ranks high and low spending over medium spending because the first option correlates with greater mobilization of the peace movement and the second with the attainment of the movement's goal, while the third results in no mobilization and the frustration of the movement's goal. See Burnheim (1985:87).

¹⁵ This changing of individual orderings so that they mirror a single ordering can either produce perfect consensus (all orderings are the same) or a majority consensus (a majority of orderings are the same), either way precluding a majority cycle. Another alternative is to induce a symmetrical distribution of preferences in which opposed preferences cancel each other out—sometimes called a balance condition. See Miller (1983:739).

¹⁶ For instance, in the previous example with three voters and preferences arrayed solely along the dimension of ideology (such that A is liberal, B is moderate and C is conservative), deliberators may agree to remove one alternative (e.g., C) or rank ordering (e.g., $A > C > B$ or $C > A > B$ or both) for any of the aforementioned reasons. By either reducing the number of options in the choice set or the number of potential preference orderings, the probability that a majority cycle will manifest also reduces. The notion that deliberation can eliminate rank orderings or alternatives from the choice set for reasons of immorality or irrationality is found in Miller (1983), Cohen (1997:77), Dryzek (2000) and Dryzek and List (2003).

¹⁷ Dryzek (2000:46) sees this as a clear advantage of deliberative democracy over economic theories of democracy: “deliberation has endogenous [internal] mechanisms for restricting the range of preferences and options, whereas social choice theory rules out such endogenous mechanisms because it is the prisoner of an assumption that sees preferences as unaffected by political process.”

¹⁸ Another way to state this problem is in terms of preference clusters, as Nicholas R. Miller (1983:737) does: “there are just two preference clusters. One cluster must be of majority size and will (under any more or less majoritarian constitution, as virtually all democratic constitutions ultimately are) constitute a majority faction that will win on

every issue. The other cluster will lose on every issue. Political satisfaction and dissatisfaction will be highly concentrated. The totally dissatisfied cluster may be quite large, and its members may have resources to make trouble of one sort or another. And since they have little or no prospect of greater satisfaction in the future, some individuals within the cluster will likely make use of these resources. Thus the political system will be unstable.”

¹⁹ Buchanan and Vanberg (1989:49) state that the first or contractarian account is subscribed to by John Rawls, David Gauthier and James Buchanan (the first a liberal democrat, the second a rational choice theorist and the last, of course, one of the authors and a constitutional economist), while the second or dialogical account is endorsed by Jürgen Habermas, Bruce Ackerman and James Fishkin—all deliberative democrats.

²⁰ On Buchanan and Vanberg’s (1989:54) account, there is a functional relationship between the extent of uncertainty and the pedigree of rules under consideration. The two dimensions of the rules are (i) their generality, such that the more general and the more speculative the effects, the more uncertain people are about how those rules will affect them, and (ii) their durability, such that the longer it is expected that rules will be effective, the less certain people are about how those rules will affect them in any given situation.

²¹ Stability according to Buchanan and Vanberg (1989:54) means that benefits that flow from the constitutional setup and “from operating under the respective constitutional constraints” will be long-lived and predictable, part of “an ongoing cooperative arrangement.” Insofar as fairness and stability “are interrelated,” the authors argue, “the concern for stability will induce a concern for fairness” (Ibid). However, the need for stability may be in tension with the need for fairness, as when fairness requires a measure, such as Thomas Jefferson’s, that the constitution be amended by a plebiscite every twenty to thirty years, which will almost invariably undermine the stability of institutions. See Stephen Holmes’s (1995:142) on Jefferson’s amendment scheme.

²² Buchanan and Tullock (1962:77) introduce the two-level account of choice in *The Calculus of Consent*. Elsewhere, Buchanan (2003:14) defines the two levels as that of “‘ordinary politics’, consisting of decisions made in legislative assemblies, and ‘constitutional politics’, consisting of decisions made about the rules of ordinary politics.” Vargova (2005:367, 383) describes these two-level schemes as “dualist constitutional normativities” and argues that they provide an inferior model of constitutional development.

²³ Hume’s (1985[1777]) account of the institution of promise-making is that promises are warranted insofar as they promote trade relationships and the advantages which result from them. See Atiyah (1981) and Fried (1981).

²⁴ Yet Brennan (1989) also acknowledges that his arguments in defence of both ethical discourse and democratic socialism are “against public choice orthodoxy.” Nevertheless, his account will occupy a central place in the foregoing project to synthesize the constitutional economics and deliberative democracy approaches.

²⁵ Buchanan and Tullock (1962:313) expressly deny Hobbes’ influence and instead credit Spinoza’s (1854 [1677]) *A Treatise on Politics* as “the most appropriately chosen classical precursor to that of this book [*The Calculus of Consent*].”

²⁶ Modern economic models and Hobbesian moral philosophy share a common, yet incomplete, account of human agency. Avio (1997:548) highlights the difference: “Hobbesian theories adopt the narrow view of human agency found in orthodox economics [*homo economicus*] . . . A more complete view of human agency would involve a picture of actors determining their ends, sometimes as social activity. The social aspect of this choice problem includes, but is not limited to, the design of social institutions which accommodate the discovery and attainment of those ends” (548).

²⁷ Van Aaken’s objection that deliberative theory does not offer a hard social scientific methodology is similar to William Riker’s (1982:753) critique of soft methodologies, namely, if they do not use mathematical modeling then they do not deserve to belong to the order of social sciences.

CHAPTER TWO

¹ Bentley and Dewey do distinguish between three broad branches of “Subjectmatter: . . . physical, physiological, and behavioral” (LW 16:270). While political subject-matter falls within the third or behavioral branch, the authors of *Knowing and the Known* do not mention politics, democracy, or political institutions.

² Dewey was a long-time critic of the “spectator view” of epistemology, which he thought was the supreme weakness of Hume’s copy principle and other empiricist models of perception. His solution was to see humans not as re-presenting the outside world in terms of internal objects (sense impressions, sense data etc.), but as agents engaged with a world that otherwise lacks an inside: “If we see that knowing is not the act of an outside spectator but of a participator inside the natural and social scene, then the true object of knowledge resides in the consequences of directed action. When we take this point of view, if only by way of a hypothesis, the perplexities and difficulties of which we have been speaking vanish.” (LW 4:157).

³ Hans Joas (1993:18) comments that Dewey's "[p]ragmatism developed the concept of action in order to overcome the Cartesian dualisms. [. . .] Cartesianism's guiding notion of the solitarily doubting ego is supplanted by the idea of a cooperative search for truth for the purpose of coping with real problems encountered in the course of action." See also Frank X. Ryan (2002).

⁴ Likewise, Dewey understands many of the so-called 'modern problems of philosophy' as defective because they rest on illusory dualisms, the source of which is a single faulty separation: "That for philosophy the outcome was the whole brood and nest of dualisms which have, upon the whole, formed the 'problems' of philosophy termed 'modern' is a reflection of the cultural conditions which account for the basic split made between the moral and the physical" (MW 12:271).

⁵ Dewey and Bentley write "[W]e find Self-action as the stage of inquiry which establishes a knower . . . residing in, at, or near the organism to do (i.e., to perform, or have, or be—it is all very vague) the knowing. Given such a 'knower,' he must have something to know; but he is cut off from it by being made to appear as a superior power, and it is cut off from him by being made to appear just as 'real' as he is, but of another 'realm'" (LW 16:127).

⁶ For application of the transactional view to biological systems, see Wagman and Miller (2003) and Palmer (2004).

⁷ T.D. Weldon (1953:77) remarks that one of the shortcomings of using the word 'problem' with reference to complex subject-matter is that it is often confused with 'puzzle' and 'difficulty,' thereby implying "that ability to solve puzzles is the sole or the primary qualification for dealing with difficulties."

⁸ For instance, in Sir Isaac Newton's *Principia*, Westfall (1973:751) notes that the author "proposed the exact correlation of theory with material event as the ultimate criterion of scientific truth." According to this view, inquirers must try to remove the subjective veil by being as objective as possible, i.e. by trying to remove as much of themselves, as much of their personal bias, from the application of the scientific method as possible.

⁹ This example comes verbatim from Chapter 6 of Dewey's *How We Think* (MW 6:235-236).

¹⁰ This example is borrowed from Smith (2004) who in turn borrowed it from Michael Polanyi.

¹¹ Ryan (2002:3) describes Dewey's process of inquiry as a "circle," while Tom Burke (1994:160-162) characterizes inquiry as a spiral. The image of a spiral is meant to convey how inquiry, or secondary experience, expands and enriches the meaning of non-cognitive or primary experience.

¹² Similarly, Ludwig von Mises (1998 [1949]:14), an Austrian economist, identifies the condition for human action and inquiry as a felt difficulty or uneasiness: "'But to make a man act, uneasiness and the image of a more satisfactory state alone are not sufficient. A third condition is required: the expectation that purposeful behavior has the power to remove or at least to alleviate the felt uneasiness.'"

¹³ There are obvious similarities between this account and W.V.O. Quine and J.S. Ulian's (1978) "web of belief." Within this web-like system, the most secure beliefs are held stationary at the center, e.g. those of mathematics and logic, while the more insecure and questionable dangle precariously at the periphery.

¹⁴ Although he mentions Dewey in passing, Blumer (1969:78) gives most of the credit for his understanding of objects to another pragmatist, George Herbert Mead. Even though he does not connect his understanding with Dewey and Bentley's transactional view, Blumer (1969:109) does employ the term 'transaction,' though in a more restrictive sense than Dewey and Bentley, to mean something like collective action—or "a fitting of the developing action of each into that of the other to form a joint or overbridging action."

¹⁵ Dewey and Bentley's objective in *K & K* is to develop a range of firm names, or specifications, for inquiry into knowings. In chapter XI, entitled "A Trial Group of Names," the authors put forth a glossary-style list of names with accompanying definitions in order to firm up, or precisify, the meanings of various knowings in inquiry. The inclusion of the qualifier "Trial" in the title indicates that the meanings of these terms may transform as the situation demands: "The reader will understand that what is sought here [in this trial group of names] is clarification rather than insistent recommendation of specific names; that even the most postulatory namings serve the purpose of 'openers,' rather than of 'determiners'" (LW 16:259). So, the authors intend for the list of names to be provisional or experimental, not essentially fixed or foundational, thereby assisting them in developing postulations about knowings or tools in inquiry that would advance the course of future inquiries. In reviewing *K & K*, Alonzo Church (1945:132) comments that "while such a search for firm names within the context of ordinary English might well prove valuable at the present stage, the objective of exactness which the authors set themselves requires that these firm names be embedded in a firm language." Also see Handy and Harwood (1975:107).

¹⁶ The four postulates that Hakman (1958:3) believes the transactional analysis deploys are: "1. The habit background behind social action. 2. The purposiveness of social action. 3. The "representativeness" of social action. 4. The techniques of social action." The six benefits that Hakman sees transactional analysis delivering over and above traditional social scientific methodologies are: "1. It avoids the reintroduction of mentalistic and self-actional variables as causative unexplained forces in the social process. 2. It leaves social activity free for investigation and removes it from speculations which posit the beginning of the social process in the human skull. 3. It removes definitive time and space dimensions in favor of broader phases of the social context. 4. It maintains discussion on

one phenomenological level of exposition, thereby maintaining consistency in categories and the distributional elements within those categories. 5. It removes the age-old dichotomy between fact and value and puts phenomena into system. 6. It provides for the constant re-evaluation and reformulation of categories to facilitate advance in social investigation” (43).

¹⁷ Arthur F. Bentley grew up in the Midwestern U.S. and earned his A.B. in economics from John Hopkins University in 1892. Interested in continental European economic and sociological thought, he traveled to Germany the following year to pursue graduate studies in social theory, studying under Georg Simmel. Bentley’s *The Process of Government* bears the imprint of Simmel’s theory of how group engagements condition individual identity. Dewey and Bentley would first cross paths--though unbeknownst to Dewey until over thirty years later--in 1896 at the University of Chicago, when Bentley audited Dewey’s courses on logic and ethics. Although by the time Bentley (1967 [1908]) wrote *The Process of Government* twenty years had still to pass until the publication of Dewey’s (1927) *The Public and Its Problems*, many of Dewey’s ideas that would appear in this later work were available to Bentley through these early lectures. Biographical material on Bentley can be found in Sidney Ratner’s (1964:24-27) introduction to Dewey and Bentley’s correspondence.

¹⁸ In 1908, the first edition of *The Process of Government* met with little positive response and had little immediate impact on the disciplines of philosophy, sociology or political science. The first review, by James Garner (1908:457) could not find any “value [in it] as a contribution to the literature of political science.” The second was published out of interest in how it related to his other works on logic. However, by the time of the third (1949) and fourth (1955) editions, the book was being acclaimed as a landmark work in group theory only to be rivaled by David B. Truman’s (1951) similarly titled book, *The Governmental Process*. In T.Z. Lazine’s introduction to *Knowing and the Known* (1949), she confirms that the work received belated accolades: “*The Process of Government*, now regarded as a classic in political science, was virtually ignored until the post-World War II period, when American political scientists discovered Bentley to be a forerunner of current interest-group theory and the realism of pressure politics” (LW 16:xv).

¹⁹ The behavioural revolution in political science, of which David Easton’s (1953) systems theory was a part, would transform political theory from a purely normative endeavour into an empirical and formal (mathematical) endeavour as well. T.Z. Lazine states that “Bentley was hailed on methodological grounds as an early supporter of the ‘behavioral revolution’ which called for the use of natural scientific methods in the social sciences, and on substantive grounds for offering a group theory of politics” (LW 16:xv). In a *Festschrift* to Bentley, Sidney Ratner appraises his legacy for political theory: “*The Process of Government* (1908) is, in my judgment, the most important contribution to systematic political theory ever made in America.”

²⁰ For instance, the group theorist David Truman (1951:51) states that “we do not need to account for a totally inclusive [public] interest, because one does not exist.” This account has also had considerable influence on the contemporary advocate of political pluralism Robert A. Dahl’s (1961, 1986) writings on democracy. See Bailey and Braybrooke (2003). Marcil-Lacoste (1992:129) credits *The Process of Government* as “the first [work] . . . to have formulated the major themes of political pluralism.”

²¹ Hale (1960:856) has misunderstood Bentley’s account of group adjustment as equivalent to the equilibrium concept in economic theory. In economics, equilibrium means a point at which two factors coincide to produce an optimum outcome. For instance, with respect to price, equilibrium is when the market clears for a particular good because the quantity supplied and the quantity demanded equate. Any other result is sub-optimal; if the price is higher than the equilibrium price then surpluses are created and lead price-setters to lower their asking price; if the price is lower than the equilibrium price then shortages manifest which leads price-setters to increase their asking price. Adjustments in Bentley’s group theory constitute phases of relative stability or temporary relief in the on-going process of group activity and struggle. Unlike equilibrium, an adjustment is by no means an optimal point for all parties concerned; it can impose costs on one group as easily as it delivers benefits to another. In this way, Bentley’s notion of adjustment presages David Easton’s (1965:20-29) systems model in political science, whereby inputs, in the form of demands for change or supports for the status quo, are perpetually converted through the linkage mechanism of the political system into outputs, taking the form of policy decisions and actions.

²² On Smith’s (1964:600) reading, “Dewey and Bentley both inveighed against the ‘spooks’ and ‘soul-stuff’ in the current theories of public life, not solely, but in part because these concepts were neither ‘pragmatically useful’ nor directly ‘observable.’”

²³ According to Sanders (1995:59), positivistic analysis in political science can be traced back to Auguste Comte’s positivism as well as the logical positivism that arose in the 1920’s ‘Vienna Circle,’ headed by Moritz Schlick and including such notable intellectuals as Neurath, Wassmann, Feigl, Godel, Ayer, Carnap and Hahn.

²⁴ The analytic-synthetic distinction can be traced back to Immanuel Kant, but its clearest expression is made by Rudolf Carnap (1947, 1967) and A.J. Ayer (1936). According to Ayer and Carnap, linguistic statements ought to be divided into two types, (1) those the meaning of which is dependent on facts about the world, or the synthetic type,

and (2) those the meaning of which is independent of such facts “come what may,” or the analytic type. Quine began his assault on the tenets of Logical positivism in the 1940s and 50s with the help of his colleague at Harvard, Morton G. White, and Nelson Goodman, at University of Pennsylvania. Quine (1953:22) criticizes the analytic-synthetic distinction as “a distinction without a difference.” See Ralston (2004) for a possible solution based on Bentley and Dewey’s transactional view.

²⁵ Dewey echoes Bentley’s critique of this positivistic tendency to privilege scientific facts as a more authentic or real than common-sense facts: “There is something both ridiculous and disconcerting in the way in which men have let themselves be imposed upon, so as to infer that scientific ways of thinking of objects give the inner reality of things, and that they put a mark of spuriousness upon all other ways of thinking of them, and of perceiving and enjoying them” (LW 4:109).

²⁶ Ruth Lane (1997) neglects Bentley’s critical insight in her attempt to substitute metaphysical realism for positivism at the theoretical hard-core of political science research programmes. Bentley (1932:131-2), on the other hand, rejects realism—both the positivist and metaphysical variety—in favor of the study of groups as functional-transactional processes, or the study of “men and things in systems.”

²⁷ Knight and Johnson (1996:69) characterize Posner’s project as “a sustained attempt to purge the pragmatist legacy of its radical political implications.”

²⁸ The notion of public spirit will be discussed in more detail in chapter 5, within the context of the debate between Walter Lippmann and John Dewey. At this point, it is sufficient to know that it derives from an analogy between the expert-citizen relationship and the cobbler-customer relationship. According to Dewey, “[t]he man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied. Popular government has at least created public spirit even if its success in informing that spirit has not been great” (LW 2:364).

²⁹ Dewey defines a “public” as “all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences.” Dryzek (2004b:77) claims that “Dewey[s] . . . definition [of a public] meshes with the idea of legitimacy in deliberative democracy: it is in the eyes of those affected, who ought to have a chance to participate in deliberation about the outcome.”

³⁰ It is possible that Posner would not be sensitive to this reading given his glib response to talk of ideals mixed with his greater concern for economic efficiency. In Sullivan and Solove’s (2003:740) review of Posner’s (2003) *Law, Pragmatism and Democracy*, they conclude that Posner has a generally pessimistic view of ideas and ideals.

³¹ In his full-length treatment of the topic, *Liberalism and Social Action*, Dewey was less sympathetic to liberalisms of the past and present: “The liberalism of the past was characterized by the possession of a definite intellectual creed and program . . . Liberalism today is hardly more than a temper of mind, vaguely called forward-looking, but quite uncertain as to where to look and what to look forward to” (LW 5:70).

³² Similar to Fukuyama, Dewey defines political democracy in liberal-democratic terms, that is, as those “traditional political institutions” which include “general suffrage, elected representatives, [and] majority rule” (LW 2:325).

³³ Dewey’s reluctance to specify model institutions that realize his democratic ideal is mirrored in the aversion that contemporary critical theorists have to institutional design. Dryzek (1987:665) explains: “Overly precise specification of model institutions involves skating on thin ice. Far better, perhaps, to leave any such specification to the individual involved. The appropriate configuration will depend on the constraints and opportunities of the existing social situation, the cultural tradition(s) to which the participants subscribe, and the capabilities and desires of these actors.”

³⁴ Evidence for Bentley’s views on democracy can be found in texts other than *The Process of Government*. Bentley authored a book in the 1920’s calling for economically aggrieved farmers to politically organize and petition their government, later published as *Makers, Users and Masters* (1969), which Ratner (1958:576) declares as proof “that he [Bentley] was unmistakably on the side of democracy.” In addition, Bentley’s work as a campaign organizer and chairman for the Progressive Party presidential campaign in Indiana in 1924 demonstrates a high level of commitment to the democratic electoral process. See Taylor (1952:220ff, 1957b:12) and Hale (1960:956) on the question of Bentley’s democratic credentials.

CHAPTER THREE

¹ Here I intend to use the expression “research programme” in the Lakatosian sense. According to Lakatos (199), a research programme involves acceptance of a hard core of assumptions that circumscribe the boundaries of scientific inquiry while, simultaneously, shielding inquiry from irrelevant critique. The deliberative democrat Jürgen

Habermas (1989:375) casts his own project as a “research program.” Besides Johnson, Warren (1996a:46) has also complained that “deliberative democrats need a concept of authoritative decision making.”

² Benhabib (1994:36) and Estlund (1993:1462) argue that Rawls’s notion of public reason unnecessarily constrains the kinds of issues that can be legitimately discussed in public discourse. Dryzek (2001:655) claims that “Rawls is a deliberative theorist, but not a deliberative democrat, his own self-description notwithstanding.”

³ Although space will not permit a full chronicling of the origins of Habermas’s theory, it should be noted that it derives its inspiration from at least five primary sources: (i) Immanuel Kant’s philosophy (especially Kantian moral philosophy, epistemology and its critique of reason), (ii) the critical theory of Herbert Marcuse, Theodor Adorno, and Max Horkheimer (with special attention to their criticisms of instrumental rationality), (iii) Max Weber’s sociology (particularly his typology of human action and rationalization thesis), (iv) J.L. Austin’s linguistic philosophy (especially the distinction between perlocutionary and illocutionary acts), and (v) the theories of developmental psychology put forth by Piaget and Kohlberg (especially their accounts of cognitive competencies). See Neble (1998:2), McCarthy (1984, 1995) and Shabani (2003).

⁴ Habermas’s (1984:23) first kind of claim, the truth claim, implicates the “truth of propositions,” or whether a statement meets certain logical or definitional standards, and the “efficacy of teleological actions,” or whether chosen means are well suited to achieve given ends. The second, or rightness claim, refers to the “rightness of norms of action” or whether, in discoursing about moral subject-matter, these norms can withstand a single test of validity: namely, that they express “a generalizable interest” (20). The validity of a third type of claim, the truthfulness claim, is judged in terms of the forthrightness and trustworthiness of the speaker, i.e. in virtue of the “truthfulness or sincerity of [his] expressions” (23). Distinct from the previous two claim-types, truthfulness claims can only be disputed through demonstration, and not by arguing; by, for instance, showing the inconsistency between an agent’s past actions and words (41). For a more thorough account of these validity claim-types, see Habermas (1984:23) and Goldkuhl (2000:173-174).

⁵ Truth and efficacy are tied to the objective world, rightness to the inter-subjectively shared social world, and truthfulness to the subjective world of individuals. Although action takes place in the foreground of these three domains, it also occurs against a common background of communication-enabling cultural assumptions and shared meanings—which Habermas (1990:135) terms the “lifeworld.”

⁶ According to Habermas (1990:95), each of the three action types taken alone—teleological, normatively regulated and dramaturgical—fails to satisfy the requirements for coordinating the activity of individuals. However, once integrated together, so that consensus manifests across all three types of action, the fourth kind of action, communicative action or action aimed at cooperative understanding through communication, is made possible.

⁷ These presuppositions of discourse are pragmatic, Habermas (1993:31) says, because they “must always be made by participants when they enter into argumentation, and transcendental because they “point beyond actually existing conditions in an idealizing fashion.” Habermas’s seminal formulation of his theory of discourse ethics is partially grounded on Karl Otto Apel’s (1984) notion of “transcendental pragmatics.” See Putnam (2002:122, 175 ff22). Habermas (1990:80-1, 95-6, 129-30) notes that to reject the claim that making validity claims is a pragmatic necessity of rational argumentation implicates the speaker in a “performative contradiction,” since the very objection he makes presupposes standards for assessing the validity of his claim.

⁸ Habermas borrows from Alexy (1989:192), who likewise states that “every speaker must give reasons for what he or she asserts when asked to do so, unless he or she can cite reasons which justify a refusal to provide justification.”

⁹ These rhetorical rules promote inclusivity in the deliberative process, so that all participants have an equal opportunity to communicate their opinions and concerns. Even when Habermas’s (1970:371-2) symmetry assumption or White’s (1980:1009) equal opportunity condition is met, though, discourse may still be prone to manipulation by shrewd strategists who are articulate deliberators. According to Putnam (2002:129-130), Jean-Francois Lyotard has informally criticized Habermas’s theory of discourse ethics for providing an opportunity for marginalization or exclusion of the “inarticulate.”

¹⁰ According to Habermas (1984:17), “the rationality inherent in this practice [of testing and redeeming claims in discourse] is seen in the fact that a communicatively achieved agreement must be based *in the end* on reasons.” Good reasons should reflect credible proof, consistent logic, judicious insights, and publicly defensible positions. Conversely, they should not be tied to highly speculative evidence, inconsistent reasoning, biased judgments and egoistic views. Fish (1999:94-95) objects that the need for justification presupposes a common understanding of what counts as a good reason, an understanding which is absent in politics.

¹¹ Redeeming the validity of norms involves recourse to Habermas’s (1990:65) universalization principle (principle U), to be discussed, which states that “all affected can accept the consequences and the side effects [that the] general observance [of the norm] can be anticipated to have for the satisfaction of everyone’s interests.” The principle bears a close relation to Immanuel Kant’s Categorical Imperative, as McCarthy (1994:45) confirms. Avio (1997) locates one major cleavage between Habermas’s principle U and Kant’s Categorical Imperative: “The

fundamental difference between the two principles is found in Habermas's requirement that contested normative validity claims be subjected to actual public argumentation, whereas Kant's principle may be applied directly by individuals acting 'monologically,' that is, by private, internal application."

¹² Habermas (1985:27) characterizes the expectation of consensus that motivates agents to engage in discourse: "So long as in their speech acts they raise claims to validity of what is being uttered, they are proceeding in the expectation that they can achieve a rationally motivated agreement and can coordinate their plans and actions on this basis--without having to influence the empirical motives of the others through force or prospect of reward." Walzer (1990:188) contends that Habermas's ideal speech situation fails to appreciate the difficulties faced by individuals wishing to reach agreement under actual or less than ideal conditions.

¹³ Walzer (1990:188) disputes whether agents to a discourse would ever concede that they had failed to make the better argument: "Habermas insists that speakers must always be bound by the better argument--the tightest constraint of all so long as we can recognize the better argument. But most speakers quite honestly think that their own arguments are the better ones." Similarly, Lupia (2002:143) argues that in order for the better argument to prove victorious, it must "win the battle for [the hearer's] attention . . . memory . . . [and do so] at the precipice of choice."

¹⁴ For analogous notions, consider Kant's (1965) "regulative ideal" and Vaihinger's (1968) "philosophy of 'as-if.'" For criticisms of how Habermas's use of the subjunctive *as if* could have extremely conservative consequences, see Clarke (2000).

¹⁵ Habermas (1989:305) also terms the process by which human action and motives are commodified the "colonization of the lifeworld"--where 'lifeworld' signifies the proper domain for communicative action. According to Braaten (1991:93), "[t]he colonization of the lifeworld is a process in which communication is replaced by exchanges or transactions in a nonlinguistic medium, such as money."

¹⁶ The prisoner's dilemma is a model in game-theory employed to illustrate how coordination problems occur between agents. In a one-shot, two-player game, each player has a choice between two moves--cooperate or defect--and in so choosing seeks to maximize the eventual payoff. For player A versus player B, there are four possible results: (i) mutual cooperation (C,C), (ii) mutual defection (D, D), (iii) A defects while B cooperates (D, C) and (iv) B defects while A cooperates (C, D). Each player's preference ranking of these results is (assuming the first is their own) $D,C > C,C > D,D > C,D$. Subjective expected utility pay-offs for each outcome can be expressed by the values $C,C=3,3$; $D,D=2,2$; $C,D=1,4$; and $D,C=4,1$. Since no player wishes to risk receiving the outcome with the lowest payoff (1) and each suspects that the other will attempt to defect in order to receive the outcome with the highest pay-off (4), both will defect, resulting in an outcome which is Pareto-dominated by the outcome in which both cooperate ($2 < 3$). Consequently, in a prisoner's dilemma situation, defection or non-cooperation becomes the only rational strategy. See Howard (1988).

¹⁷ Johnson (1993) and Heath (2001) acknowledge the convergence of work by critical theorists, such as Habermas, and game theorists concerned with the role of strategic rationality in political interactions. The prisoner's dilemma situation is also a centerpiece of public choice theory and constitutional economics, particularly in Brennan and Buchanan's (1985:5-15) argument for the necessity of rules. See chapter four.

¹⁸ McCarthy (1991:65) also dismisses the game-theoretic approach in his treatment of strategic action, stating that he will not repeat "the familiar debates concerning game theoretical approaches to the general theory of action." Although McCarthy and Habermas appear to reject the legitimacy of strategic action, Habermas (1985:183) does admit that "[w]e cannot exclude the element of strategic action from the concept of the political."

¹⁹ Habermas (1993:50) states that discourse ethics formalizes the process by which roles are exchanged in the American Pragmatist George Mead's (1934) theory of ideal role-taking: "Practical discourse may be understood as a communicative process that induces all participants simultaneously to engage in ideal role-taking in virtue of its form, that is, solely on the basis of unavoidable universal presuppositions of argumentation." McCarthy (1992:54) and Abouafia (1995) also note the importance of Mead's notion of ideal role-taking for Habermas's theory of discourse ethics.

²⁰ Habermas's (1995:112-113) aversion to *homo economicus* can be detected in his critique of John Rawls's (1971) use of the rational actor assumption in his design of the original position, whereby agents choose principles of justice that will maximize their intake of basic goods: "But can the meaning of considerations of justice remain unaffected by the perspective of rational egoists? At any rate, the parties are incapable of achieving, within the bounds set by their rational egoism, the reciprocal perspective taking that the citizens they represent must undertake when they orient themselves in a just manner to what is equally good for all." See Michelman (1996:312).

²¹ Habermas (1993:37-8) draws heavily on Klaus Gunther's (1989, 1993) work in making the distinction between discourses of justification and application. According to Frank Michelman (2002:132), the priority and autonomy of the outputs of discourses of justification, i.e. abstract moral norms, to the outputs of discourses of application, i.e. concrete legal rules, is open to what he terms the "pragmatist denial of the priority of norms to their

applications”: “The trouble is that it’s not clear how a social norm can be known, identified, or discriminated, completely prior to and independent of its applications. In what I think we can fairly call a pragmatist view, social norms—no doubt, as we’ll see, including positive-legal norms—are always under (re)construction” (114).

²² This objection has been leveled at Habermas by Weinberger (1999), Fraser (1992), and Dryzek (2000). Dryzek (2000:26) articulates the objections in more general, although equally forceful, terms: “I think Habermas falls prey to a familiar, indeed near-universal, tendency among political theorists: to treat empirical reality in terms of a few stylized facts, rather than attending seriously to the findings of empirical political science.”

²³ In his original formulation of the idea of the public sphere, Habermas (1991:12) describes how groups of educated elites in Europe with shared interests and occupations “developed into the sphere of ‘civil society’ that as the genuine domain of private autonomy stood opposed to the state.” See Fraser (1992:112). In his later formulation, Habermas (1996:171) defines the public sphere as a space for “informal opinion-formation that prepares and influences political decision making [that] is relieved of the institutional constraints of formal proceedings programmed to reach decisions.”

²⁴ For a more thorough treatment of the concept of civil society, see Cohen and Arato (1992), Cohen and Rogers (1992), Seligman (2002) and Hendriks (2002).

²⁵ Fraser (1992:133-134) clearly articulates this point: “Accordingly, their [private citizens] discourse does not eventuate in binding, sovereign decisions authorizing the use of state power; on the contrary, it eventuates in ‘public opinion,’ critical commentary on authorized decision-making that transpires elsewhere. The public sphere, in short, is not the state; it is rather the informally mobilized body of nongovernmental discursive opinion that can serve as a counterweight to the state.” Hendriks (2002:1) distinguishes between micro deliberative democrats, such as Elster, Cohen, Gutmann and Thompson, who propose that portions of civil society should partake in structured state-sponsored deliberation, and macro deliberative democrats, such as Habermas, Dryzek and Benhabib, who instead recommend unstructured deliberation among informal groups and associations within civil society, which is distinct from and critical of state power.

²⁶ While it is fairly clear how parliaments and legislatures convert their constituents’ deliberated opinion into legislation, on Habermas’s (1996:237) account, courts also translate the public’s concern for order and stability into case precedent that upholds the integrity of the legal system, or rule of law: “The public interest in the harmonization or consistency of law highlights a concise move in the logic of adjudication: the court must decide each case in a way that preserves the coherence of the legal order as a whole.”

²⁷ According to Habermas (2001:779), deliberators would have to consider whether “it [the constitution] has come about in a legitimate way, namely, according to the procedures of democratic opinion- and will-formation that justify the presumption that outcomes are rationally acceptable.” Plausible questions would then arise about whether, in the constitutional choice situation or founding event, the interests of all concerned parties were considered, whether coercion or manipulation was employed and whether the decision-making rule was fair and rational. Besides examining the historical origin of the constitution to ensure that it was fairly and rationally formed through discourse, citizens would also have to determine if there are good reasons to support the constitutional essentials given recent judicial decisions that are supposed to be consistent with it.¹ So, by testing the constitutional essentials in discourse, citizens may affirm (or disconfirm) the hypothetical that the constitution “could meet with the acceptance of all those concerned in their capacity as participants in practical discourse” (1998:34). In this way, each successive generation of citizens is empowered to critically and deliberatively re-examine the constitution’s legitimacy.

²⁸ For criticisms of Habermas’s notion of constitutional patriotism, see Michelman (1999), Honig (2001) and Ferrara (2001). The last two respond to Habermas’s (2001) brief article defending his theory of constitutional democracy. For a defence of Habermasian constitutional patriotism, see Shabani (2002). A phenomenon similar to constitutional patriotism, termed “the patriotism of benevolence,” has been observed by Frederickson and Hart (1985) among public servants in modern democracies.

²⁹ See Benhabib (1990), Bohman (1995), Sunstein (1997), Gould (1988), Dryzek (2000). Van Mill (1996:747) expresses skeptical worries about the realism of expecting a consensual convergence of deliberators’ preferences and reasons. Dryzek (2000:490) proposes a solution: “Collective choices are indeed produced by near-universal assent; but people can support this decision for different reasons.” Besides Dryzek’s solution, Sunstein’s (1997) “incompletely theorized agreement,” in which agents agree for different reasons so long as these reasons are continually subject to critical inquiry and deliberative renewal, also provides relief for the problem of Habermas’s unreasonably high requirement of consensus. Habermas (1993:60) lowers the threshold himself when no “generalizable interests” are at stake, from consensus to “fair compromises.”

³⁰ Dryzek (2000:52) illustrates this point with the example of Martin Luther King, Jr. In contrast to Dryzek, McAdam (2000:132) finds room in Habermas’s theory for King’s speech in his third action-type of dramaturgical action: “it was the compelling dramaturgy of King’s tactics rather than his formal pronouncements that keyed the

dynamic.” Rehg (1997:372) employs the example of Jesse Jackson’s 1988 Democratic convention speech, which appealed to his audience’s sympathy to support the cause of justice for the working poor, to illustrate how rhetoric can heighten audience interest and promote rational argumentation. According to Dryzek (2000:53), “any formal or informal rules of debate that exclude emotional responses [including several of Habermas’s logical, dialectical and rhetorical rules of discourse] may be suppressing particular ways of making a point [such that, while] . . . emotion can be coercive . . . in the end it must answer to reason.” Difference democrats, such as Sanders (1997) and Young (1996, 2000), likewise contend that an over-rationalized model of discourse tends to have exclusionary consequences, and that alternative modes of expression, such as narratives, greetings and testimonials, should therefore be permitted. Diamond (1991) claims that there are some ethical reasons that cannot be articulated in the form of a rational argument. In addition, Baxi (1987:8) argues that “[t]he discrediting of sycophancy [or false flattery] as a mode of communication is undoubtedly related to the insistence on rationality in public discourse.”

³¹ As Bohman (1998:415) confirms, “[f]ew deliberative democrats now think of deliberation independently from . . . bargaining. The question is only how to make . . . [it] more consistent with deliberation rather than undermining it.” Habermas (1996:283) does state that legitimate or fair bargaining “presupposes a willingness to cooperate, that is, to observe the rules of the game so as to arrive at results acceptable for all parties on the basis of their different preferences.” However, Blattberg (2003:164) contests that there is no place for fair bargaining in Habermas’s theory given Habermas’s identification of bargaining tout court with instrumental rationality: “While the deliberative democrat [Habermas] does distinguish between fair and unfair bargaining, the former being said to consist of the respect of procedures meant to ensure that parties have an equal opportunity to pressure each other, those parties are nevertheless still considered to be acting in accord with an instrumental form of rationality; as such, there is no place for viewing them as willing to make concessions which good-faith negotiations require.”

³² This conclusion does not assimilate all negotiating activity to the realm of deliberative activity. Otherwise, activities such as log-rolling or vote-trading, would be essentially deliberative, when in fact they do not involve public justification. Also, the conclusion does not state, in Gutmann and Thompson’s (2001:113-114) words, “that self-interested (or group-interested) bargaining processes are better than deliberative ones.” Although this might be the case in some contexts, bargaining is by no means always privileged over deliberation. As Walzer (1999:62) observes, “[s]ometimes the positions . . . have been deliberated on, but very often they are the products of long and complicated negotiations among interested as well as opinionated individuals.” Hence, negotiation and deliberation may complement each other.

³³ In this respect, Gutmann and Thompson’s theory is consistent with the seminal account of deliberative democracy found in the writings of Bessette (1980, 1983), who studied the deliberations of the U.S. Congress.

³⁴ Bohman (1998:408) locates the difference between Gutmann-Thompson and Rawls in the latter’s more stringent requirement that citizens employ public reasons in their deliberations: “Like Rawls, they [Gutmann and Thompson] see fundamental disagreements as endemic to modern society; but unlike Rawls . . . they do not then proscribe a ‘method of avoidance’ or a ‘conversational constraint’ as a liberal precommitment.”

³⁵ Rawls (1996:47) frames the problem of stability in a pluralist society as a question, viz., “how is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines?” Rasmussen (2004:527) states that “the problem of stability emanates from living in a society in which there is a plurality of comprehensive doctrines, with the result that the exclusive enforcement of any of those doctrines would lead to political oppression.”

³⁶ One criticism made against the requirement that citizens be reasonable is that reasonableness is never clearly defined by Rawls; see Freeman 2002:31-32 and Habermas 1995:135. At least three attempts have been made to respond to this objection; one, Rasmussen (2004), who construes reasonableness as a virtue; two, Ferrara (2004), who reconstructs the reasonable as the exemplary; and, three, Boettcher (2000, 2004), who interprets the reasonable as a disposition framed by Rawls’s conceptions of a liberal society, the citizen and the capacity for judgment.

³⁷ De Marneffe (1994:259-60) gives the example of a public assembly debating the legalization of a hallucinogenic recreational drug. It would seem that to legalize would be neutral between all conceptions of the good since it allows drug-users to continue to freely pursue their life plans and does no overt harm to others, while criminalizing privileges one conception of the good, viz. that of the anti-drug lobby, over another, viz. that of the drug-users. However, this account is flawed since the opportunity to take drugs is not a basic good necessary for all citizens to pursue a reasonable conception of the good. So given that the matter, unlike issues about basic justice and constitutional essentials, is non-neutral, i.e. it favours the partial interests of drug-users, public reasons cannot be offered for or against legalization. Since no public reasons can be offered, the decision must be subject instead to a fair decision-making procedure such as majority rule. See Quong (2004:239).

³⁸ Rawls (2001:34) understands “reasonable pluralism” in the following manner: “[u]nder the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable yet reasonable comprehensive doctrines will come about and persist, should it not already exist. This fact about

free societies is what I call the fact of reasonable pluralism.” Rawls (1996:10) defends a political, not metaphysical account of justice that is neutral between the plurality of comprehensive and reasonable worldviews: “political liberalism looks for a political conception of justice that we hope can gain support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it.”

³⁹ Given the fact of reasonable pluralism, Rawls (1996:36, 43) claims that social organization requires “a stable overlapping consensus of reasonable comprehensive doctrines.”

⁴⁰ Rawls (1999:141) states that his account of political liberalism “endorses the underlying ideas of citizens as free and equal and of society as a fair system of cooperation over time.”

⁴¹ For an argument that the narrow reading of public reason’s scope, viz., that public reason only pertains to matters of basic justice and constitutional essentials, is less defensible than a broad reading, viz., that public reason extends to all choices in which the state wields coercive authority over citizens, see Greenawalt (1994) and Quong (2004).

⁴² Cooke (2000:958-9) concedes that Rawls’s (1997:783-7) reformulation of the notion of public reason in the essay “The Idea of Public Reason Revisited”, does permit citizens to appeal to their personal beliefs and values apart from the public conception of justice, and thus is less monological. However, Rawls’s shift to a “wide view of public reason,” Cooke contends, is “still inadequate” because it is only a way for “political opponents [to] reassure each other of their respective allegiance to a basic constitutional and political values . . . not [to] anticipate, or even hope for, modification of their own or their opponents’ views” (959). In other words, there is no opportunity for citizens to transform each other’s personal or shared values about the subject of what justice entails, and so Rawls’s notion of public reason is still insufficiently deliberative.

⁴³ Note that Dryzek’s claim that Rawls’s theory is incomplete is not the same as the common objection that Rawlsian public reason is incomplete because it arbitrarily excludes too many moral issues from the political domain. For a critical response to this objection, see Schwartzman’s (2004).

⁴⁴ Gutmann and Thompson (1996:21) reject the economist’s model of rational, self-interested human agency, or *homo economicus*: “Citizens and officials sometimes—even often—act on self-interest, but there is no warrant for assuming, as a theoretical postulate, that they always, or even generally, act on this basis. Self-interested behavior is not in any nonvacuous sense presumptively rational. We should not regard the assumption of self-interest as the default position of deliberative democracy.”

⁴⁵ Even though clarifying their values or gaining additional information could lead agents to reach agreement, this outcome is never guaranteed. Instead, taking either course may only advance the deliberators to a state of shared understanding about the terms of their dispute—or a point at which they may respectfully agree to disagree. For instance, pro-life and pro-choice advocates in the abortion debate may determine that their disagreement originates with the question of how to determine when life begins—whether at the point of conception or when the foetus can survive outside the woman’s body. Even if the disagreement arises from a shortage of information, agreement may still not be forthcoming. This is especially the case when parties on either side of the debate possess deep differences in values (Gutmann and Thompson’s 1996:74-79).

⁴⁶ Gutmann and Thompson (1996:62-63) describe the problematic implications of being satisfied with mere tolerance: “Even if a principle of toleration could be justified on impartial grounds, it would not go far enough for the purposes of deliberative democracy. It provides no positive basis on which citizens can expect to resolve their moral disagreements in the future. Citizens go their separate ways, keeping their moral reasons to themselves, avoiding moral engagement. This may sometimes keep the peace (though often only temporarily, as the violent confrontations over abortion show). But mere toleration also locks into place the moral division and makes collective moral progress far more difficult.”

⁴⁷ What Gutmann and Thompson (2001:114) are worried about in admitting bargaining into the decision-making process is the tendency of negotiators to concede “the current distribution of resources and power as a baseline.” This is especially true of constitutional economists, such as Buchanan (1977:13) who maintains that we must be content with the status quo arrangements “because there exists no alternative means of deriving acceptable judgments about change.”

⁴⁸ Deliberation encourages citizens, representatives and other state actors to operate in transparent ways, and to be satisfied with exposing more, rather than less, of their activities to public scrutiny. Although there would admittedly be some situations—such as discussions about issues of national security—that would justify covert or closed-door deliberations, the benchmark should be full publicity, and thus full accountability. “In a deliberative democracy,” Gutmann and Thompson (1996:101) write, “the principle of publicity requires that government adopt only those policies for which officials and citizens give public justifications.” By requiring that justification or reason-giving occur publicly, the result is that reason-givers become accountable to others outside of the deliberative forum. In this way, satisfying the procedural requirements of publicity and accountability engenders multiple benefits, including greater transparency in the decision-making process and, ultimately, wider acceptance of the legitimacy of deliberative practices and their outcomes.

⁴⁹ The distinction between positive and negative liberty is introduced by Isaiah Berlin (1969). Weinstock (2003) connects Berlin's twin notions of liberty with Gutmann and Thompson's theory of deliberative democracy. Gutmann and Thompson's focus on the differences between egalitarian and libertarian accounts of fair opportunity likely derives from Rawls's (1971:58-60, 2001:43-4) similar treatment of the differences between liberal and natural liberty versions of the second principle of justice and its fair equality of opportunity provision.

⁵⁰ Similar to schemes for the redistribution of wealth, affirmative action schemes are often perceived by libertarians as infringements on the individual liberties of members of the dominant group (or as a form of reverse discrimination). For a discussion of the affirmative action debate between libertarians and egalitarian liberals, see Brighouse (2004:120-41).

⁵¹ For a similar recitation of Rawls's option of pure procedural justice, and then an application to a problem in legal decision-making, see Ralston (2000a).

⁵² Gutmann and Thompson (2001:95) write: "The principles of deliberative democracy, they [pure proceduralists] argue, should not prescribe the content of the laws, but only the procedures (such as equal suffrage) by which laws are made and the conditions (such as free political speech) under which the procedures can be made to work fairly. These theorists, whom we call pure proceduralists, insist that democratic theory should not incorporate substantive principles such as individual liberty or equal opportunity beyond what is necessary to ensure a fair democratic process." Christiano (1997:246) also states the pure proceduralist position: "The outcomes are justified because they are brought about in a certain way. There are no independent standards for assessing outcomes on this approach: the standards for assessing institutions are entirely elaborated within the process of deliberation among free and equal citizens."

⁵³ Gutmann and Thompson (2004:13) explain the difference between aggregative and deliberative theories in regard to the status of preferences: "The deliberative conception . . . considers the reasons that citizens and their representatives give for their expressed preferences. It asks for justifications. The aggregative conception, by contrast, takes preferences as given [for] . . . [i]t requires no justification for the preferences themselves, but seeks only to combine them in various ways [i.e. through alternative aggregative procedures] that are efficient and fair."

⁵⁴ Despite their opposition to pure proceduralism, the Harvard legal scholar Frederick Schauer (1999:19) depicts *Democracy and Disagreement* as "a book about decision procedure—about how a democracy should make its decisions on pressing policy questions that are pervaded by moral and political disagreement." The difficulty with this position is not in its reasoning, but in the dearth of deliberative democrats who would fulfill the criteria for being pure proceduralist. As we will see, Habermas does not fit the description. Although Nino (1996) comes close, the shortage of deliberative democrats who are pure proceduralists could support the argument that Gutmann and Thompson have merely erected a straw man.

⁵⁵ Gutmann and Thompson (1996:351-2) confront the dilemma in the conclusion of *Democracy and Disagreement*. For other accounts, see Bohman (1998:403) and Weinstock (1997:724).

⁵⁶ Gutmann and Thompson (1996:40) treat their six principles as free-standing residents of a non-foundational moral context: "It is in middle democracy that much of the moral life of a democracy, for good or ill, is to be found. This is the land of everyday politics . . . Middle democracy . . . is a land that democrats can scarcely afford to bypass. A democratic theory that is to remain faithful to its moral premises and aspirations for justice must take seriously the need for moral argument within these processes and appreciate the moral potential of such deliberation." However, Gutmann and Thompson's mid-level theoretical account of deliberative democracy has not met with a universally positive reception. Weinstock (1997:724) criticizes their theory for its aversion to vindicating the six principles: "given that the authors are concerned to avoid the kind of foundationalist arguments sometimes relied upon by liberals, how do they justify their own first principles? Democracy itself cannot be invoked, since the principles are brought in to constrain democratic decision-making procedures. And moral considerations also must be avoided, since they might be disowned by some citizens. The six principles are thus left dangling uncomfortably in theoretical midair."

⁵⁷ Nino (1996:218) also sees the constitution of deliberative democracy as supporting a "two-stage structure," consisting of (i) an abstract assessment of actual practices and procedures based on a set of ideal procedural principles, i.e. the ideal constitution, and (ii) the implementation of amended practices and procedures that respects the authority of the codified procedural principles, i.e. the historical constitution.

⁵⁸ Gutmann and Thompson (2001:96) frame the pure proceduralist position in terms of two arguments, one from moral authority and the other from political authority: "The argument from moral authority holds that the moral judgment of democratic citizens, not democratic theorists, should determine the contents of law . . . The argument from political authority maintains that substantive principles similarly preempt the political sovereignty of citizens, which should be exercised not through hypothetical theoretical reasoning but through actual democratic decision-making." I would just as easily collapse these into a single argument from democratic authority, viz. that no theorist can artificially delimit the deliberations of actual citizens of a democracy by imposing theoretical or hypothetical

constraints that have highly restrictive practical consequences for the actual process of deliberative democratic decision-making. In the next chapter, a strikingly similar argument is made by constitutional economists to the effect that deliberative democratic theorists should not preempt the decision-making authority of democratic citizens.

⁵⁹ Given Gutmann and Thompson's (2001:97) conviction that close adherence to procedures ensures fair and impartial outcomes, pure proceduralists overtly deny that they smuggle in substantive principles to independently assess outcomes: "Such [substantive] principles," Gutmann and Thompson argue, "should be included so that the theory [of deliberative democracy] can explicitly recognize that both substantive and procedural principles are subject to contestation in similar ways." By denying the existence of these covertly employed substantive constraints, pure proceduralists not only violate the publicity condition, but they also permit them to surreptitiously operate as fixed and absolute limits on the realm of possible outcomes. Gutmann and Thompson claim that all principled constraints, whether procedural or substantive, must instead be tentative and open-ended if they are to invite further deliberation: "This provisionality gives deliberation part of its point" (Ibid.)

⁶⁰ Although human fallibility requires that specific formulations of principled constraints on deliberation be kept open-ended, some tenets of this view of deliberative democratic decision-making are not so tentative. In particular, Gutmann and Thompson (2001:115) state that "[d]eliberative democrats . . . reject--and not just provisionally--any theory that denies the need for moral justification." Implied by the principle of reciprocity, the requirement of mutual justification and reason-giving is a non-negotiable feature of Gutmann and Thompson's theory of deliberative democracy.

⁶¹ According to Putnam (2000:19), "'social capital' calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital." Putnam (2000, 1993) has drawn on enormous amounts of empirical data from the United States and Italy to demonstrate that there is strong historical correlation between levels of engagement in civil society organizations and participation in politics, such that the recent decline in political participation and voting is merely a symptom of a far greater problem, viz. the deteriorating social bonds among citizens (who are no longer joiners, but are instead "bowling alone") in the broader society. In the title of an article and a book on the phenomena of declining social capital in the U.S., Putnam (1995:70) has characterized it as the trend toward "bowling alone," because "more Americans are bowling today than ever before, but bowling in organized leagues has plummeted in the last decade or so."

⁶² Shapiro (2003:91-2) understands Putnam's in similar terms: "For civic engagement to flourish, community members have to trust in the reciprocity of those around them and have the ability and resources to utilize social networks. Putnam deployed the term *generalized reciprocity* to connote a social understanding that one's efforts to participate and protect the common good will be reciprocated by others, known and unknown."

⁶³ Barring deliberators from giving religious reasons is *prima facie* unfair, whether on the grounds that it would require believers to give disingenuous reasons or that it unfairly constrains free speech. In the two-tier system for regulating speech in American First Amendment Constitutional law, for instance, only political speech deserves the highest level of protection from regulation and non-political speech is reserved for a substantially lower level of protection or no protection at all. Nickel (2000:7) argues against Sunstein's account of such a two-level judicial standard and in favour of full protection of religious speech (and reasons) in discourse: "Suppose that a federal law prohibited evangelism on television for a widely despised religion that was totally focused on gaining access to heaven in the after-life and thus had little relevance to the deliberations of democratic political bodies. This sort of religious discourse is not in Sunstein's top tier, and thus regulations of this sort would be relatively easy to justify. However, surely such a law would be an unconstitutional infringement of freedom of speech (and religion)."

⁶⁴ Weithman (2005:279 ff18) refers to Rawls's citing of public reasons in the value-laden statements of the U.S. Constitution's *Preamble*, and notes that these be employed in argument to serve strategic or egoistic ends: "someone could appeal to these values [in the U.S. Constitution's *Preamble*] to argue for conclusions that we recognize as patently unjust."

⁶⁵ Similarly, Reidy (2000) claims that because liberal public reason is incomplete, comprehensive doctrines, and non-public reasons, must play a wider role than Rawls admits. For a critical response, see Williams (2000).

⁶⁶ Gutmann and Thompson (2001:7) state the principle as follows: "[T]he continuing debate it [deliberative democracy] requires should observe what we call the principle of the economy of moral disagreement. In giving reasons for their decisions, citizens and their representatives should try to find justifications that minimize their differences with their opponents." However, as several deliberative theorists--for instance, Habermas (1996a:484) and Elster (1998b)--point out, political deliberation extends to many areas of decision-making that are not necessarily circumscribed by moral conflict, such as constitution-making, social scientific inquiry and policy implementation. Instead of conceding this point, Gutmann and Thompson selectively emphasize moral issues in their chosen case studies, such as those of the abortion, euthanasia and evolution-creationism (or intelligent design)

debates. In addition, the principle of the economy of moral disagreement is intended to promote mutual respect and peaceful relations, but not always agreement, between morally divided parties.

⁶⁷ In Knight and Johnson's (1994:286) essay, this point is made to refute the claim by deliberative democrats that deliberation can defuse the threat of majority cycling by increasing consensus outcomes and reducing the number of issue dimensions. The authors argue that, to the contrary, it is also possible that given the greater inclusivity of deliberative forums and the drastic differences in participants' worldviews, dissensus and an increase in the number of issue dimensions could also result. See discussion in chapter 1.

⁶⁸ As a result, these citizens may choose not to partake in political discourse, thereby exercising what Hannah Arendt (1973:280) calls their "freedom from politics." According to Anne Phillips (1991:163), as the requirements of political participation increase, average citizens tend to disengage: "The more participatory the politics, the less accountable [the political system is] to those who are passive and inert." According to J.S. Mill, "every hour spent in talk is an hour withdrawn from actual business" (quoted in Farr 1993:383).

⁶⁹ Ackerman (1989:6) terms this the "asymmetry problem" and characterizes it as the difficulty of trying "to explain why dialogue seems so much more fundamental in public than in personal life."

⁷⁰ Ackerman's reading of Habermas relies entirely on works prior to *Between Fact and Norms* (1996) and *The Structural Transformation of the Public Sphere* (1991).

⁷¹ The liberal problem of public order, as Ackerman conceives it, parallels Rawls's difficulty of how to produce a stable political regime in a pluralist society. Ackerman (1989:9) states the liberal problem of public order in these terms: "Despite their ongoing disagreements, all groups find themselves on the same planet, in potential conflict over the planet's scarce resources. Hence the problem of liberal politics: How are the different groups to resolve their problem of mutual coexistence in a reasonable way?" Since each group holds its own comprehensive moral doctrine to be unqualifiedly true, truth-seeking dialogue between members of opposing groups only results in entrenched disagreement. Ackerman (1989:10) notices that when members of opposing groups, such as those that are pro-evolution and pro-creationism, engage in dialogue premised on a personal search for truth, then "neither P [some moral position on an issue] and not-P is going to win the moral argument to the other's satisfaction."

⁷² Ackerman (1989:10) defines the supreme pragmatic imperative as follows: "If you and I disagree about the moral truth, the only way we stand half a chance of solving our problems in coexistence in a way both of us find reasonable is by talking to one another about them." Moon (1991:213) disagrees with Ackerman that it is possible to discuss conflicting beliefs without addressing the issue of whether they are true or not: "the key idea behind his [Ackerman's] strategy of 'conversational constraint' is to avoid questions of 'moral truth.' But in the case of beliefs, it is not clear that we can even identify a particular belief without asking questions about its 'truth,' about its coherence, grounds, relationship to other beliefs, and so on. Thus to be barred from discussing the truth of contested beliefs may prevent us from discovering common ones."

⁷³ The problem of democracy's empty space is originally stated in those terms by Lefort (1988:ch. 1), who develops Tocqueville's concern that popular democratic leaders can operate outside the law into the critique that since democratic majorities are of a changing composition, democratic leaders can appeal to the empty space of "the people," even without an overt sign of all or most of the people's support. Cunningham (2002:20) summarizes the threat: "The notion of 'the people' is at once contentless and unstable. It is without content, because it is not supposed to be coextensive with any specified individuals, not even the majority at any one time. Thus, elected politicians in a democracy typically announce that 'the people' have spoken in electing them. At the same time, publics, like nature in general, abhor vacuums and are prone to identify the space of democracy with specifiable people."

⁷⁴ Galston and Galston (1994:447) note how this account justifies the judicial practice of reviewing legislative products and executive actions to ensure that they are constitutionally valid: "for Ackerman judicial review is supremely democratic because it defends the crystallized constitutional products of certain quintessentially democratic moments when the people are moved to participate en masse in deliberative judgments concerning matters of high principle."

⁷⁵ Dryzek (2004:50) argues that the suspension of constitutional constraints during these momentous and infrequent crises is evidence of a weakness in constitutional orders: "This [temporary suspension of constitutional constraints] points to a limit to constitutions as sources of order: they cannot cope with great crises."

⁷⁶ Ackerman (1991:302) employs the metaphor of "new beginnings" to illustrate the open-endedness of the constitutional project and how it is continually renewed by citizens who "mark a new beginning by mobilizing themselves for sustained political deliberation about the future of their nation." Vargova (2005:377ff11) points out that Ackerman has inherited this notion from Hannah Arendt: "Here, Ackerman follows Hannah Arendt's idea of "beginning" that she associates both with the revolutionary act of constitutional foundation that creates an entirely new political order and with its continuous augmentation through constantly rebuilding itself anew."

⁷⁷ Cohen (1997:75) makes his case that deliberation improves preferences, even if consensus is unreachable and they are eventually expressed in a majority voting procedure: “The institutional consequences are likely to be different in the two cases [deliberation that results in consensus versus deliberation that results in a vote decided by majority rule], and the results of voting among those who are committed to finding reasons that are persuasive to all are likely to differ from the results of an aggregation that proceeds in the absence of this commitment.”

⁷⁸ For a comment on how little empirical evidence there is to support this connection between deliberation and qualitative improvement of preferences, see Price and Neijens (1998:14-15). For an inconclusive study of five deliberative polls conducted in the UK in the 1990s to determine whether the deliberative polling experience led to belief or attitude changes, see Sturgis et al. (2005).

⁷⁹ For a laboratory study of group polarization, see Cason (1997). Sunstein’s (1991) earlier article surveys the empirical research on group polarization. His later essay (2000) identifies multiple examples in current political and legal institutions.

⁸⁰ Fishkin (2000:8) frames the tension in the U.S. between direct-majoritarian and elitist-deliberative decision-making in terms of the historical debate between Federalists and Anti-Federalists, and particularly the Rhode Island Referendum which was the “only effort to consult the people directly about the ratification of the Constitution.” The Anti-Federalists spearheaded the referendum as an alternative to the Federalists’ convention of running small ratification conventions in each state, where citizens could meet, deliberate and decide. Anti-Federalist supporters of the Referendum argued that “submitting it [the choice] to every Individual Freeholder of the state was the only Mode in which the *true* Sentiments of the people could be collected” (Ibid). The Federalists boycotted the referendum which decided against ratification and eventually pressured Rhode Island to hold the required state convention. According to Fishkin, the pendulum has swung back towards such direct-majoritarian methods and away from deliberation.

⁸¹ In the 1996 National Issues Convention (NIC) deliberative poll conducted in Austin, Texas, the moderators were drawn from a similar institutionalized deliberative forum called the National Issues Forums (NIFs), sponsored by the Kettering Foundation. According to Fishkin (1995:185), they were specially trained in advance to enable “participants to formulate key questions that they wanted to ask of competing experts and politicians” and “to insulate the participants as much as possible from the social pressures of reaching a consensus on the substance.”

⁸² Walzer (1999:68) interprets the deliberative poll as a concession that direct democracy is impossible: “Fishkin’s argument for citizen juries, where scientific sampling substitutes for electoral politics, suggests the central problem of deliberative democracy: Deliberation is not an activity of the demos.” However, because deliberation is not required in a direct democracy, events such as referenda, initiatives and recall elections are easily manipulated by propaganda elites, thereby generating outcomes that do not favour the common interest and undermining the goal of cultivating an informed demos. See Cronin (1989).

⁸³ The notion of rational ignorance is introduced by Downs (1957:84), who adapts the economic axiom that rational behavior is any behavior in which marginal return is greater than marginal cost to the procedure by which a citizen decides to vote: “The marginal return on information acquired for voting purposes is measured by the expected gain from voting ‘correctly’ instead of ‘incorrectly.’ In other words, it is the gain in utility a voter believes he will receive if he supports the party which would provide him with the highest utility income instead of supporting some other party. However, unless his vote actually decides the election, it does not cause the ‘right’ party to be elected instead of a ‘wrong’ party; whether or not the ‘right’ party wins does not depend on how he votes. Therefore, voting ‘correctly’ produces no gain in utility whatsoever; he might as well have voted ‘incorrectly.’”

⁸⁴ The acceptance rate in the British deliberative poll, conducted in Manchester, was 74% and in the U.S. deliberative poll, held in Austin, Texas, 72%. See Fishkin (1995:166, 179). The Kettering Institute also administers National Issues Forums, which differ markedly from Fishkin’s deliberative polls in that participants are self-selected, not randomly selected: Melville et al. (2005:39): “The National Issues Forums [NIFs] is a nonpartisan, nationwide network of organizations and individuals who sponsor public forums and training institutes for public deliberation.”

⁸⁵ The elections occurred in 1996 and pitted presidential incumbent and Democrat Bill Clinton against presidential hopeful and Republican Bob Dole. The current vice president and vice presidential candidate, Al Gore, addressed and answered the questions of participants in National Issues Convention (NIC). See Fishkin (1995:191-5, 198-200) for summaries of the exit polls in the U.S. and British deliberative polling forums.

⁸⁶ A related, but more technical objection about the quality of the sample is that the “Hawthorne effect” would weaken the experimental findings. In experiments conducted in the 1920s on factory productivity, Elton Mayo (1945) found that if factory workers knew they were the subjects of an experiment then they would alter their behavior—in the case of the factory workers, they increased productivity—in order to bring about a desirable result. Fishkin (1995:194-5) responds to this objection with three points. One, unlike the Hawthorne experiments, the environment is not entirely artificial assuming that the participants will deliberate and inquire about issues in their

natural environment prior to the event. All those aspects that might be interpreted as constituting artificiality--such as exposure to briefing material, experts and politicians--are intended to generate higher quality deliberation. Lastly, in the Hawthorne experiment, the intention was not to provide every motivational incentive for workers to be productive, whereas in the deliberative polling experiment the intent was to "establish an atmosphere of civility and substance in which citizens have every

⁸⁷ Benjamin Page (1996:90-96) makes a similar criticism of Fishkin's deliberative poll. However, Page's analysis differs from Goodin's in that he sees the source of distortion not in the design of the deliberative poll itself, but in the television and newspaper media's tendency to report the outcome in a way that suits their own agenda. Kuran (1998:542) criticizes Fishkin for a different mistaken assumption, namely, that deliberators will sincerely express their preferences in discourse.

⁸⁸ A possible counter-argument is that even though the preferences of elite-level deliberators and average citizens may diverge, the deliberators may still imagine reasons similar to those that citizens would entertain in Goodin's process of "deliberation within." Drawing on Bernard Williams's (1981) distinction between internal and external reasons, the problem with this counter-argument is that the motivational sets of elites and average citizens are not identical. So, it is likely that what an elite-level deliberator decides is an acceptable internal reason for a citizen (i.e. a reason that is good for the citizen and one that she acknowledges as good due to the fact that it is part of her motivational set) is really just a projection of the deliberator's own internal reason onto the motivational set of the citizen, thus making it an unacceptable external reason for the citizen (i.e. a reason deemed good for the citizen by the deliberator yet one that the citizen does not acknowledge as good due to the fact that it is not a part of her motivational set).

⁸⁹ In structural schemes of representation, members of an elected assembly are expected to behave as principals for their constituent-agents, acting on behalf of the interests of all or at least a majority of those whom they represent. However, they are not normally representative in the way that a representative sample is, i.e. in the sense of having the near-identical characteristics of the greater population of their constituents, or even of a majority of them. The distinction between structural representation and representativeness of a sample is clearly articulated by Brennan and Hamlin (1999:110): "The structural idea of representation is logically prior to any specific understanding of the 'representativeness' of any particular group of agents."

⁹⁰ In the more recent account, Ackerman and Fishkin (2004:7) decide to hold the holiday a week and a half before the national election.

⁹¹ By endorsing public discourse as an essential activity for securing the public good within the voting process, John Stuart Mill was in many ways a proto-deliberative democrat. "Mill's insight," according to Ackerman and Fishkin (2002:129), "was that the very process of public discussion would encourage sensitivity to the public interest." Ferejohn and Pasquino (2002:26) echo John Stuart Mill's concern that the secret ballot undermines political engagement and deliberation: "when it comes to electoral decisions, far from requiring deliberation or reason giving, our public norms seem to forbid it. In this context we are thinking specifically of the secret ballot . . . [which] work[s] to make democracy at the electoral level a matter of numbers, independent of reasons or reasoning."

⁹² Moreover, the Australian or secret ballot has the advantage of protecting the process of voting from corruption and, in particular, vote-buying. As Hershey (2005:193) explains, before the use of the Australian ballot in U.S. elections, parties were able to verify that citizens whose vote they had bought with favours voted for their candidate.

⁹³ First of all, the majority must elect a foreman who, similar to the moderator in deliberative polls, ensures that the deliberations are distortion-free. These rules of order include a five-minute time-limit for each party to speak and a supermajority voting rule for excluding a "nonconforming [or disruptive] citizen" (142). Lastly, the deliberations on Deliberation Day will reap dividends beyond the Day's activities, stimulating citizens to learn about the issues and engage in debate prior to and long after Deliberation Day. Ironically, if in the day leading up to Deliberation Day citizens test their views by continually searching out contrary information and publicly justifying them through discourse, then on the Day itself the deliberative activity they engage in could possibly yield little or no transformative effects on their already tested and well-proven views. Ackerman and Fishkin (2002:135) call this the "leveraging strategy."

⁹⁴ For a more exhaustive account of the logistical and financial minutiae of how to implement the institutional design of Deliberation Day, see Ackerman and Fishkin (2004). There are some minor differences between this latest account and their first formulation (2002).

⁹⁵ What I am not claiming is that Posner misunderstands the concept of opportunity costs. Ample evidence can be found in his own seminal writings on law and economics to refute such a claim. For instance Posner (1986:6): "Cost to the economist is "opportunity cost"—the benefit foregone by employing a resource in a way that denies its use to someone else."

⁹⁶ As an example of such a system of high-stakes deliberative decision-making, Cohen and Sabel's (1997:325) scheme of a direct-deliberative polyarchy seeks to solve the problems associated with representative and aggregative democracy: "directly-deliberative polyarchy' . . . marries the virtues of deliberation and directness to an ideal of learning by explicitly pooling experience drawn from separate experiments."

⁹⁷ Manin (1987:343) quotes from Rousseau's *Social Contract*: "Each person in voting, gives his opinion in this matter, and the general will is then deduced by counting the votes. Therefore, when an opinion contrary to my own prevails, it merely proves that I was mistaken, and that what I had taken to be the general will, was not."

⁹⁸ Self-selection, from the perspective of a social science researcher, is methodologically unsound because it cannot nullify extrinsic threats to the internal validity of the experiment, that is, biases in the form of selection effects (e.g. more affluent and educated people, usually ideologues, deciding to participate in the event) that would lead to a non-random and non-representative sample. See Frankfort-Nachmias and Nachmias (2000:95-6).

⁹⁹ To clarify, here I am not referring to ethnic or cultural minorities. The objection could be made that the controlling minority need not be composed of elites. While this is true, in a discourse of mixed elites and non-elites the tendency is for the more educated, articulate and expressive to be the elites, who will thereby exercise greater influence during the deliberation process. For instance, Sanders (1997:365) reports that "[s]tudies of the behavior of interracial groups in American classrooms support the general finding that emerges from studies of juries, that members of the dominant group in society also tend to dominate in small groups working on a common problem."

CHAPTER FOUR

¹ One possible explanation explored by Laswell (1951:3) and Buchanan (2003a:151) for why deliberative democrats have failed to find a common language and set of assumptions is the swift growth in the complexity of the subject-matter and the unsatisfied need for specialization among theorists and researchers.

² Public choice is described as a research programme by Buchanan (2003c:1, 2003b:13). Constitutional economics would then more accurately be described as a sub-research programme, even though Buchanan (1990:12-13) refers to it also as a research programme. So, most of the following references will remain consistent with Buchanan's usage, i.e. constitutional economics as a research programme, unless constitutional economics is related to its parent programme of public choice, in which case I will opt for the alternative usage, i.e. constitutional economics as a sub-research programme.

³ These founders come from the Virginia School of Economics. Buchanan is the most renowned of these four men, having been awarded the Nobel Prize in Economics in 1986 for, as cited in Shapiro (2003:17), "his development of the contractual and constitutional bases for the theory of economic and political decision-making." Two other schools of public choice exist—one, the Rochester (New York) school led by Riker and often called "social choice" and, two, the Bloomington (Indiana) school led by Vincent and Elinor Ostrom. Historical account of the development of the public choice research programme can be found in Ostrom (1987), Buchanan (2003c), Mitchell (1988) and Ostrom and Ostrom (2004).

⁴ As mentioned in chapter one, Vanberg and Buchanan (1989) recommend deliberation in a limited fashion, i.e. as a way of gathering information and altering theory-based preferences. The economist Albert Hirschman (1989:77), cited by Bohnet and Frey (1994:344), endorses "a democracy [in which] . . . opinions [are] *not* . . . fully formed *in advance* of the process of deliberation."

⁵ This extension of economic modeling to non-market decision-making has also, in Ostrom's (1975:848) words, "provoked a paradigmatic challenge to those fields of scholarship (public administration and political science) which have been centrally preoccupied with nonmarket decision making." Probably more than any other public choice scholar, Buchanan has persuasively argued that the methods of economics and models of public choice analysis should be used to better understand political phenomena. See Sandamo (1990:50).

⁶ Independently, Buchanan (1977c, 1984, 2003b, 2003c) and Tullock (1967, 1979) authored essays outlining the justification, assumptions and methodology for the public choice research programme.

⁷ Buchanan was not the first to deploy nearly identical assumptions about human behavior in political contexts as are made in economic contexts, or market-places. At least three classical theorists—Kenneth Arrow, Anthony Downs and Mancur Olson—have conducted analyses of political phenomena under the aegis of a closed behavioral system. Kenneth Arrow (1951) called into question the legitimacy of those democratic decision-making processes governed by majority rule. As explained in chapter one, Arrow demonstrated how majority voting leads to cycling and inherently unstable outcomes if human rationality is modeled identically in political and economic contexts. Anthony Downs (1957) applied the principles of economics to electoral politics, proposing that parties behave as firms by choosing a platform will maximize popular support and votes given the current distribution of views along

a left-right ideological spectrum. In his rational ignorance thesis, Downs (1975:265) argued that since “time is a scarce resource, voting is inherently costly,” and so informing oneself about the issues and casting a ballot are manifestly irrational given the small probability that the vote would decide the election’s outcome. Finally, Mancur Olson (1965) studied how political agents reason as economic agents in their pursuit of public goods and the extent to which this logic discredits the group theories of Bentley (1967 [1908]) and Truman (1951). Since no member of a group may be excluded from the common objectives and shared benefits of public goods, it is rational for agents to accept the benefits offered by the group yet forego paying the costs, thereby making the agent a free-rider who weakens the ties of allegiance which bind individuals together in groups.

⁸ “Closure of the behavioral system,” according to Buchanan (1972b:12), “means only that analysis must be extended to the actions of persons in their several separate capacities.” Tullock (2005 [1997]:17 ff8, 1972:321) reports how he appropriated Buchanan’s saying that the person in the voting booth and the person in the supermarket are identical. Nevil Johnson (1978:135) sceptically challenges, “if one talks about the economics of politics . . . is there not a danger in concluding too easily that we can construct an account of political relationships, and a theory of how the political system works, which treats the political system as analogous to the goods producing system constituted by the economic arrangements of the society? I am doubtful whether the analogy can or should be pursued too far.” Boulding (1969:1-2) object to the closing of the behavioral system, calling it “economics imperialism.”

⁹ Brennan and Lomasky (1993:6) write: “As they [i.e. public choice’ theorists] see it, accepted ‘political theory’ is characterized by prescriptive definition and heroic assumption, stronger on ‘hope’ than analytic reasoning.” Indeed, Buchanan (1979:145) asserts that both political theorists and welfare economists endorse a naïve conception of government: “Most economists and, I suspect, most political scientists, view government as a potentially benevolent despot, making decisions in the ‘general’ or the ‘public’ interest, and they deem it their own social function to advise and counsel this despot on, first, the definition of this general interest and, second, the means of furthering it.”

¹⁰ Public choice’s two initial assumptions--methodological individualism and rational choice--are drawn directly from the fundamental tenets of microeconomics and formal political theory. The last postulate, or politics understood as an exchange process, comes from a less recognizable source, one which directly links public choice with constitutional economics: constitutional contractarianism. In this section, the three postulates will be briefly summarized. As postulates, these propositions not only form the hard core of the research programme; they also function as all-purpose proposals and guides for meaningful inquiry. Ostrom and Ostrom (1971:205-11) propose a competing set of postulates that do share one in common: methodological individualism. The others are “the conceptualization of public goods as the type of event associated with the output of public agencies” and the idea the alternative decision-making structures generate alternative effects on the rational strategies of individual agents.

¹¹ These propositions are based upon, though not identical to, those enumerated by Malcolm Rutherford (1996:31-2). Vanberg (1986:80) defines methodological individualism as “the guiding principle that aggregate social phenomena can be and should be explained in terms of individual actions, their interrelations, and their--largely unintended--combined effects.” Debate persists among economists as to whether the origins of the assumption can be traced to Adam Smith (1976). For those who argue that it can, see Buchanan (1987a) and Vanberg (1994). For those who contend that Smith was not the originator, see Sen (1987, 2000) and Walsh (2000).

¹² While public choice theorists accept the assumption that agents possess a single set of motivations, this acceptance does not resolve the more contentious issue of how to characterize the substance of those motivations. At the hard core of the public choice programme, the methodological individualism postulate avers that the primary motivation of autonomous agents is self-interest. However, at the margin of the research programme, there are at least two conflicting approaches to construing the scope and intensity of self-interest. The strong approach to methodological individualism asserts that self-interest is best interpreted as amoral egoism; that is, agents seek to advance their own private interests solely for selfish reasons, and without regard to moral consequences. Buchanan and Tullock (1962:30) illustrate the strong approach’s disregard for the morality or immorality of outcomes: “We propose to analyze the results . . . independently of the moral censure that might or might not be placed on such individual self-seeking action.” Brennan and Hamlin (1995:294) explain the methodological rationale for construing self-interest as amoral egoism: “[W]e might assume that individuals are amoral, so that we focus on the moral properties induced by institutions against a morally neutral background.” The weak approach, on the other hand, states that self-interest only partially characterizes the motivational makeup of human agents. What should also be incorporated into models of agent psychology are empirically supported insights about human motivation, particularly from behavioral economics, social psychology and cognitive science. In Don Boudreaux’s (2005) opening talk to the attendees of the 25th Annual Public Choice Outreach Conference, this version of methodological individualism was illustrated with the following two questions to an audience member: “Would you donate one of your kidneys to a complete stranger? How about a family member or friend?” An answer in the

negative to the first question and one in the affirmative to the second question was taken as evidence that self-interest extends to family and friends. Tullock (2005 [1997]:17) also espouses this slightly relaxed version of strong methodological individualism, or “the simple assumption that people were mainly trying to maximize the well-being of themselves or their families in politics.”

¹³ In order to achieve particular research objectives, social science researchers may conditionally attribute purposes and preferences to collective bodies. Arrow (1951) attributes preference rankings normally reserved for the utility functions of individual agents to collective bodies, deriving social preference orderings and group utility functions. Moreover, he applies the individual rationality condition of transitivity to groups for the sake of evaluating the stability of decision-making processes governed by a majority voting rule. Since Arrow does not disclaim that groups can be rational in the way that individuals are, Buchanan (1987:173) criticizes him for being disingenuous to the postulate of methodological individualism, making groups into “organic” social wholes.

¹⁴ Although, as Buchanan (1984:14) draws attention to, “preferences may differ,” the motivation to satisfy those preferences does not. Rather than creating a problem for public choice scholars, this variance in individual preferences and their rankings establishes the conditions for mutually-beneficial transactions. “[P]ossible differences among persons,” Buchanan maintains, call forth “an exchange opportunity” (Ibid). If agent 1 values outcome A more than agent 2 values outcome B, then agent 1 has reason to invest scarce resources in persuading agent 2 to accept outcome A rather than B. Through the device of the veil of ignorance, Rawls’s (1971) imposition of a state of perfect equality, and therefore identity, upon agents to the original position negates this primary condition for economic exchange: viz., that agents have diverse preferences. As Gordon (1976:576) affirms, “[h]is [i.e. Rawls’s] initial conditions in fact reproduce the one state of affairs in which economic theory shows that no mutually advantageous bargaining is possible—where the parties are identical” By drawing attention to this condition for economic exchange, Buchanan and Tullock (1962:134-5) also anticipate their model of log-rolling, in which differences of preference intensity make it rational for legislators to trade votes.

¹⁵ In one of Buchanan’s (1964:217) seminal articles, he makes the argument for a wholesale change of perspective among economists, one that focuses on exchange: “I want economists to modify their thought processes, to look at the same phenomena through ‘another window,’ to use Nietzsche’s appropriate metaphor. I want them to concentrate on ‘exchange’ rather than ‘choice.’” The politics-as-exchange postulate makes a similar request of political scientists and theorists, that is, to understand political phenomena in the terms of an exchange paradigm.

¹⁶ Hayek (1976:108) refers to free market competition as “the game of catallaxy,” a “wealth-creating game,” a “zero-sum game” and one whose outcomes result from a “mixture of skill and chance” on the part of its players. DiZerega (1989:235) characterizes catallaxy as “a social order predicated upon contractual exchange.” The exchange process “with its natural extension to institutional settings in which persons interact collectively” is “in a very broad sense,” Buchanan (1989:16) states, “what the public-choice perspective on politics is about—a different way of looking at the political process.” Thus, as a unique perspective on politics, the politics-as-exchange postulate challenges political observers to view collective political action as the overcoming of a coordination problem: either both agents withhold their potential contribution to the group effort or both give it up as part of a reciprocal exchange. See also Vanberg (1986), Gamble (1996), and Macedo (1999).

¹⁷ Pareto-superiority is thought to be the efficiency standard that most closely approximates the requirements of justice. In addition, if there is no state which is Pareto-superior to the one arrived at through agreement, then the exchange outcome is Pareto-optimal. Jules Coleman (1984:149) criticizes the use of Pareto-optimality as a “guide to public policy” because an assertion that an outcome is Pareto-optimal stifles efforts to find Pareto-superior moves and thus perpetuates the status quo: “If an existing state of the world were not optimal, rational autonomous agents would make a Pareto-superior move. If every existing state of affairs is optimal, it is unlikely that the criterion of optimality can serve as a guide to change.”

¹⁸ Coleman (1990:139) explains how Buchanan treats the efficiency of exchanges as contingent on particular institutional frameworks: “Buchanan’s insight is that efficiency is always defined within a framework for trade. Frameworks differ and what will count as a market failure will always be relative to a particular framework.” By relativizing efficiency to institutional frameworks, it turns out that “any given state of the world [or outcome] at any time (ruling out force or fraud) is efficient” (140). So, instead of efficiency, the common measure between competing institutional frameworks becomes the degree of voluntariness. This strategy is similar to Carnap’s (1967) treatment of the meaning of linguistic expressions as relative to the semantic and syntactical rules of particular linguistic frameworks. Also, see Putnam (2002) and Ralston (2004).

¹⁹ While critical of the model’s assumption that agents are purely self-interested, Mansbridge (1990b:141) nicely summarizes the situational conditions of the prisoner’s dilemma: “In the prisoner’s dilemma a district attorney offers, individually, each of two prisoners release from jail if they give evidence that will convict the other. If one remains silent but the other gives evidence [i.e. unreciprocated cooperation], the prisoner who holds his tongue will receive a heavy jail term but his comrade, who squealed, will be released. If both remain silent [i.e. mutual

cooperation], they will both get only a short term in jail. If both give evidence against the other [i.e. mutual defection], they will both get moderate terms. For each individual, the best strategy is to give evidence on the other [i.e. the individually rational choice of mutual defection], but if both give evidence they will each be worse off than if they had kept quiet [i.e. the collectively optimal choice of mutual cooperation].”

²⁰ This rational choice account of equilibrium was first formulated by John Nash (1950). In public choice and neoclassical economics, “[e]quilibrium means that a state of balance exists between opposing forces or that there is a state of rest, the achievement of which means that there are no incentives for further changes” (Johnson 1991:21). For an examination of the Nash equilibrium concept in the context of modeling bargaining processes under incomplete information, see Chatterjee and Samuelson (1983).

²¹ Vanberg and Buchanan (1990:180) highlight the differences between a coordination and prisoner’s dilemma problems: “The ‘perverse incentives’ that characterize prisoner’s dilemma problems are absent in coordination problems; rules can therefore emerge and be maintained much more smoothly for coordination problems.”

²² Buchanan (1997b:175) clarifies the connection between the postulate of politics-as-exchange and contractarianism: “The process through which constitutional agreement, conceptually, remains contractual, and remains in this sense ‘political exchange’, in which each individual trades off or exchanges his or her own interests with others. Each person or group accepts the potential constraints defined by the constitution in exchange for the like acceptance of comparable constraints by others in the community.” One of the problems with contractarianism, as revealed by Jules Coleman (1984:142), is that if voluntary consent is treated as a necessary condition for the outcome to be justified and there are winners and losers, then either we say that the losers’ loss is unjustified because they did not consent to it or that the losers agreed to accept their losses in originally giving their consent to the contractual arrangement.

²³ T.M. Scanlon (1982) established the main tenets of contractarianism in moral philosophy: “An act is wrong if its performance under circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis of informed, unforced general agreement” (110). One major difference with Buchanan’s model is that while the “unforced agreement” condition in Scanlon’s account eliminates coercion as well as imbalances of bargaining power, for Buchanan it bans coercion but allows for unequal bargaining influence because any alteration of the status quo ante would be arbitrary. See Avio (1997:542-3). Cohen (1996:101) disputes whether Scanlon’s notion of reasonable rejection is equivalent to his idea of reasonable acceptance, whereby constraints are placed on what count as acceptable reasons in deliberations.

²⁴ Brennan (1984:129) explains how constitutional economists conceive this connection between rules, process and outcomes: “one [the constitutional economist] is committed to spelling out the complex interaction process that connects emergent end states to the underlying institution [rule-based] fabric. One necessarily understands public-policy outcomes as the result of political process.” Ostrom (1987b:77) clarifies the relationship between constraints and constitutions: “The design of a particular constitution depends upon certain basic assumptions, terms, and propositions used by its designers in building political constraint into the structure of inter-personal relationships so that people can govern their affairs.”

²⁵ In Buchanan’s (1978:9) account of the genesis of his book project with Gordon Tullock, *The Calculus of Consent* (1962), he tells of how they overcame the difficulty of how to transform self-interest into a more generalized interest or enlightened self-interest “by looking at how rules for ordinary parlour games are settled *before* the fall of the cards is known. Uncertainty about just where one’s own interest will lie in a sequence of plays or rounds of play will lead a rational person, from his own interest, to prefer rules or arrangement or constitutions

²⁶ “Wicksell supported changes in voting rules from simple to qualified or super majorities,” Buchanan (2003b:14) reports, “for example, the requirement of five-sixths approval for collective proposals.”

²⁷ In this way, politics-as-exchange differs during constitutional and ordinary politics contexts. Buchanan (1997b:174-8) explains the difference in terms of two models of exchange: (i) exchange between relative equals to constrain the power of government, restricted to the constitutional level of agreement and (ii) exchange between the drastically unequal citizen and the “monolithic and coercive agency of government,” occurring within already existing constitutional rules and usually resembling a bilateral monopoly. However, the analytical distinction of the two, Buchanan reminds his reader, is artificial: “By necessity, the individual in a democracy participates simultaneously in the two political exchanges isolated for discussion” (180).

²⁸ C.B. MacPherson (1977) initially makes the distinction between developmental and protective democracy. Frank Cunningham (2002:34) explicitly connects protective democracy with Madison’s thought: “Protective democrats, in the tradition of Madison . . . think that inevitable disparities in people’s abilities combined with the equally unavoidable centrality of self-interest in human behaviour will ensure economic inequalities and, in turn, prompt factional conflict over perpetual scarcity of resources.” See also Held (1996) and Harrison (1993). As a protective democrat, Buchanan (1997c:220) notes that constitutional constraints are necessary to protect against the excesses

of “[m]ajority rule [as] . . . a means through which the interests of those who make up the successful coalition may be advanced, if necessary, at the expense of those who are outside the coalition.”

²⁹ According to Shapiro (2003:17), Buchanan and Tullock’s analysis of constitutional rule-making “builds on the [U.S.] Framers’ impulse to make some rights and liberties more difficult than others to change by majority rule.” Buchanan (1989b:22-3) acknowledges Madison’s influence on public choice generally: “It is not surprising, therefore, to discover the roots of a public-choice perspective that contains both elements [the *homo economicus* and politics-as-exchange postulates] in the writings of the American Founders, and most notably in James Madison’s contribution to *The Federalist Papers*.”

³⁰ On the superiority of majority rule, Locke (1988[1690]:332) argues, “for that which acts of any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary that Body should move that way whither the greater force carries it, which is the *consent of the majority* . . . and so every one is bound by that consent to be concluded by the *majority*.” Following the social choice literature, Barry (1979) argues that the “majority principle . . . is that outcomes are legitimate if they correspond to majority preference and illegitimate if they run counter to majority preference.” Although critical of the dominant strain of democracy, or what she calls “adversarial democracy,” Mansbridge (1981:466) declares that “majority rule, once an incomplete substitute for consensus, is now almost synonymous with democracy itself.” Likewise, Dahl (1989:135) states that “[c]ontemporary writers—both advocates and critics of democracy—often hold that democracy ‘means’ or requires majority rule.” Also, Habermas (1996:179) emphasizes the importance of majority rule. And, lastly, Rawls (1971:356) presumes that “some form of majority rule is justified as the best available way of insuring just and effective legislation.”

³¹ Coleman (1984:152) objects to Buchanan and Tullock’s approach on the ground that it would not prove feasible to treat all external costs as relevant to measuring the decision rule’s efficiency: “It’s hard for me to imagine that all transaction costs would count as part of an institutional [or decision rule’s] setting--unless we stretch the concept of an institution [or decision rule] to the point where it ceases to be a useful one.”

³² “The number of categories, and the number of decision-making rules chosen,” Buchanan and Tullock (1962:75-6) write, “will depend on the situation which the individual expects to prevail and the ‘returns to scale’ expected to result from using the same rule over many activities.” In other words, if applying a single rule on a larger scale basis continues to produce net gains, then the positive return justifies maintenance of the rule. However, if after extending the rule to a grander scale it begins to generate excessive costs and inefficiency, then a change of rule is warranted insofar as it restores net gains and cost-efficiency.

³³ Among constitutional economists, Jack Goode and Gordon Tullock have taken the position that the Supreme Court would be required to use a two-thirds decision rule when setting precedent, as reported in Tullock (2005 [1998]:352). In the controversial U.S. Supreme Court case of *Roe vs. Wade* (1973), adoption of this super-majority decision rule would still have eventuated in the same controversial decision, as seven justices were in the majority. However, in the case of *Bush vs. Gore* (2000), which decided the 2000 U.S. presidential election, the outcome would not have been affected with regard to the opinion to stop the recount because there was not an existing legal standard (decided by seven justices), but the *per curiam* opinion that there was not enough time to determine a standard by which to hold a new recount (decided by five of the nine justices) would have been decided the other way.

³⁴ Buchanan (1991:235) defines the “electoral fallacy” as “the idea that so long as governments act ‘democratically’ in accordance with decisions by duly elected representatives in parliamentary or legislative assemblies, the individual is sufficiently protected against the overreaching of the State.” Brennan (1981:137) agrees with Buchanan that “the case for a model in which government is totally constrained by the majoritarian electoral processes seems to me to be extremely weak.” Ian Shapiro (1996:17) accuses Buchanan and Tullock of committing what he calls the “reductionist fallacy.” By reducing political decision-making to analogous choice processes in the demand-side theory of micro-economics, individual voters are modeled as consumers seeking to maximize gains from trade by minimizing interdependence costs. Buchanan and Tullock’s reductive strategy proves defective, Shapiro (1996:17-29; 2003:17-19) contends, for three reasons: (i) a faulty social contract myth hidden in their assumptions, (ii) their conflation of two senses of unanimity, and (iii) their undue privileging of the status quo (or what has been previously termed ‘status-quoism’). Although Buchanan (1977:140) concedes that some changes to the status quo might be forthcoming, he notes that in order to ensure the voluntariness of these changes, “compensations [to the advantaged party] might be required to secure agreement.” Shapiro (1996:22) responds: “One must anticipate that no matter how much time is spent negotiating, the bag lady from Manhattan may not have the resources to compensate the millionaire businessman and ‘buy off’ his potential opposition to a welfare program.” Unexpectedly, though, Buchanan’s (1977:141) qualified version of his compensation requirement provides an opportunity for deliberation: “To the extent that argument, debate, and discussion can generate consensus on change, on reform, the need to resort to more overt means of compensation is reduced or eliminated.”

³⁵ Buchanan (1984b:29) describes the truth-discovery approach to decision-making embodied in jury deliberations: "The jurors are directed to find the truth, to ascertain the correct answer to the question of guilt or innocence." Another example of a deliberative forum that embodies a truth-judgment approach is a moral or ethical philosophy seminar. As Brennan (1989:63) explains, the dynamics of these academic seminars are distinctly different than the dynamics of forums within ordinary politics: "Politics may often be an arena for ethical debate, but it is not a moral-philosophy seminar--supposing, for the purpose of illustration, that a moral-philosophy seminar can be seen as a context where participants are engaged in some common quest for moral truth."

³⁶ Young (1996) and Sanders (1997) highlight how the narrow definition of deliberation reinforces the marginalization of uneducated deliberators and the privileging of educated participants within the deliberation, given their different levels of competency at rational argumentation. Elster (1997) and Bohman (1996) consider the relationship between deliberation and bargaining, while Remer (1999, 2000) investigates the connection between deliberation and rhetoric.

³⁷ More often than not, the results of political competition are, in other words, Kaldor-Hicks-efficient, meaning that at least one party benefits to such an extent that it can in principle compensate others for their losses (though compensation is seldom required), than Pareto-efficient, meaning that no part loses and at least one party benefits.

³⁸ Carlos Nino's (1996:118) procedural account of deliberation, in which "the results [of deliberation] are presumed to be good because they are produced by that procedure," is an example of the kind of pure proceduralism Gutmann, Thompson and Shapiro deplore. However, Gutmann and Thompson have also come under attack, particularly from Schauer (1999:22), for proposing an overly-ideal model of deliberation: "The central anomaly in their argument . . . is the tension between, on the one hand, the nonideal world that they rightly claim gives rise to the problems that address and, on the other, the idealized dimension of the solution they propose for resolving or at least managing those problems."

³⁹ Austen-Smith and Feddersen (2006:211) respond to Coughlin (2000), stating that his conclusion does not hold in the case of all voting rules under the more realistic condition of uncertainty about other deliberators' preferences: "In this case, the choice of voting rule does matter."

⁴⁰ This solution is consonant with Bohman's (1998:401, 422) observation that "deliberative democrats have become increasingly interested in the problems of institutionalization" and that, as a result, "deliberative democracy has now 'come of age' as a practical ideal." He continues: "As a feasible version of participatory democracy, theories of deliberative democracy have increasingly gone beyond questions of justification to problems of institutional design" (415). See also Dryzek (2000), Bohman (1996) and Nino (1996) in their attempts to institutionalize Habermas's (1996) deliberative ideal.

⁴¹ Christiano (1993:176) coins the expression "'straightforward' voting" to describe what others in the literature call "'sincere' voting." Brams (1975:56) defines 'sincere voting' as when the agent "votes directly in accordance with his preferences." So, strategic voting is a species of insincere or non-straightforward voting, as well as preference falsification. For empirical research and public choice analysis of strategic voting, see Felsenthal and Brichta (1985), Berg and Lepelley (1990) as well as Cherry and Kroll (2003).

⁴² The Hare system of a single transferable vote (STV) was initially devised by Thomas Hare in England and Carl George Andre in Denmark in the 1850's. J.S. Mill (1862:25) esteemed it as "among the greatest improvements yet made in the theory and practice of government." Each voter ranks all of the candidates. In the first round, all those candidates who do not make the quota defined as $(n/(m+1) + 1)$, where n is the number of voters and m the number of candidates to be elected, do not advance to the second round. All those who do make the quota have all votes in excess of the quota transferred to the second round, and the process continues with those who do not make the quota or the one which receives the lowest number of votes being eliminated in each round thereafter until the final slate of elected candidates remain. Thus, if a person's vote does not assist in electing their first preference, because it is impossible that the candidate will win (so that, for instance, the candidate is eliminated for not making the quota in the first round), their second, third and so on preferences can still count toward choices in later rounds. However, even STV is susceptible to manipulation by voters who estimate which candidates are most likely to be eliminated and in what order and then truncate their votes, or fail to state all their preferences; see Brams and Fishburn (1984). However, this is difficult to effectuate. Proposed over two-hundred years ago, Borda's (1781) procedure, the Borda count, ranks candidates from the lowest (0), next to lowest (1), and so on up until the highest ranked candidate, which receives $m-1$ points, if m is the number of candidates. Points are added up for each candidate and the candidate with the largest number of points is victorious. This system also eliminates what is called the 'spoiler effect,' or votes being wasted on a candidate which has little or no chance of winning, but can also be strategically manipulated so as to defeat the most serious competitor to one's favorite candidate by always ranking it last; see Ludwin (1978). According to Black (1958:238), awareness of this weakness caused Borda to declare, "My scheme is intended only for honest men."

⁴³ Vote trading is openly practiced in U.S. legislative politics, typically resulting in the reciprocal exchange of pork-barrel projects or earmarked funding for projects in representatives' districts. In Canada, Tullock (2005 [1994]) remarks, the case is slightly different: "Vote trading is . . . less obvious in Canada where very strong party discipline precludes Members of Parliament from voting against their party. However, there are issues on which parties vote together, and laws are often modified at the committee stage to reflect the concerns of opposition parties. The process of bargaining is simply less obvious in Canada than in the U.S." For a formal model of logrolling and demonstration of its applicability to actual cases, see Tullock (1970b).

⁴⁴ Buchanan and Tullock (1962:125) describe why most normative political theorists neglect the phenomenon of vote-trading: "Much of the traditional discussion about the operation of voting rules seems to have been based on the implicit assumption that the positive and negative preferences of voters for and against alternatives of collective choice are of approximately equal intensities. Only on an assumption such as this can the failure to introduce a more careful analysis of vote-trading through logrolling be explained." Hardy Lee Weiting (1966:99-100) argues that Buchanan and Tullock's critique of democratic theorists rests on an illicit assumption that interpersonal comparisons of the strength of preferences can be made. Buchanan and Tullock (1966:305) respond that the objection displays a fundamental misunderstanding of the economic framework within which their analysis in *The Calculus of Consent* was conducted, particularly "in so far as such trade [in votes] takes place, relative intensities of preference, in an interpersonal sense, can be reflected in the outcome of majority voting, provided that a sequence of issues is presented and provided that relative intensities differ."

⁴⁵ In their empirical work and formal models, political scientists have long acknowledged that there exist institutional incentives for legislators to form minimum winning coalitions to support specific distributive policies through logrolling activities; see Riker (1962), Enelow and Koehler (1979), Koford (1982), Baron and Ferejohn (1989) and Grosecloser and Snyder (1996). More recent empirical and analytic work supports the claim that politicians pursue membership in broad-based (also termed 'universalistic') vote-trading coalitions, so as not to be excluded from the advantages that accrue to their districts from pork-projects and, in turn, to their prospects for successful re-election; see Ferejohn (1974), Arnold (1979), Wilson (1986), Weingast (1994), Collie (1988) and Carubba and Volden (2000).

⁴⁶ Weiting (1966:92) criticizes Buchanan and Tullock's model of logrolling for its inability to account for the "group [that] hold[s] to their convictions about the evils of trading votes." Buchanan and Tullock (1966) respond that Weiting has gone too far in construing the normative implications of their positive analysis of voting rules and logrolling: "if one must interpret positive analysis in normative terms, the implication of our analysis on this particular point could perhaps best be summarized in the admonition: 'Relax!'"

⁴⁷ Similar to strategic voting, the potential for forming these coalitions depends on the degree to which agents have information about each other's preferences and how they intend to vote. "The extent to which people can successfully trade votes so as to get outcomes that they desire," Christiano (1993:177) claims, "also depends on their ability to form coalitions as well as on their information about others' preferences and voting strategies." Consequently, deliberation that reveals preferences and electoral strategies complements the practice of effective vote trading. However, in representative democracies, legislative politics that includes vote trading can also produce perverse outcomes. This is particularly the case when representatives trade votes on special (or 'pork-barrel') projects that generate concentrated benefits for trading partners' constituents and dispersed costs, usually in the form of increased taxation, for the entire citizenry citizens—a situation analogous to Olson's (1965) free-riding problem. Johnson (1991:217) explains how pork-barrel projects coincide with logrolling: "The pork barrel projects—you vote for my pork or port and I'll vote for your sugar or silo—are a familiar part of every congressional session. Various minority groups benefit by voting for each other's projects while the tax bills are shared by the majority of citizens."

⁴⁸ According to Jonathan Macey (1986:251), cited in Elster (1995:247), "[t]he reason special interest legislation is so often drafted with a public-regarding gloss is because the gloss raises costs to the public and rival groups of discovering the true effects of the legislation. This, in turn, minimizes the major cost to the legislator of supporting narrow interest group legislation—the loss of support from groups that are harmed by the legislation."

⁴⁹ Austen-Smith (1992:46) states that "[t]he rational choice approach to modeling talk is to treat speeches (or messages or announcements) as signals in much the same way as, for example, educational achievements are signals of ability." Signals need not be veridical or truth-preserving. Farrell (1993:516) models a "signaling game" as "a simple two-player two-stage game of incomplete information." Signaling presumes that interlocutors have a robust language of shared meanings. However, the problem of meaning or comprehensibility of the message must be distinguished from the problem of credibility or whether the message is believable (530).

⁵⁰ Dryzek (2000) and Ward, Norval et. al (2003) designate the cheap talk allegation the 'Rochester critique' because many of those critics of deliberative democracy who employ it are academics at the University of Rochester. Some of these include Knight and Johnson (1994), van Mill (1996), and Przeworski (1998).

⁵¹ The tendency of agents in deliberations to veil their self-interested plans as proposals to benefit the public good may also cause listeners to devalue or disregard these statements as cheap talk. Elster (1998b:102) understands the incentive to dissemble in this fashion as a trade-off: “there is an obvious trade-off. On the one hand, the proposal has to be sufficiently diluted to deflect suspicions [that the proposal is motivated by self-interest] (*the imperfection constraint*). On the other hand, it must not be so much diluted that the interest in question is harmed rather than promoted.” Farrell and Gibbons (1989:222) argue that the perception that lying is costless not only affects deliberations, but also “cheap talk can affect whether negotiations ensue.”

⁵² Austen-Smith (1992:46) frames the problem of discovery in terms of opportunity costs: “frequently it is no harder for a speaker to announce that X is the case than it is to announce that Y is so; talk per se has no real opportunity cost, and the content of speeches can be prohibitively costly to verify.”

⁵³ This short definition of rent seeking follows Tullock’s (1980:17) account: “an individual who invests in something that will not actually improve productivity or will actually lower it, but that does raise his income because it gives him some special position or monopoly power, is ‘rent-seeking,’ and the ‘rent’ is the income derived.” Likewise, Buchanan (1980a:4) defines rent seeking: “The term rent seeking is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus.”

⁵⁴ The rent-seeking literature begins with Tullock’s (1967) seminal article and was given its namesake by Anne Krueger (1974). According to Buchanan (2003c:6), “the central idea [of rent seeking] emerges from the natural mind-set of the economist, whose explanation of interaction depends critically on the predictable responses of persons to measurable incentives. If an opportunity that promises to yield value arises, persons will invest time and resources in efforts to capture such value for themselves.” Moreover, Tollison (1982:578) writes: “Rent seeking is the expenditure of scarce resources to capture an artificially created transfer. [. . .] Rent-seeking costs are incurred . . . and only the form that such costs take is influenced by how the government transacts its business in artificially contrived scarcity values.” Whereas Tollison (1982:587) believes that rent seeking extends to private setting, others, such as DiLorenzo (1984:185), maintain that “government empowerments (licenses, franchises, tariffs, etc.) are most often essential for a meaningful analysis of rent-seeking behavior.”

⁵⁵ Some deliberative democrats have considered the possibility that government might legally compel private citizens to deliberate, and have responded negatively. According to Gutmann and Thompson (2004:35), “voluntary associations should be free from any state-imposed requirement to deliberate.” Shapiro (2003:43) identifies deliberation as a “consumption good” or an activity that citizens should freely to choose to take up: “people should be free—but not forced—to engage in it [deliberation].”

⁵⁶ Schroeder (2002:116) comments: “Private pursuits, including those associated with family, work, and leisure, will compete for the resources of deliberative citizens. We live in a time in which human flourishing is intimately associated with activities of private life, including family, relationships, career, and the pursuit of life projects. The value in these aspects of ordinary life constitutes one of the hallmarks of modernity.”

⁵⁷ In making this argument that more deliberation produces better or more truthful results, Habermas (1984) has explicitly invoked Karl Otto Apel’s (1984) transcendental pragmatics as a justification for his own theory of discourse ethics. Relying on Charles S. Peirce’s (1998 [1905]) definition of truth as the outcome of an indefinitely extended inquiry, Apel’s notion of transcendental pragmatics substitutes discussion for inquiry, so that all discourse continued for an indefinite period of time tends to converge on the truth. See Putnam (2002:175 ff22).

⁵⁸ Empirical researchers, Ward, Norval, Landman and Pretty (2003:287), make this point: “Sometimes it is possible to find solutions in which all stakeholders can win. However, those construed as stakeholders are seldom the only people with relevant concerns, as decisions often generate uncompensated losers, or at least relative gains. An apparent consensus can, therefore, hide a power play. To move too quickly to consensus is often to be satisfied with what those who most loath to see change will accept.”

⁵⁹ A concrete example of this kind of deliberative forum would be the U.S. 9-11 Commission, which inquired into the circumstances surrounding the September 11th terrorist attacks on New York’s World Trade Center and the Pentagon. Although the U.S. President did not implement all of the recommendations, the outcomes of the Commission’s investigations and deliberations have since been accepted by most citizens as legitimate and continue to inform criticisms of the administration’s national security policy with regard to the “war on terror.” See National Commission on Terrorist Attacks (2004).

⁶⁰ Somin (1998:440) continues: “It is thus lamentable that deliberative democrats have generally overlooked the widespread ignorance that prevents most voters from achieving even the more modest levels of political knowledge required by traditional pluralist conceptions of democratic control.” She cites several empirical studies conducted in the 1980s and 1990s which confirm the existence of an epistemic deficit among voters, particularly with regard to (i) their understanding of the basic institutions of government, (ii) their capacity to conceive the relations between multiple issues relative to a single ideological framework and (iii) their persistence of ignorance in the face of increasing levels of education in the general populace (417-9).

⁶¹ Like many other “[c]ritics of liberal ideology,” Schumpeter on Ricci’s (1970:247) reading, “strongly denied the basic assertion of large numbers of generally rational men [and women].” Similar to Schumpeter, Schauer (1999:25, 17) notes that “[i]t is a source of continuing astonishment for me that such a small percentage of even my soundest opinions command widespread assent. Indeed, my only source of solace in this is the knowledge that most others experience life in similar ways and thus must confront the obtuseness of their fellow citizens.”

⁶² Tullock (1979:38) summarises McKenzie’s findings: “As a special application of this ignorance hypothesis, Richard McKenzie (1976) wrote a study in which he theoretically deduced that people who are compelled to take courses in political science, sociology, or economics in college, to improve their ability to vote intelligently, would forget about these courses as soon as they had passed the final examination.”

⁶³ According to Caplan (2003:219), “[i]n a Downsian environment where the cost of erroneous beliefs is negligible, the standard arguments for rational expectations have little force.”

⁶⁴ Caplan (2001:9) compares and contrasts his theory of rational irrationality with Downs’s theory of rational ignorance: “The theory of rational irrationality, like the theory of rational ignorance, predicts that when private error costs are zero, agents will gather little information. But unlike the rationally ignorant, the rationally irrational nevertheless form definite conclusions. They know what they want the truth to be, and if error is cheap, they choose their ‘bliss’ belief even if they have little information to go on. When private error costs are zero, conclusions that are at the same time baseless and unreasonable should be expected.” Another difference between the rationally ignorant and the rationally irrational is that the rationally ignorant are aware of their malady and would therefore support political reforms aimed at its cure, while the rationally irrational are truly unaware of their malady and thus would not support similar actions by government to cure them of their irrational beliefs (Caplan 2003:224).

⁶⁵ Wohlgemuth (2002:239) detects this “hidden implication of Caplan’s analysis: that government by experts (preferably economists, see Caplan 2000) is referable to governments by popular majority and an unqualified public’s opinion.”

⁶⁶ Fishkin and Ackerman (2002, 2004) and Fishkin (1991, 1995) do address the problem of rational ignorance, as explained in the last chapter. Somin (1998:441) acknowledges that James Fishkin’s work on deliberative polling is “[a]n exception to the general neglect of rational voter ignorance among deliberative democrats.”

⁶⁷ In the context of constitution-making, Buchanan (1989:28) makes a similar point: “In a large-number setting, the individual player may not consider himself or herself influential in controlling the ultimate selection among sets of rules; hence, the fully rational player may well refrain from participating in the choice among regimes.” Buchanan (1965:8) gives several examples of the problem of large numbers, which is roughly equivalent to the deliberative democrat’s problem of scale, “in every day experience”: “Volunteer fire departments arise in villages, not in metropolitan centers. Crime rates increase consistently with city size. Africans behave differently in tribal culture than in urban-industrial settings. There is honor among thieves. The mafia has its own standards. Time-tested honor systems in universities and colleges collapse when enrolments exceed critical size limits. Litter is more likely to be found on main-traveled routes than on residential streets.”

⁶⁸ Kurrild-Klitgaard (2004:6) presents a slightly qualified version of Buchanan and Tullock’s principle, whereby the total benefits from adding more deliberators (as external costs are lowered) increases, yet at the same time with each additional deliberator (and increase in decision-making costs) the marginal benefit decreases as the overall size of the deliberating group approaches that of the entire population: “the collective benefits while increasing will be marginally decreasing, i.e., at first there are significant benefits to letting more individuals take part in deliberation, but over time (e.g. as the group of individuals come to approximate the population more and more) the size of the marginal benefits will be smaller and smaller until the marginal change in total benefits approximates zero.” Even deliberative democrat James Fishkin (1991:51) concedes that certain decision-making devices, such as the veto power that comes with unanimity decision rule, “obviously raise decision-costs enormously. They are also a practical possibility only at the small scale, in what I am calling a face-to-face society.”

⁶⁹ Also called the ‘mandate-independency controversy,’ the ‘paradox of representation’ pertains to the question of whether a representative should act as a trustee of her constituents, with relative independence of judgment as to how to deliberate and decide, or as a delegate, with greater dependence on the explicit instructions or bound mandates of her constituents. See Cunningham (2002:90-100). For those who endorse the delegate model, see Mill (1991[1861]:ch. 12) and Pitkin (1967:ch. 3). For advocates of the trustee model, see Christiano (1996) and Przeworski (1999). In the field of economics, the difficulty whereby principal and agent interests do not align is termed the ‘problem of agency.’ See Fama and Jensen (1983) and Coleman (1987:151-2).

⁷⁰ Several studies have focused on the dynamics of information networks and how discussion among agents correlates to discussion effects, such as changes in agent preferences and voting behaviour. Some of these studies have found that networks merely reflect existing political preferences; people, in other words, tend to discuss politics with like-minded others; see Huckfeldt and Sprague (1987). This has come to be known as the “social

cohesion” model. The drawback of this model is that it fails to explain why discussants would try to influence each other to vote differently if they are already so like-minded as to share the same voting preferences. Political talk research has been characterized by controversy rather than consensus over the validity of the social cohesion model. Some researchers, such as Huckfeldt and Sprague (1991), have sought to undermine this model in their interpretation of election survey data. Others, such as Kenny (1994, 1998), have taken a defensive stance and attempted to affirm its value. Still others, including Marsden (1987), have taken a different route and shown that political talk is more likely to influence vote choice when it takes place within discussion networks that are populated by diverse, rather than homogenous or like-minded, groups of people. This is called the “diverse groups” model.

⁷¹ Bohnet and Frey (1994:341) argue similarly that direct-democratic methods, particularly referenda and initiative, are superior aids to discourse: “One of the major reasons why direct democracy performs well for allocation and distribution is that it institutionalizes and channels the political discussion.”

⁷² Dryzek (2005) has only recently proposed the possibility that networks of contestational discourses might replace liberal constitutional orders. In a previous work, it was denied that discourses and constitutions were mutually exclusive devices for ordering relations in political society. There, Dryzek (1990:119) states that the “choice between liberal and participatory [or deliberative] models is not . . . an either-or decision.”

⁷³ Hayek’s (1979:108) argument that constitutional legitimacy depends on a “background of traditions and beliefs” that support it is closely tied to Aristotle’s idea that a constitution is a *modus vivendi* or way of life. Hayek and Aristotle’s account also accord with Bentley’s (1967 [1908]) notion of a constitution: “For constitutions are but a special form of law. They are specially guarded habitual activities of the society, enforcing themselves on all would-be variants.”

⁷⁴ Another difference between Aristotle and Voigt’s constitutionalism is that Aristotle establishes a ranking of constitutions based on an ideal-type (royalty), whereas Voigt identifies one ideal function of constitutional arrangements (distributing public goods). Yet, in evaluating constitutions by reference to a perfect model, both heed David Hume’s (1985 [1777]) advice to measure the actual against the ideal for the sake of bringing the former closer to the latter, which thereby preserves political stability “In all cases it must be advantageous to know what is the most perfect in the kind, that we may be able to bring any real constitution or form of government as near it as possible, by such gentle alterations and innovations as may not give too great a disturbance to society.”

⁷⁵ Indeed, the only point in the paper that Dryzek (2004:55) advocates for anything resembling the wholesale substitution of discourses for constitutions is in the international system, where “constitutional sources of order are weak.”

⁷⁶ Resistance to constitutional reform can originate from many sources, Buchanan (1984:21-6) explains, such as ignorance, constitutional illiteracy, extreme democratic majoritarianism and some versions of institutional evolutionism. However, in most cases, the push towards constitutional limits on democratic decision-making (including the deliberative variety) prevails: “The constitutional vision suggests that free men and women may impose constraints upon themselves and live within these constraints, both in their private and in their political capacities” (32). Two examples of constraints on governmental action—in this case, to tax—have been popularly enacted in the U.S. during the tax payers’ revolt movement: one, the adoption of Proposition 13 by two-thirds of California voters in 1978 (amounting to a 57% reduction in property tax revenue) and, two, the passage of a set of constitutional provisions by Colorado’s electorate in 1992, termed the Taxpayers’ Bill of Rights (TABOR), setting limits on government revenue collection. Revenue limits are based on the previous year’s collections and changes in population and inflation and any amount collected in excess of the limit is refunded to the voters. On the taxpayer revolt movement, see Brennan and Buchanan (1979:21), Brennan (1984:115) as well as Brennan and Buchanan’s (2000[1980]) attempt to design a “fiscal constitution.”

⁷⁷ Vanberg (2004:70) does not excuse constitutional economists from also persuading the citizenry of the merits of their proposals: “when constitutional economists advance proposals for ‘improving democracy’ they consider as their ultimate addressee the citizens themselves, i.e. those who as members of democratic polities have to live with the consequences of whatever reforms are suggested.” In this way, deliberative democrats and constitutional economists subscribe to a similar notion that changes in the political order (or the constitutional rules of the game) must garner the consent of all those affected.

⁷⁸ Although Gauthier (1993) conceives deliberation as compatible with constitutional politics, Morris (1993:344 ff17) is more sceptical: “James Buchanan would be sympathetic to Gauthier’s identification of justice with constitutional reasoned agreement. But his agreement would stem from his skepticism about the determinate results that may be derived from abstract, idealized bargaining [i.e. deliberative] theory.” However, from Vanberg and Buchanan’s (1989:60) collaborative article, there is evidence that Buchanan views them as compatible, but that he grants a far more limited role for deliberation (i.e. “raising the level of shared information”) than deliberative democrats do (i.e. discovering truth, reaching mutual understanding and transforming preferences): “The dialogue

or discourse notion [of agreement] can be fruitfully interpreted as drawing attention to the importance of the informational dimension in constitutional choice.”

CHAPTER FIVE

¹ This section is nearly identical to Ralston (2005, 2006).

² ‘Reconstruction’ signifies an imaginative process of interpreting past events that have previously been subject to historical interpretation, which approximates Dewey and Carnap’s understandings of the term. In Ralph Ross’s introduction to Dewey’s *Reconstruction in Philosophy*, he explains how Dewey defines the term: “Reconstruction meant the application of intelligence (not Reason in the old sense, but the kind of observation, experiment, and reflection used in physical science) to human and moral subjects.” Likewise, Edna Ullmann-Margalit (1977:1) summarizes Carnap’s definition of reconstruction: “it is a description of the essential features of situations in which such an event could occur: it is a story of how something could happen—and, when human actions are concerned, of what is the rationale of it happening that way—not of what did actually take place.” See also Dryzek and Berejikian’s (1993:50), Bohman’s (1996:241) and Habermas’s (1993:11-12) notions of reconstruction.

³ The two reviews of Lippmann’s works by Dewey are “Public Opinion,” (MW 13:337-345) and “Practical Democracy: *The Phantom Public* by Walter Lippmann” (LW 2:213-221).

⁴ Westbrook (1993:505-506; 1991:306-318) thinks that Lippmann won the debate. Eldridge (1996:16-17) and Boisvert (1998:75-77) believe that Dewey was victorious.

⁵ The halcyon days of American Progressivism took place from 1912 to the mid-20s. The Party had been graced with an inspired leadership—including Teddy Roosevelt and Robert LaFollette—but as enthusiasm for their causes dried up, so did their election victories. Moreover, Progressive political candidates pushed innovative domestic reforms—such as child-labour, minimum wage and eight-hour workday legislation—but, due to a turn of historical events, their platform met with an increasingly dour reception. Unfortunately, with the advent of the First World War, public interest had shifted from domestic to foreign affairs. See John Chamberlain (1965) and McGerr (2005). Peter Levine (2000:18) states that, “practically all self-described progressives shared at least one commitment. They believed that there was a “national interest” or “public good,” superior to special interests and market outcomes.

⁶ The analogy between Lippmann and later democratic realists, such as Schumpeter and Hayek, is so strong that some commentators identify Lippmann as a pseudo-democratic realist. For instance, Flamm (2006:45) claims that “Lippmann charged advocates of participatory democracy with romanticizing the abilities of the masses, and endorsed his own opposed ‘democratic realism.’”

⁷ An obvious line of objection to my reconstruction of the debate is that Dewey, too, retained card-carrying status in the Party, shared many Progressive political views and could therefore be situated among the class of Lippmann’s opponents, as I have defined it. However, this objection overlooks the specificity of the class that I have identified. Although Dewey belonged to the Progressive Party and fought for several of its causes, he definitely did not count himself among the subset of Progressives—particularly, those committed to the majoritarian creed—that I have pinpointed as disputants in the debate. This point will become clearer in sub-section two.

⁸ Whereas traditional democratic theory, inspired by Aristotle, assumes that citizens are “omnicompetent,” and thus equipped by “natural endowment” for self-government, the actual practice of democracy, Lippmann (1945:379) argues, proves otherwise. The amount of accurate knowledge that any one person can accumulate about the modern world is, in point of fact, extremely limited. So, while majoritarian methods might prove effective at measuring citizens’ preferences, those preferences, left to develop on their own, reflect a coloured, and even unintelligible, record of the political landscape.

⁹ In a revealing passage, Lippmann (1945:68) critically assesses the average voter’s time and capacity for informed judgment: “Of those who can both read and understand, a good three-quarters we may assume have some part of half an hour a day to spare for the subject. To them the words so acquired [by listening to the rhetoric of their leaders] are the cue for a whole train of ideas on which ultimately a vote of untold consequences may be based. Necessarily the ideas which we allow the words we read to evoke form the biggest part of the original data of our opinions.”

¹⁰ While the expression “manufacture of consent” has since become popularized by Naom Chomsky, it was originally coined by Lippmann (1995: 8).

¹¹ Lippmann is often referred to as the forefather of “democratic elitism.” See Bachrach (1980) and Benveniste (1983).

¹² In a strikingly similar event sixteen years prior, Graham Wallas dedicated his book, *The Great Society*, to Lippmann, his former student at Harvard (Steel 1980:26-28). Wallas intended to convince Lippmann of the soundness of his view that the environment of modern life was so complicated as to be inscrutable to all but the very few. As might be expected, Wallas' efforts to convert Lippmann were not made in vain. Lippmann's mature elitist views and especially his notion of a pseudo-environment bear the stamp of Wallas' influence. To persuade Hand and his Progressive ilk, as Wallas had done to Lippmann years earlier, Lippmann had to do more than simply dedicate a book. He had to attack and exploit the vulnerable underbelly of their majoritarian creed.

¹³ It is easy to overlook Hand's resistance to Lippmann's brand of elitism, and conclude that the American jurist was, on all accounts, an easy convert. For one, Hand accepted the dedication and, two, if his silence is interpreted as assent, he implicitly agreed with *The Phantom Public's* conclusions. Yet Hand's biographer, Gerald Gunther (1994:385), infers the opposite conclusion, namely that, "Hand must have read the book with very mixed, often disappointed emotions. He never wrote to Lippmann about it; unlike *Public Opinion*, it elicited no superlatives from him." Therefore, according to Gunther, *The Phantom Public's* arguments could topple Hand's faith that citizens should direct the affairs of government through majoritarian political processes. Gunther's conclusion that the American jurist rejected Lippmann's arguments proves more persuasive in light of Hand's conviction, shared with other Progressives, that some powers integral to self-government cannot be delegated to leaders and experts. For instance, in the *Masses* decision, Judge Hand affirmed the right of citizens to freely discuss and decide what government policies and practices should be tolerated, on the ground that "public opinion . . . is the final source of government in a democratic state."²¹ Years later in the Holmes Lectures at Harvard, Hand (1958:73) would declare that, "[f]or myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge I should miss the stimulus of living in a society where I have, at least theoretically, some part in public affairs."

¹⁴ William Caspary (2000) also understands Dewey, generally, as acting in the role of mediator in the inevitable conflicts that arise over issues in political theory and practice.

¹⁵ Dewey writes: "At the basis of the scheme lies what Lippmann has well called the idea of the 'omnicompetent' individual: competent to frame policies, to judge their results; competent to know in all situations demanding political action what is for his own good, and competent to enforce his idea of good and the will to effect it against contrary forces. Subsequent history has proved that the assumption involved illusion" (LW 2:334).

¹⁶ Dewey's prognosis that the "public is in eclipse" stems from observations, not far from Lippmann's, that officials "employ their panoply [of power] to advance private and class interests" and citizens eschew sound judgment and gravitate easily towards charismatic leaders (LW 2:286, 314).

¹⁷ Damico (1978:107) insists that Dewey will not concede this point to Lippmann: "Dewey argues against . . . [Lippmann's claim] that rule by experts will be benevolent or in the common interest. The only way the common interest can be uncovered, he insists, is through the public's participation in governing."

¹⁸ To illustrate the transactional view, Dewey and Bentley employ the analogy of an economic or commercial transaction: "[A commercial] transaction determines one participant to be a buyer and the other a seller. No one exists as buyer or seller save in and because of a transaction in which each is engaged" (LW 16:242). In other words, people become buyers and sellers, just as things become goods and commodities, in virtue of their belonging to the transactional process. No buying or selling agents or exchanged objects are ontologically prior to the transaction; to wit, each is functionally defined by its relation to the overall process.

¹⁹ In their groundbreaking work on deliberative democracy, Amy Gutmann and Dennis Thompson (1996:27) define majoritarianism as the "most straightforward form of popular rule [in which] . . . members of a sovereign society agree to be governed by the will of the majority or their accountable representatives. The decision of a majority at any particular time is provisional, since it may always be revised by subsequent majorities."

²⁰ Dryzek and Torgerson (1993:127) contend that "the [elitist] idea . . . [was] first proposed by Plato . . . that some elite should govern because of its monopoly on expertise. The relevant expertise might be that of Enlightenment *philosophes*, *laissez faire* economists, the early positivist priesthood, scientific managers, Marxists-Leninists, psychologists, nuclear engineers, or contemporary ecologists."

²¹ Damico (1974:196) reports that for Dewey "[s]cience unites knowing and acting through the process of experimentation and thereby makes a difference in the life of man." Art, in Dewey's words, is "communication in its in its purest and undefiled form" (LW 10:249). According to Mattern (1999:72), there is an explicit connection between Dewey's aesthetic theory and his democratic theory: "At its best, art offers opportunities for revitalizing public life and for expanding the meaning and practice of democracy. Dewey's lifelong interest in making of democracy a whole way of life propelled him into the arena of art."

²² Similar to Bentley, Dewey expressly rejects the positivistic doctrine that the social sciences should imitate the natural sciences: "The assimilation of human science to physical science, represents . . . only another form of absolutist logic, a kind of physical absolutism" (LW 2:359-360). Despite this overt repudiation of positivistic social

science, the broad similarity of the method of inquiry to the scientific method has consistently misled commentators, such as Morris (1999:619) and Munro (1928a:610), to conclude that Dewey endorses a scientific approach to political inquiry. In the same year as his review of *The Public and Its Problems* was published, Munro (1928b:8) delivered an address, "Physics and Politics--An Old Analogy Revised" in which he naively identified inquiry in politics with inquiry in physics: "The science and the art of government still rest upon what may be called the atomic theory of politics--upon the postulate that all able-bodied citizens are of equal weight, volume, and value; endowed with various absolute and unalienable rights; vested with equally absolute duties." For similar over-statements of the analogy between science and politics, see Bagehot (2002 [1872]) and Becker (1991).

²³ Dewey claims that democracy "is an ideal in the only intelligible sense of an ideal: namely, the tendency and movement of some thing which exists carried to its final limit, viewed as completed, perfected. Since things do not attain such fulfillment but are in actuality distracted and interfered with democracy in this sense is not a fact and never will be" (LW 2:328).

²⁴ Although Dewey does not explicitly refer to "Progressives" or "Progressives embracing the majoritarian creed" in the passages I cite to support my position, the reference is implicit and would be understood by most mature Americans who had lived through the halcyon years of American Progressivism and witnessed its recent decline. According to Dewey, "counting of heads compels prior recourse to methods of discussion, consultation and persuasion . . . Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is merely majority rule . . . [it is also] antecedent debates, modification of views to meet the opinions of minorities, the relative satisfaction given the latter by the fact that it has had a chance and that next time it may be successful in becoming a majority" (LW 2:365).

²⁵ As Dewey reminds the majoritarian Progressives, "associated or joint activity is a condition of the creation of a community," and the members of that community "demand communication as a prerequisite" (LW 2:330). According to one group of commentators, "Dewey . . . suggested that public deliberation produces public goods and public selves, which transcend the aggregation of individual interests" (Burkhalter et al. 2002:416).

²⁶ Dewey states that with communication impeded by censorship, bias and distorting propaganda, reformers "have no way of telling how apt for judgment of social policies the existing intelligence of the masses will be" (LW 2:366). As Kinder and Herzog (1993:355) note, "[i]n *The Public and Its Problems* (1927), a veiled response to . . . Lippmann's case, John Dewey suggested that instead of seeing human nature as the cause of political ignorance we should see contingent social practices. Change the practices, and people would become intelligent, acute, incisive." On the historian Lewis S. Feuer's (1959:568) view, what was unique in "Dewey's thought was the perspective of the back to the people movement" that brought with it "a spirit of democratic socialist reform."

²⁷ Recognizing itself as a public is the "primary problem of the public" and success in doing so will end what Dewey calls the present "eclipse of the public" (LW 2:283). According to Dryzek and Torgerson (1993:129), "[a]s the spectre of an irrational populace loomed larger in the progressive mind, it was left to John Dewey in *The Public and Its Problems* (1927) to reassert the possibility of a democratic public life involving experts and citizens." Ronald Dworkin (2000:358) likewise acknowledges the citizen's "two main roles in a mature democracy" as "judges of political contests" and "participants in the political contests they judge."

²⁸ Together they share in the common enterprise of intelligent inquiry, "consultation and discussion which uncover social needs and troubles." Otherwise, if the enterprise is entirely sequestered by bureaus of policy experts and social scientists, the "specialized class" that results will become insulated from the public interest and thus "shut off from knowledge of the needs which they are supposed to serve" (LW 2:363-4). Peter deLeon (1995:896, 1992:126) provides the example of former U.S. Assistant Secretary of Health and Human Services, David T. Ellwood, who had little appreciation of the poverty problem which he and his fellow bureaucrats were tasked to resolve: "Ellwood and others in [President Bill] Clinton's welfare reform camp, however sympathetic to the plight of the impoverished, have found themselves 'effectively sequestered from the demands, needs, and (most critically) values of the people they are reputed to be helping.'"

²⁹ According to Dewey, the average citizen does not require the "knowledge and skill to carry on the needed investigation," but rather "the ability to judge of the bearing of the knowledge supplied by others upon common concerns" (LW 2:365). Dewey was also aware of the limitations immanent in such partnerships, stating that "there is no magic in democracy to confer immediately the power of critical discrimination upon the masses . . ." (LW 5:54). A more recent analysis by Bohman (2000:48) recognizes problems to expert-citizen partnerships, such as "epistemic dependence" of citizens on experts, where citizens can only know the whole of the problem by reliance on the expert, and "asymmetric information," where experts have so much more information at their disposal that citizens cannot verify or check the work of experts. Bohman's solution to these problems is to introduce a cognitive division of labor "in which those affected by experts [i.e. citizens] can evaluate the political credibility of experts and acquire influence over the terms of cooperation with them" (48-9). According to Kweit and Kweit (1987:35), many techniques of political problem-solving rely on "the unrealistic assumption that analysts have

access to comprehensive information . . . [when in fact] [c]itizen participation could help the analyst maximize the information available in the policy process, the integrating rationality and responsiveness.”

³⁰ Public spirit satisfies one of Blumer’s (1969:91) key requirements for a “satisfactory concept in empirical science”: “it must point clearly to the individual instances of the class of empirical objects to which it refers.” Dewey defines ‘concept’ as “nothing more than a set of operations; the concept is synonymous with the corresponding set of operations” (LW 4:89). As a concept, then, public spirit means the set of operations (e.g. collaboration, communication and deliberation) which transforms relations between policy experts and average citizens into successful partnerships. Richard Rorty (1983:587-8) sees this conditional willingness to establish general deliberative concepts with specific applications (e.g. in constitution-making) as characteristic of postmodernist bourgeois liberals, among whose ranks he counts Dewey: “The moral deliberations of the postmodernist bourgeois liberal consists largely in this same sort of discourse, avoiding the formulation of general principles except where the situation may require this particular tactic—as when one writes a constitution, or rules for young children to memorize. It is useful to remember that this view of moral and political deliberation was a commonplace among American intellectuals in the days when Dewey—a post-modernist before his time—was the reigning American philosopher.”

³¹ According to Wilson’s (1886:11) analogy, self-government is a partnership between citizens and trained experts within a bureaucracy not in cobbling shoes, but in cooking: “Self-government does not consist in [citizens] having a hand in everything, any more than housekeeping consists necessarily in cooking dinner by one’s own hands. The cook [i.e. the bureaucrat] must be trusted with a large discretion as to the management of the fires and the ovens” (11). See Stillman (1973) and Levine (2000:25).

³² What public spirit is not is a transcendent, *a priori* or religious concept. Although the term “spirit” carries its own sectarian baggage, Dewey made every effort to divest it of that burden. Dewey naturalizes the notion of spirit when he states that, “Spirit quickens; it is not only alive but spirit gives life. Animals are spirited, but man is a living spirit” (LW 1:224). In the same passage, Dewey expressed some doubt that “spirit” can be entirely saved from its religious or supernatural baggage.

³³ By joining “spirit” with “public,” the new symbol, “public spirit,” signifies a whole new set of meanings. Since “man is living spirit,” these meanings are naturalized, that is, their sense is disclosed through lived experience. Therefore, the concept of public-spiritedness is not understood, nor does it exist, prior to experience. *A posteriori*, it attaches to a whole range of human experiences, from engaging in “face-to-face intercourse” with one’s fellow citizens to criticizing existing institutions, from learning the rights and duties of citizenship to fully participating in communal life (LW 2:367-368). See Benello (1992).

³⁴ In an early essay, Dewey writes: “Reconstruction is a periodic need of life. It represents, in history, the conflict between ideas and the institutions that embody those ideas.” (EW 4:97).

³⁵ Others who make this connection include Honneth (1998), Bohman (1999), Festenstein (2001, 2004), and Talisse (2005).

³⁶ Also, in an earlier article, Dewey states: “In the question of methods concerned with reconstruction of special situation rather than in any refinements in the general concepts of institutions . . . lies the true impact of philosophical reconstruction” (MW 12:190).

³⁷ Dewey eloquently declared that, “[d]emocracy will come into its own, for democracy is a name for a life of free and enriching communion. It had its seer in Walt Whitman. It will have its consummation when free social inquiry is indissolubly wedded to the art of full and moving communication” (LW 2:350). In drawing a connection between the democratic ideal and the notion of community, Dewey is echoed in the later works of Cohen (1971:7) and Gawthrop (1998:767).

³⁸ Bohman (1998:415) acknowledges the potential to institutionalize expertise in deliberative institutions: “In considering institutional design, many of the features of democracy as it is has been developed (voting, judicial review, constitutionalism, representation, expertise) are no longer rejected or identified as ‘merely aggregative,’ but reinterpreted so as to promote the deliberative ideal.”

³⁹ Campbell (1995:184) states that for Dewey “conceptions are tools to be used in our attempts to settle our social problems, and that they have an ‘absolute’ or ‘final’ meaning only in an abstract or definitional sense.” Although this account does not dwell on the dynamics of the interpretive process, a more comprehensive argument that Dewey’s writings contain a hermeneutic approach to understanding historical phenomena can be found in Ralston (2003). Briefly summarized, the argument is that any hermeneutic approach tied to Dewey’s pragmatism must rely on the twin notions of inquiry and a situation, whereby participants render interpretations based on those interpretive concepts funded from previous inquiries and the conditions they experience in the present situation. Blumer (1969:89) nicely summarizes this idea in his statement that “any line of social change, since it involves change in human action, is necessarily mediated by interpretation on the part of the people caught up in the change—the change appears in the form of new situations in which people have to construct new forms of action.”

⁴⁰ See Levine (2000), Gutmann and Thompson (1996), Green (1999), and Habermas (1996a), among others. Similar to Habermas, Dewey reveals the connection between democracy and the procedural conditions for rational inquiry and discourse. However, according to Festenstein (2001:741), Habermas's critical-deliberative theory and Dewey's pragmatic-democratic theory are not identical: "One way in which inquiry and democratic values, then, are not related by Dewey is via a Habermasian argument about the presuppositions of rationally addressing practical problems."

⁴¹ Given that the expression "deliberative democracy" was not introduced until the late twentieth-century, specifically by Bessette (1980, 1994), it would be disingenuous to call Dewey, who died in 1952, a deliberative democrat. Indeed, the expression was initially coined by Bessette as early as 1979, Mansbridge (1993:94) writes, "[i]n . . . a prescient paper . . . presented at the American Political Science Association annual meeting but never published . . . [demonstrating] that in Congress deliberation on matters of the common good plays a much greater role than either the pluralist or the rational-choice schools had realized." On similar grounds, Ralston (2003) disputes Posner's (2002b, 2003) claim that Dewey is a deliberative democrat. However, this is not to deny that Dewey as well as other thinkers who predate Bessette had anticipated certain aspects of the deliberative ideal. For instance, Elster (1998a:1-4) asserts that Burke, Mill, Aristotle and Pericles had made "the case for deliberative democracy" long before the contemporary deliberative democracy movement and in similar (though not identical) terms as contemporary deliberative democrats. Likewise, Bohman and Rehg (1997b:xii) claim that John Dewey and Hannah Arendt were precursors to contemporary deliberative democrats, but then qualify their claim with the disclaimer that "[t]he term 'deliberative democracy' seems to have been first coined by Joseph Bessette."

⁴² "Closure of the behavioral system," Buchanan (1972:12) states, "means only that analysis must be extended to the actions of persons in their several separate capacities." Dewey, of course, does not endorse closing the behavioral system, or treating individuals acting in their public or political capacities as identical with individuals acting in their private or economic capacities. For instance, Dewey was concerned with treating officials as stewards of the public rather than their own private interest, "who look out for and take care of the interests thus affected" (LW 2:246).

⁴³ This account parallels Anthony Downs's proposal in *An Economic Theory of Democracy* (1957:25), whereby a political party represents "a coalition of men seeking to control the governing apparatus" and that the party's platform is an instrument by which to win office. According to Buchanan's (1990:46) reading, the insight of the Downsian approach is found in its modeling of electoral politics after the microeconomic theory of firms. Indeed, according to Downs (1957:295), his "main thesis" is that "parties in democratic politics are analogous to entrepreneurs in a profit-seeking economy" who make "whatever policies they believe will gain the most profits." When two parties and their candidates compete for electoral victory, they choose an ideology that they speculate will attract the most popular support, or will maximize votes, given the current distribution of views along a left-right ideological spectrum. In a similar fashion, firms attempt to maximize profits given the current consumer demand for the good, the cost of production and the firm's capacity to supply the good.

⁴⁴ Dewey notes that, "the monopolization of spiritual capital may in the end be more harmful than that of material capital" (LW 5:117). Richard Posner (2003:131) is critical of Dewey's developmental view, particularly his melioristic faith in the capacity of humans to individually and collectively engage in intelligent inquiry and, thus, to directly address public policy issues: "[I]n John Dewey's democratic theory citizens are expected to address public questions with an approximation to the rigor, disinterest, and open-mindedness with which natural scientists address scientific questions. [. . .] Few citizens have the formidable intellectual and moral capacities (let alone time) required for the role."

⁴⁵ Mansbridge (1994:156-7) contends that deliberation promotes public spirit by transforming participants' preferences, assisting them in "understand[ing] the interests they have in common," stimulating "'we' rather than 'I' thinking," and encouraging "input from the less powerful and from minority opinion" in society-at-large.

⁴⁶ Gutmann and Thompson's understanding of public spirit might be closer to Bell's (1999:76-77) account of the Confucian dedication to human excellence in public service: "[O]nly those who acquire knowledge and virtue ought to participate in government, and the common people are not presumed to possess the capacities necessary for substantial participation." However, the difficulty with institutionalizing this ideal of public spirited service--e.g. in the meritocratic bureaucracies of many East Asian societies--is that it remits to a brand of political elitism on par with a society governed by Philosopher Kings turned experts, which Dewey rejects.

⁴⁷ The closest Kelman (1987a, 1992) comes to mediating public choice and public spirit is his argument that "cooperationist institutions," which bring together oppositional parties to cooperatively resolve their conflicts, are superior to "adversary institutions," which allow third parties advocate for their clients in a competitive environment. Distinct from public choice scholars who rely almost exclusively on structural incentives and sanctions, Kelman adopts a norm of public spirit in order to control strategic action.

⁴⁸ Arendt (1988 [1958]:244ff) states that "people gather together and 'act in concert,' which disappears the moment they depart. The force that keeps them together . . . is the force of mutual promise or contract." Sociologists

Maines and Charlton (1985:272) characterize the “negotiated order perspective” as the “view that one of the principal ways that things get accomplished in organizations is through people negotiating with one another, and . . . both individual action and organizational constraint can be comprehended by understanding the nature and contexts of those negotiations.” However, some sociologists and social theorists dispute the aptness of the contractual metaphor. Emile Durkheim (1964:365) claimed that “social relations are not capable of assuming this juridical form [of contract].” Brandl (1988) and Barnard (1968) argue for a communitarian rather than a contractual basis for social organization. Also, Carnevale (1995:38) calls for “working beyond contract” and toward creative and innovative problem-solving in organizations.

⁴⁹ An example of a mutually beneficial participatory policy-making process is the reforming of long-term healthcare policies for elderly people in Ontario, begun in the 1980’s and culminating in 1991-2. In both the formulation and implementation phases of the policy process, older citizens of the province who received healthcare services were consulted with by professionals and administrators in service and planning organizations. Although not a perfectly participative and public-spirited process, Aronson (1993:374) notes that it did make some progress towards the ideal of full consultation or partnership between citizens and policy experts.

CHAPTER SIX

¹ Without taking the traditionally opposed cognitivist position, Blumer (1969:93) objects to Stevenson’s subjectivist account of moral conflict on the ground that the concept of attitude is unsuitable for scientific inquiry. Another difficulty with Stevenson’s use of the terms attitude and belief is that in ordinary ethical discourse, people rarely state that they have an attitude about a moral issue (e.g. abortion), whereas they typically do state that they have a belief concerning the issue. According to Putnam (2000:152 ff28), this apparent difficulty leads Cavell to object that Stevenson has no sensitivity for what actual ethical arguments sound like. Although Dewey did not survive long enough to review *Facts and Values* (1963), he did read Stevenson’s (1944) *Ethics and Language*, commenting that it “is a curious mixture of good and very bad things” (Ratner and Altman 1964:456).

² A similar definition of ‘belief’ arises in one of Dewey’s essays, in which he claims that, “a belief is not a wholly subjective state of mind, but rather [it] is an existential, working hypothesis” whose experimental confirmation constitutes a fact (MW 3:94).

³ Blaug (1996) acknowledges the cognitivist foundations of Habermas’s conception of deliberative decision-making: “What is particularly intriguing about Habermas’s position is his insistence on a cognitive account of collective judgement.” This is perhaps unsurprising given that, as O’Neill (2002:250) points out, “[t]he main theoretical sources of recent [and particularly Habermas’s] deliberative theory has been Kantian.”

⁴ Avio (1999:546) nicely summarises the differences between Habermas and Buchanan on this point: “Habermas is led to a Kantian-inspired cognitive theory emphasizing communicative action . . . In contrast, Buchanan’s theory is Hobbesian-inspired and non-cognitive.” “In . . . [Habermas’s] idealist conceptualization of politics,” Buchanan (1984b:29) argues, “individual evaluations are useful only in so far as they offer means for arriving at a *truth judgment*. Individual evaluations are not incorporated [into the decision-making process] as value weights that count because they represent persons’ own values or opinions or interests.”

⁵ Vanberg and Buchanan (1989:52) defend the subjectivist stance that interests trump beliefs in constitutional decision-making: “His [i.e. the agent’s] constitutional interests . . . are his own, subjective evaluations of expected outcomes, evaluations to which attributes like true and false, correct and incorrect can not be meaningfully applied.” Most neoclassical economists are subjectivist non-cognitivists, according to Putnam (2002:61), because they subscribe to the logical positivist thesis “that ‘value judgments’ are subjective and that there cannot really be reasoned argument about values. Even the younger Amartya Sen (1967) defended a version of Hare’s (1952) subjectivist theory of prescriptive universalism, or the position that all ethical claims resemble universal imperatives.

⁶ According to Buchanan (1990a:13), “[t]he autonomous individual is a *sine qua non* for any initiation of serious inquiry in the research program.” So, there is little dispute over Buchanan’s credentials as a proponent of methodological individualism. “Like other economists,” Coleman (1990:142) writes, “Buchanan is a methodological individualist.”

⁷ Hecló (1994:383) echoes Buchanan’s concern, when he states that “[m]ethodological individualism gets an important part of the story right [; namely] . . . [c]ollectivities do not act; [. . .] only individual people do.” Buchanan (1949:496) proposes two mutually exclusive approaches to understanding state-level decision-making: (i) the “organismic” approach, whereby the state is a single person with its own ends and means of satisfying them (e.g., changing spending and taxation levels) and (ii) the “individualistic” approach, whereby only individuals have ends and the state serves as an instrument of individual want-satisfaction. Although the first approach is widely used in the social sciences, Buchanan believes that it is methodologically bankrupt. Conceived of as an organic agent, the

state cannot, at least in any meaningful way, express its preferences and pursue its ends in the same sense that an individual can. "State decisions are, in the final analysis," Buchanan writes, "the collective decisions of individuals" (498).

⁸ In philosophy, this mistake is more commonly termed the 'fallacy of composition.'

⁹ An exception is the deliberative democrat, Jon Elster, who embraces methodological individualism in a trivial sense, to be discussed in the next section.

¹⁰ Johnson (1991:191) distinguishes "broadly between 'economists' and 'sociologists,' between theorists who ground their analyses in the strategic choices of rational actors and those who view social action as primarily governed by internalized normative constraints." Tullock (1972:325) believes the different emphases of sociologists and economists arise because they are "[c]oming from different intellectual backgrounds." Joas (1993:34) addresses the objection that sociologists neglect individuals in their studies of social behaviour: "sociology is defined as the science of collective behavior. That does not mean, of course, that individual action is to be ignored or excluded from the domain of sociology, but rather that it is to be understood as collectively constituted in its orientation."

¹¹ Informing their methodological collectivism, Musgrave (1984:134) claims, is the assumption that "[i]ndividuals in important degree act as members of groups, classes, or sects, not as isolated units." Echoing the methodological collectivist view as well as the sociological approach that informs it, Bentley (1967 [1908]) contends that "[t]he society itself is nothing other than the complex of the groups that compose it." Similar to Bentley's position, deliberative democrats do not espouse methodological holist position, or what Buchanan (1949:496) terms the "organismic" approach. Instead of the social whole constituting one group, they believe that smaller groups constitute the greater social whole.

¹² In the discipline of philosophy, this error is more often referred to as the fallacy of division. For a classic study in which the researcher comes near to committing the ecological fallacy, see Robinson (1950).

¹³ Johnston (1991:106) notes that decisions made through deliberation are not always "instrumental . . . to advance predetermined goals," but are instead intrinsically valuable because they help to reveal personal and group identity. Likewise, Habermas (1985:163) argues that discourse's advantage over instrumental rationality is that it explains why agents decide to pursue the collective "goal of reaching understanding."

¹⁴ Musgrave (1984:134) comments on the limited capacity of the social sciences to understand group activity through the filter of methodological individualism: "Group structures and their interactions are forces that positive social science, as distinct from a normative model of individual autonomy, cannot overlook. Nearly exclusive focus on individual action has placed too restrictive a frame on the theory of social [and public] choice, and thereby has handicapped its analysis of governmental [and group] behavior." Moreover, in assuming self-interest as a universal human motivator, economists make it difficult to explain the motivations that individuals might have for selfless activities, such as entering public service. When public servants accept lower wages and benefits than in the private sector, perhaps the only explanation is, as Kelman (1990a:202) observes, that "public spirit is an important reason many people go into politics." Some possible solutions to methodological individualism's problematic conception of human motivation are mixed motivational accounts (Schroeder 2002; Margolis 1990) and models linked to context (Mansbridge 1990a).

¹⁵ Buchanan's (1972a:175) continues: "The relevant response to the charge of unrealism is surely the frank admission that, of course, individuals do not always act as the model {of *homo economicus*} postulates. A model is a construction that isolates one element of behavior and upon this the analyst may erect conceptually refutable hypotheses." Later on, he clarifies the notion of a conceptually refutable hypothesis by stating that "[t]he only real limitation lies, ultimately, in the testing of the predictions made." Buchanan's idea that the realism of the self-interest assumption is irrelevant so long as the assumption yields testable hypotheses and good predictions is most likely derivative of an earlier position taken by Friedman (1953), who argued that how descriptively accurate a theory's assumptions are need not affect the economist's decision to employ them in inquiry. Instead, the "theory is to be judged by its predictive power for the class of phenomena which it is intended to 'explain'" (8).

¹⁶ Responding to Brennan, Musgrave (1984:138) isolates the difference between their respective positions as the difference between a protective (or constraining) account of government and a developmental (or cooperative) account: "Where Brennan sees the problem [of how to improve government] as one of constraining the exogenous tyrant of his [Leviathan] model [of government] . . . I see it as one of improving the institutions and rules by which government is conducted, so as to render it a more fruitful expression of cooperation."

¹⁷ Brennan and Lomasky (1993:6) write: "Public choice scholars have insisted that a proper *positive* account of political process is a critical exercise in its own right, and that any subsequent ethical evaluation must be undertaken at the more abstract level of political institutions--the [constitutional] rules of the game--rather than at the level of particular policies or policy platforms."

¹⁸ Even though it does not accurately describe human nature, "the *homo economicus* construction is an abstraction from reality," Brennan and Buchanan (1981:157) declare, that performs a particularly useful methodological

function. If researchers are concerned to compare how various arrangements of decision-making rules affect outcomes, then they must be capable of measuring the consequences of implementing alternative regimes of constraints.

¹⁹ However, it might be doubted whether Buchanan, in his two-tiered model of rule-making, privileges constraints over preferences. Since constitutional framers choose higher-level rules that structure lower-level rule-making in ordinary politics, then the higher-level constraints are themselves the expressions of preferences, viz. the preferences of the conventioners. Buchanan (1991:231) seems to deny the privileging of either when he claims that constitutional economists are constructivists, in “that rules are deliberately ‘constructed’ from the choices of those persons who are to be subject to the constraints that these rules embody.” However, one problem with this account is that the original conditions for the creation of the constitution will inevitably differ from those conditions that manifest for future generations. As Musgrave (1981:117) notes, “this conception of constitution-making as a continuum runs into conflict with the fact that a historically determined constitution must set the rules for its own change, leaving the idea of constitutional process (which is needed for day-to-day operation) in conflict with the idea of continuum of the ‘initial condition.’”

²⁰ Summarizing Habermas’s view of constraints, White (1980) writes: “A rational consensus can be guaranteed only if discourse is freed from formal constraints on the process of argumentation itself . . . [so that the] conditions of the ISS [i.e. Ideal Speech Situation] take the form of rules [or presuppositions of discourse] prohibiting such constraints.”

²¹ For Gutmann, Thompson, Fishkin and Ackerman’s views, see chapter three. According to Benhabib (1994:31), “all [participants in discourse] have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out.”

²² Habermas (1985:173-4) summarises the differences between strategic and communicative action in terms of these competing coordination mechanisms: “I regard communicative action and strategic action as two types of social action representing an alternative from the point of view of the actor himself; the participants in interaction must intuitively choose between a consent-oriented and a success-oriented attitude.”

²³ This danger is acknowledged by David Hume (1985 [1777]) and Thomas Hobbes (1968 [1651]). Hume advises that “in politics . . . every man must be supposed a knave” (VI, 42-3). If by “knave” Hume means self-interested rational actors, then Hume’s advice has been taken to heart by public choice scholars and constitutional economists (Kliemt 2000, 2005). Opportunistic behaviour must be guarded against by the imposition of appropriate sanctions, so as to make “it the interest even of bad men, to act for the public good” (iii, 16). Likewise, Hobbes counsels not to be the first to perform on a contract in the state of nature, for “he which performeth first, does but betray himself to his enemy; contrary to the Right (he can never abandon) of defending his life, and means of living . . . if there be a common Power set over [the contractors], with right and force sufficient to compel performance, it is not Voyd” (ch. 14, 196). Some economists and game theorists cite this passage in *Leviathan* as evidence that “Hobbes sees the strategic structure of exchange by contracting as a Prisoner’s Dilemma” (Hardin 1991:160).

²⁴ Bohman and Rehg’s (1997b:xx) characterization of deliberative theorists as universally averse to rational choice is not entirely warranted. At least one theorist, Jon Elster (1995, 1998a), straddles the divide between rational choice theory and deliberative theory, arguing that strategic calculations factor into most, if not all, deliberative decision-making. In his essay, “Deliberation and Constitution Making,” Elster (1998b:105-7) studies the deliberations of the France’s Assemblée Constituante of 1789-91 and 1848, as well as the Germany’s Frankfurt Assembly of 1848, and argues that constitutional decision-making can be understood in terms of an arguing-bargaining continuum. In evaluating the relative merits of arguing and bargaining, Elster (1995:250) ultimately champions arguing: “argument—even when purely strategic and based on self-interest—tends to yield more equitable outcomes than bargaining.” Therefore, despite the fact that strategic considerations and self-regarding motives enter into deliberations, they have an innocuous influence on the fairness of outcomes.

²⁵ One possible reason for the inflexibility of these beliefs is that they are the product of an intensive process of socialization. See Jaros (1973) for an account of how various “socializers,” from families, schools to peer groups, are responsible for preferences that are a function of what I will call ‘scrutiny-proof’ beliefs.

²⁶ Dewey makes this point in the opening pages of *The Public and Its Problems*: “If one wishes to realize the distance which may lie between “facts” and the meaning of facts, let one go to the field of social discussion. Many persons seem to suppose that facts carry their meaning along with themselves on their face. Accumulate enough of them, and their interpretation stares out at you. The development of physical science is thought to confirm the idea. But the power of physical facts to coerce belief does not reside in the bare phenomena. It proceeds from method, from the technique of research and calculation. No one is ever forced by just the collection of facts to accept a particular theory of their meaning, so long as one retains intact some other doctrine by which he can marshal them. Only when the facts are allowed free play for the suggestion of new points of view is any significant conversion of conviction as to meaning possible. Take away from physical science its laboratory apparatus and its mathematical

technique, and the human imagination might run wild in its theories of interpretation even if we suppose the brute facts to remain the same" (LW 2:238).

²⁷ This is particularly the case when agents, to use Quine's (1953:44) metaphor, hold these commitments at the center of their "web of beliefs." Coleman (1990:144) also understands David Gauthier's solution to the prisoner's dilemma, whereby agents choose whether they have a cooperative or defection-prone character, as the invocation of an identity-based preference: "In Gauthier's view, individuals are presumed to know that they will likely face prisoner's dilemmas where they must choose between cooperation and defection, and they ask themselves which disposition to act--the disposition to cooperate or defect--will be utility-maximizing."

²⁸ In their investigation of the problem of choice without preference (or with indifference), Ullmann-Margalit and Morgenbesser (1977:763) rely on examples of selecting consumer goods as paradigmatic of social picking situations: "Generalizing somewhat, we contend that in this era of mass production and automatized assembly lines there is an abundance of essentially identical products and consumer goods that repeatedly place very one of us in [social] picking situations."

²⁹ Elster (1995:239) proposes three kinds of motives at work in deliberation: passions, interests and impartial reason. Elster (1989b:100) writes: "I believe that the emotive aspect of norms is a more fundamental feature than the more frequently cited cognitive aspects. If norms can coordinate expectations, it is only because the violation of norms is known to trigger strong negative emotions, in the violator himself and in other people." Norms command obedience because norm-followers have a negative reaction to the prospect of experiencing internal sanctions for non-conformity (e.g. guilt and shame). In response to Elster, Habermas (1996a:338) disputes whether norm-governed action can be construed in non-cognitive terms: "As long as normativity and rationality exclude each other like this, the rationally motivated coordination of action can only take the form of a negotiated agreement among strategically oriented actors . . . If Elster wants an additional mechanism of action coordination . . . then he must acknowledge a rational core to norms and value orientations and correspondingly enlarge his concept of rationality." If norm-following only requires a non-cognitive reaction to anticipated sanctions, then cognition detaches itself from the process of reaching agreement, thereby eliminating the possibility of communicative action. So, deliberators can orient their interactions only at success through strategic action, which provides a weak basis for collective action. Therefore, to ensure a stronger foundation for coordinating social action, Habermas argues, Elster would need to restore a "rational core" to norms and, by implication, to discourse and agreement (340). For an alternative explanation of norm-following in terms of rational choice, see Coleman (1987).

³⁰ Brennan and Lomasky (1993) and Brennan and Hamlin (1998, 1999) propose that expressive voting is an alternative to instrumental voting. Their theory of expressive voting is largely meant to avoid the unacceptable conclusion of Downs's (1957) analysis, namely, that instrumental voting would lead voters to be perfectly rational in abstaining from casting a ballot. Mouffe (2005:25) also understands voting combined with deliberation as having non-instrumental value: "[In] the case of voting . . . the rationalist approach is unable to grasp . . . that what moves people to vote is much more than simply the defence of their interests. There is an important affective dimension in voting and what is at stake is a question of identification. In order to act politically people need to be able to identify with a collective identity which provides an idea of themselves they can valorize. Political discourse has to offer not only policies but also identities which can help people make sense of what they are experiencing as well as giving them hope for the future."

³¹ Psychologists Janis and Mann (1977:66) note that when decision-makers are confronted with emotionally-charged and stressful situations, they will sometimes try to evade the issue at-hand and then settle too quickly on a choice that in the short-run minimizes conflict, but in the long-run exacerbates the original problem: "a person's defensive avoidance pattern might abruptly change to hypervigilance if he [i.e. the decision-maker] encounters a new, dramatic danger signal." They define the condition of hypervigilance: "the person in a state of hypervigilance fails to recognize all the alternatives open to him and fails to use whatever remaining time is available to evaluate adequately those alternatives of which he is aware. He is likely to search frantically for a solution, persevere in his thinking about a limited number of alternatives, and then latch onto a hastily contrived solution that seems to promise immediate relief, often at the cost of considerable postdecisional regret" (51).

³² To incorporate the affective dimension, many commentators emphasize action-oriented and intelligence-based, rather than reason-based, account of knowing found in Dewey's thought and pragmatism, generally. Festenstein (2004:293) writes: "Pragmatism starts from the belief that reason itself cannot ground all our beliefs." Likewise, Langsdorf (2002:144) states: "In Dewey's language, this [alternative account of knowing] is inquiry: knowing in doing, which is quite opposed to distanced, contemplative knowing." Ricci (1970:259) reminds us that Bentley also stressed the non-rational dimension of experience: "Bentley argued that men are driven by subjective interests, which cannot be known to investigators directly but which manifest in the political groups formed to advance their interests. The shape of political reality, therefore, is not to be ascertained a priori by premises about motives but

rather to be plotted empirically according to the vectors of pressures exerted by groups. Rationality may be left entirely out of the picture.”

³³ Dewey writes: “The habit of disposing of the doubtful as if it belonged only to us rather than to the existential situation in which we are caught and implicated is . . . a mistake [because] a situation is [not] doubtful only in a ‘subjective’ sense” (LW 12:110). Putnam (1995:305) notes that one of the insights of pragmatists such as Dewey is that they do not reduce all agent dispositions, such as doubt and belief, to “self-identifying mental state.” For instance, in describing the experience of sleep-disrupting shock at the noise of a window-shade hitting a window, Dewey explicitly states that the indeterminate situation “is [initially] experienced as being” fear, but in an objective sense (LW 3:160). Misak (2004:9) interprets Dewey’s theory of experience to be that of a thorough-going cognitivist: “It is unsurprising that so many pragmatists are moral cognitivists . . . [for it] leaves the prospects for cognitivism intact, as it [i.e. pragmatism] does not require a causal connection between our beliefs and physical objects.” However, this is an equally flawed reading of Dewey’s theory of experience because Dewey observes that the majority of our adult lives is spent in a non- or pre-cognitive mode of experience (primary experience) which has been previously funded with meanings and habits.

³⁴ The distinction between knowing and having, secondary and primary experience, is found as early as 1905 in Dewey’s “The Postulate of Immediate Empiricism” (MW 3:163) and later (1929) in *Experience and Nature* (LW 1:3-5). In the second appendix of the latter work, Dewey writes: “There are two dimensions of experienced things: one that of having them, and the other that of knowing about them so that we can again have them in more meaningful and secure ways” (LW 1:379). David Fott (1998:104) comments that “[t]he difference between immediate [or primary] experience and reflective [or secondary] experience implies that not all things in a person’s experience are objects of knowledge.” The distinction is also insightfully developed by Kenneth Chandler (1977:51) and Frank X. Ryan (1994, 2005) as the concept of “mediate immediacy.” According to Dewey, cognitive experience, or knowing, is secondary to its non-cognitive counterpart, or having “an experience,” because consciousness seamlessly shifts from an active foreground of thinking and problem-solving to a settled background “of meanings as they are embodied in organic life” (LW 1:229). Having an experience is primary, the repository of these tentatively settled meanings and habits that are both the outcome of successful past inquiries and potentially employable resources in subsequent inquiries. According to Schutz (2001:289), “human beings simply do not have the ability to attend consciously to more than a very small proportion of their daily activities.” So, habits and meanings accumulated from cognitively-rich secondary experience mediate and enrich the immediacy of primary experience, thereby permitting humans to negotiate day-to-day challenges in cognitively undemanding ways. Dewey’s example of a machine’s constant and rhythmic operations versus the spatio-temporal changes that make up its processes is intended to distinguish between primary and secondary phases of experience (LW 4:130).

³⁵ The cyclical relation between knowing and having is perhaps best represented as an “ebb and flow” movement, which Dewey does when describing the relationship between emotional, volitional and intellectual modes of experience (LW 4:18). Relying on the metaphor of sea tides, the tide, although initially out, flows in and then recedes, leaving its deposit of objects (seaweed, shells, sand etc.) on the beach. The tide represents the phases of knowing and having that alternatively constitute experience; when the tide is out, having is emphasized and much of the meaning deposited by knowing has been previously funded or embedded in a habit background that mediates immediate experience; when the tide is in, knowing takes the foreground and having the experiential background, as the meaning, terms and conditions of problems become functional subject matter for inquiry. See Ralston (2004:65 ff92).

³⁶ Dewey defines a habit as “a way or manner of action, not a particular act or deed” (LW 12:21). In the movement from secondary to primary experience and back again, “[w]hat he [i.e. the agent-inquirer] has learned in the way of knowledge and skill [or habit] in one situation becomes an instrument of understanding and dealing effectively with the situations which follow” (LW 13:25-6). Ryan (2005:147) explains: “In Dewey, a ‘settled’ noncognitive ‘having’ is interrupted by the instantiation of a *problem* that calls forth both the imaginative ‘play of ideas’ leading to the formulation of a hypothesis and the concrete data and tools whose successful experimental outcome is, quite literally, both an ‘objective’ and an ‘object’ in the everyday sense.” Cognitive science research on schemas, or organized structures of information that guides day-to-day behaviour, corroborates Dewey’s balanced account of human experience. Humans store or fund the products of prior investigations into the attributes of particular individuals (person schemas), the ways in which we confront problems (event schemas), the social roles we assume in particular situations (role schemas) and generalizations about the self (self schemas). With appropriate stimuli, these schemas are then recalled and habitually acted upon in a non-reflective or cognitively undemanding manner. The massive literature on schema theory is too extensive to comprehensively describe here. See, for instance, Alvares and Risko (1989), Anderson (1984), Cantor (1990), and Rumelhardt (1980). Schemas in deliberation can also be understood as frames which, as James Farr (1993:380-1) explains, “help us to understand the sort of rationality to be found in popular beliefs and public opinion, and to establish the epistemological prerequisites for

democratic discussion. Akin to 'ideas' . . . frames also reveal the cognitive resources that citizens (or elites) have beyond self-interest in making sense of the real world of democracy around them."

³⁷ Putnam (2002:103) claims that "pragmatists [such as Dewey] in particular have always emphasized that experience isn't 'neutral,' that it comes to us screaming with values." Likewise, Ryan (2004:21) writes: "That fact is intrinsically connected to value [for Dewey], indeed a literal means to value, erases both the fact-value dualism and the attempted reduction of values to facts."

³⁸ Bentley and Dewey criticize a strict fact-value dichotomy: "Whether this word [value] is used or not in the case of prizings, esteemings, cherishings, etc., the observed facts emphasize a point previously made:--'Valuing' is not a special isolated type of act performed by a peculiar or unique agent, under conditions so unique that valuing and values can be understood in isolation from orders of fact not themselves of the 'value' kind" (LW 16:348).

Crediting this insight to his "pragmatist teachers," particularly John Dewey and Morton White, Putnam (2002:137, 145) likewise insists that "[k]nowledge of facts presupposes knowledge of values" which means two things: one, that "the activity of justifying factual claims presupposes value judgments" and, two, that "value judgments [must be] . . . capable of being right (as 'objective' in philosophical jargon), if we are not to fall into subjectivism."

³⁹ This solution can also be justified by appeal to an Aristotelian model, whereby subjective elements, whether emotions or interests, are grounded on rational beliefs. O'Neill (2002:265) writes: "Because [on the Aristotelian model] emotions have beliefs constitutive of them, they are open to appraisal. They can be appropriate or inappropriate, felt at the right time, of the right things, for the right reasons or not." Ryan (2004:21) acknowledges the similarity between Dewey and Aristotle's approaches: "In the spirit of Aristotle, valuation [for Dewey] seeks to establish not just a list of prescribed values, but a genuine disposition to evaluate desires in terms of long-range goals."

⁴⁰ According to Landwehr (2005:58), "[m]aking reasons and giving reasons could . . . even constitute a kind of experimental action, instrumental for acquiring well-justified preferences. Reasons and information acquired in communication will then produce new and revised preferences." In other words, any account of a preference cycle would have to capture the complexity of deliberation understood as a process of experimental inquiry, wherein preferences are tested through reason-giving and argumentation. An extant theory, which has a transactional tone to it, is the psychological theory of motivated reasoning which, as described by Schroeder (2002:121), "builds on the hypothesis that we formulate favorable or unfavorable judgments about objects of our attention that are subsequently stored in our memories as an evaluative or affective 'tag.'" It is also similar to schema theory in cognitive science, as summarised by Scholl (2002).

⁴¹ Ackerman and Fishkin (2004:66) note that "in reflecting on our deliberative polling experience, we have found that the social skills of the moderator [or facilitator] have been useful in keeping the flow of conversation going and encouraging an atmosphere of mutual respect."

⁴² Also understanding the choice between *homo economicus* and its alternative as a false dichotomy, Wohlgemuth (1995:75) writes: "The repeated defenses of *homo oeconomicus* as a coherent explanatory device can only be convincing as far as they draw upon a myopic dichotomy between the benevolent despot model for politicians and neoclassical *oeconomicus*. Both models, however, differ only in alleged motives, not in their irrelevance to account for basic facts of human condition."

⁴³ Here, Dewey echoes Jon Elster's (1989:13) point that "[t]o explain social institutions and social change is to show how they arise as the result of the actions and interaction of individuals. This view, often referred to as methodological individualism, is in my view trivially true."

⁴⁴ These lectures are collected and edited by Koch (1998). In the first letter of their correspondence, from Bentley to Dewey in 1932, Bentley wrote: "While you [Dewey] were at Chicago, I had a place at the outer edge of one of your courses, where I secured a certain manner of vision which, so far as I can appraise such things, I have long regarded as one of the three or four most valuable aids I have received" (Ratner 1964:51). What Bentley took notice of in these lectures, according to Sidney Ratner (1964:27) was the convergence of Dewey's ideas with those of the social theorist Georg Simmel: "the 'individual' formulation can be developed out of the 'social' formulation much more vividly than the purportedly 'social' can be developed out of the 'individual.'" So the individual is not the brute unit of analysis; instead individuals are themselves constituted by their group and community involvements. Several years later, in his correspondence with Dewey, Bentley credited Dewey and Simmel as "the real writers of this book [*The Process of Government*]" (Ratner 1964:85).

⁴⁵ Group involvement--for instance, the mob in the football stadium or the assembly of activists at the political rally--often produces starkly different behaviour in individuals as compared to individuals taken singly. Moreover, this behaviour is not always motivated by self-interest. According to Le Bon (1910:5), "[t]he substitution of the unconscious action of crowds for the conscious activity of individuals is one of the principal characteristics of the present age." For more recent works on group psychology and crowd behaviour, see Tambiah (1997) and Oakes (2002). If Dewey and Bentley's socially-constructed view of the individual is warranted, then constitutional

economists' treatment of the individual as the primary unit of analysis radically neglects observable behaviour for the sake of methodological simplicity. The problem with methodological individualism is, then, an overall picture of human behaviour which is not only pessimistic, but also descriptively inaccurate.

⁴⁶ Although analysis of groups into their constituent parts or individuals is necessary for studying social behaviour (particularly in the transactional terms of system inputs and outputs), methodological collectivists, including many deliberative democrats, unfortunately neglect this valuable technique.

⁴⁷ As Blumer (1969:82) contends, "group or collective action consists of the aligning of individual actions, brought about by the individuals' interpreting or taking into account each other's actions." After analyzing thirty-five years of empirical data on prisoner's dilemma experiments, Sally (1995:86-7) concludes: "Rational behavior may not always be self-interested. If the temptation to defect is great, the group size is large, or no money is at stake, people will be more likely to act in their own self-interest. Yet, their consciences are triggered and they seem to account for the utility of others if the group has a lot to gain when everyone cooperates, if they are instructed to cooperate, if they can look at their partners when deciding, if they can select an affectively named choice, and, most importantly, if they can engage their partners in conversation."

⁴⁸ In response to Buchanan's separation of market and jury conceptions of politics, Rae (1984:36) responds: "the tradition of pragmatism in the United States . . . [states] that practical activity, including politics, must be understood as a search for truth under certain circumstances of uncertainty, and the operating dictum must be 'Keep the road open to change.' [. . .] What makes the marriage between a truth-based conception of political society and constitutionalism possible is a doctrine of fallibility applied to existing dogma."

⁴⁹ Doubt over the motivations of fellow deliberators transitions into a process of deliberative problem-solving: (i) defining the difficulty of discerning fellow deliberators' and groups' motives, (ii) suggesting hypotheses about particular motives and interests, (iii) refining these suggestions and (iii) experimentally confirming or disconfirming these suggestions through discourse and observation. "[W]hile self-interest has its objective components," Mansbridge (1990a:262) insists, "it is also in part constructed, through public and private deliberation." Objecting to Mansbridge's view of deliberation as a corrective to the orthodox economic understanding of human motivation as self-interested, Schroeder (2002:120) relies on Howard Margolis's (1990) dual utility approach: "individuals [who have preferences for both partial and public interests] will engage in public-spirited behavior when they are asked to do just a few simple deeds, because the participation ratio [i.e. one's expenditure of resources on public over spending on private activities] will then be low and the value ratio [i.e. the gain from public-regarding activity over the consequent private gain foregone] relatively high, in so far as they will not forego much private satisfaction if the deeds are simple. Unfortunately, the prospect of extended deliberation presents just the opposite, and motivationally less attractive, prospect: namely, a high participation ratio and a low value ratio."

⁵⁰ Mansbridge (1990a:157) proposes an alternative economic model of deliberation: "The point of 'economic' thinking ought not to be to postulate one set of motives rather than another, but, having determined through empirical investigation that one or another set of tastes or values seems to prevail in a given context, to see how actors possessing those tastes or values respond to changes in constraints." Indeed, research in this area has already begun, and continues, in the field of behavioral economics. The literature on behavioral economics, which combines psychology and economics to determine how agents behave given typical constraints (e.g., imperfect knowledge), capacities (e.g., cognitive heuristics) and motivations (e.g. altruism), is extensive. Leibenstein (1976) and Thaler (1994) explore the shortcomings of the existing model of economic man. Mullainathan and Thaler (2000) develop the notion of bounded rationality, originally invented by Simon (1997:291). Khalil (2003) defends behavioral economics by employing tools from Dewey and Bentley's transactional view.

⁵¹ The similarities between deliberation and inquiry are manifold. One significant parallel that Ryfe (2005:56) brings to light is that the onset of deliberation, similar to the advent of inquiry, "represents a disturbance of everyday reasoning habits." According to Burkhalter, Gastil and Kelshaw (2002:409), the "listening [phase of deliberation] often involves active inquiry." Identifying the generic stages or phases of deliberation is not to insist that deliberating is a thoroughly standardized undertaking. To the contrary, "deliberation is not a uniform activity," Button and Ryfe (2005:22) maintain, "it can take different forms, be oriented to different purposes, and have different outcomes." However, by detecting certain generic features of successful deliberations (similar to inquiries) it is possible to design a deliberative process that does the work that deliberation accomplishes better.

⁵² Goodin and Niemeyer (2003:634) eventually confirm their hypothesis that internal-reflective deliberation during the information phase has more impact on shifting policy preferences than external-dialogical deliberations during the discussion phase: "it [the discussion stage] was of much less consequence than the information phase—contrary to the expectations of discursive democrats who would have us privilege conversation as politically the most important mode of deliberation."

⁵³ Dewey writes: "the resolution of an indeterminate situation is the end, in the sense in which "end" means end-in-view and in the sense in which it means close" (LW 12:160). Dewey continues: "An end as an actual consequence,

as an existing outcome, is, like any other occurrence which is scientifically analyzed, nothing but the interaction of the conditions that bring it to pass. Hence it follows necessarily that the idea of the object of desire and interest, the end-in-view as distinct from the end or outcome actually effected, is warranted in the precise degree in which it is formed in terms of these operative conditions" (LW 13:216).

⁵⁴ Joas and Beckett (2002:2) comment on how on Dewey's understanding of ends-in-view, goals are not exogenously determined: "According to Dewey's concept of 'ends-in-view,' goals are not externally set but emerge in the action process itself . . . [which] allows viewing perception and cognition not as acts preceding action but as part of the action process that is inherently connected to the situational context." Eldridge (1998:102) likewise comments on the locality and endogeneity of ends-in-view: "the end-in-view is the objective insofar as it organizes the 'subactivities' into the process that brings about the sought objective. As such, it is a specific end sought in a specific situation."

⁵⁵ Dewey claims that the development of a procedure is proof that ends-in-view operate in inquiry: "The difference between the two senses of end, namely, end-in-view and end as objective termination and completion, is striking proof of the fact that in inquiry the termination is not just realistically apprehended and enunciated but is stated as a way of procedure" (LW 12:169) Dewey continues: "For an end-in-view is itself a means, namely, a procedural means. [. . .] Only an end-in-view that is treated as a hypothesis (by which discrimination and ordering of existential material is operatively effected) can by any logical possibility determine the existential materials that are means" (LW 12:490)

⁵⁶ Dewey writes: "An idea of an end to be reached, an end-in-view, is logically indispensable in discrimination of existential material as the evidential and testing facts of the case. Without it, there is no guide for observation; without it, one can have no conception of what one should look for or even is looking for" (LW 12:491). Dewey calls attention to the operational nature of ends-in-view: "Unless the anticipation or end-in-view is an idle fantasy, it takes the form of an operation to be performed" (LW 12:168). Dewey comments on how ends-in-view facilitate the selection of means in inquiry: "Formation of an end-in-view, or consequence to be brought about, is conditioned by recollection; it requires making plans in conjunction with selection and ordering of the consecutive means by which the plan may become an actuality" (LW 12:41). Dewey continues: "The objective close [of inquiry] in being foreseen and intended, becomes an end-in-view and thereby serves to direct intelligent selection and arrangement of techniques and materials" (LW 12:385).

⁵⁷ Geuss (2001: 126) observes the interchangeability of means and ends in Dewey's action theory: "What is a means in one context, may be an end in another, and in many spheres, especially those in which human activity is freest, the distinction will have only whimsical application." Dewey confirms that the concept of an end-in-view gives rise to a means-end continuum: "Every condition that has to be brought into existence in order to serve as means is, in that connection, an object of desire and an end-in-view, while the end actually reached is a means to future ends as well as a test of valuations previously made" (LW 13:229). Dewey continues: "The end-in-view is that particular activity which operates as a coordinating factor of all other subactivities involved. Recognition of the end as a coordination or unified organization of activities, and of the end-in-view as the special activity which is the means of effecting this coordination, does away with any appearance of paradox that seems to be attached to the idea of a temporal continuum of activities in which each successive stage is equally end and means" (LW 13:234). As an illustrative example about how means are progressively refined, Dewey employs Charles Lamb's story about the origin of roast pork: "The first time roast pork was enjoyed, it was not an end-value, since by description it was not the result of desire, foresight, and intent. Upon subsequent occasions it was, by description, the outcome of prior foresight, desire, and effort, and hence occupied the position of an end-in-view" (LW 13:227).

⁵⁸ Campbell (1993:23) makes a similar argument: "Dewey's claims about intelligence are not about the intellectual level of various individual members of the general population. His point is rather about the possible efficacy of cooperative inquiry using shared intelligence. If people begin to participate actively in the determining of their own lives, they will learn more; and the complaint that they are too stupid for the life of cooperative inquiry would have to be reevaluated."

⁵⁹ According to Schroeder (2002:121), "[o]ur directional goals are among the conditions that can influence the beliefs, rules, and evaluations that people employ and find persuasive." Because converging on an end-in-view indicates a successful close to inquiry (or arrival at a warranted assertion) as well as superior coordination and organization of activities, it should likewise signal the termination of successful deliberation and effective social action. Dewey comments on the relationship between ends-in-view, means and warranted assertions: "The proposition in which any object adopted as an end-in-view is storable (or explicitly stated) is warranted in just the degree to which existing conditions have been surveyed and appraised in their capacity as means" (LW 13:213). Dewey notes how ends-in-view serve to effectively coordinate activities: "The end-in-view is that particular activity which operates as a coordinating factor of all other subactivities involved. Recognition of the end as a coordination or unified organization of activities, and of the end-in-view as the special activity which is the means of effecting

this coordination, does away with any appearance of paradox that seems to be attached to the idea of a temporal continuum of activities in which each successive stage is equally end and means” (LW 13:234).

⁶⁰ Although not identical, this five-stage process resembles the “decision-making process” that Hunold and Young (1998:89) recommend as a condition for truly inclusive policy-making in a communicative democracy: “all affected parties must be able to participate in the agenda-setting, formulation, implementation, and evaluation stages of the policy process.”

⁶¹ One of Dewey’s contemporaries, Mary Parker Follett (1949:1) also expressed the insight that “[d]ecision is only a moment in process.” Musgrave (1984:135) echoes the more general point that “process also matters as a means of moving from one state to another, and here, the dichotomy between process and end-state theories of social justice is a chimera which dissolves under closer scrutiny.”

⁶² In Dewey’s own writings as well as those of commentators, the terms ‘situation’ and ‘context’ are often interchanged. For instance, Bernstein (1961:28) writes: “The concept of the situation or context is perhaps the most fundamental in Dewey’s theory of experience.” The concept of context is similar to Benhabib’s (1996:69) concept, appropriated from Hegel, of “objective spirit”: “the terms ‘objective spirit’ would refer to those *anonymous yet intelligible* collective rules, procedures, and practices that form a way of life.” Deliberative democrats Mansbridge (1994:153), Ackerman and Fishkin (2002:134), and Cohen (1996:101) all note the importance of contextual factors in deliberation. Context is also analogous to Daniel Kemmis’s (1990:6) notion of “place” when he writes “public life can only be reclaimed by understanding, and then practicing, its connection to real, identifiable places.”

⁶³ For instance, a person who decides not to mow his neighbor’s lawn because it would lower his status in the community would not begin mowing lawns once someone notified him of this fact. In other words, even if the agent is ignorant of his identity-based commitment to not mow lawns, making him aware of this commitment will not change his behaviour (Khalil 2004:2).

⁶⁴ For example, a moderately conservative gambler who chooses the bet with the higher payoff over the bet with a lower payoff would likely change his strategy once he has been informed of the much lower probability that the high payoff bet would win (Khalil 2003:1-3).

⁶⁵ Empirical research has shown that by not fully revealing preferences at the outset, participants in discourse will tend to negotiate towards outcomes that reflect the total information available and that are, on the whole, more feasible. Austen-Smith and Feddersen (2006:211) note that “any requirement that personal biases should be made clear before contributing to public deliberation, is inconsistent with a desire to promote the full revelation of information regarding the relative merits of the feasible collective decisions.” This conclusion might indicate that participants in deliberation will not, unlike the Arizonan in Fishkin’s deliberative poll, easily admit that they have changed or compromised their preferences.

⁶⁶ This more feasible outcome--i.e. clarification and re-ordering of preferences--is what Dryzek (2000:45) envisions in his recommendation that deliberation endogenously “restrict the domain of preferences” to overcome intransitive preference orderings, or majority cycling. See also Dryzek and List (2003). Similarly, Benhabib (1996:71) states that “the formation of coherent preferences cannot precede deliberation; it can only succeed it.”

⁶⁷ In deliberation, context matters. However, constitutional economists are wont to admit that the form of preferences, such as the way in which they are communicated, can dictate outcomes. Elias Khalil (2004:3) calls attention to one of the reasons for this denial: a “standard neoclassical axiom” whereby “different representations of the same choice problem [i.e. its form] should produce the same decision [content].” For instance, agents who intentionally misrepresent their preferences (e.g. through strategic voting and cheap talk) fail to see that words, like wrapping a gift, are only effective symbols for signaling preferences if the hearer-receiver trusts the speaker-giver (Khalil 2004:3). Kuran (1995:15) concurs: “[T]he proclivity to engage in preference falsification depends crucially on the institutional context.”

⁶⁸ Mackie (1998:112) notes that, “it [the cheap talk model] does not apply to normal political discussion. Recurrent public interaction about knowable information among multiple senders and multiple receivers, not one-time private interaction about unknowable information in a dyad, is the characteristic structure of the *democratic forum*.”

⁶⁹ The principle of *stare decisis* in the common law, i.e. to treat like cases alike, exemplifies how a context-dependent preference to preserve tradition or custom can be bolstered by the intelligent design of constraints. Hayek (1979:17) claims that a commitment to such common law principles will successfully preserve stability in political orders: “a society will achieve a coherent and self-consistent overall order only if it submits to general rules in its particular decisions”

⁷⁰ On a self-actional model, deliberative choice is dictated either by preferences only, as is the case with many deliberative democrats, or constraints only, which most constitutional economists accept, then by favoring one the other is left by the wayside. Consequently, inquirers using the self-actional model pass over either the preference- or constraint-influenced dimension of the deliberative situation. To remedy this situation, some constitutional

economists and deliberative democrats alike have sought to incorporate preferences and constraints into interactional models of deliberative choice. See, for instance, Buchanan (1991:226) and Schwartz (1989:32).

⁷¹ Mansbridge (1994:153) summarises Buchanan's (1986) position: "Buchanan concluded, with a sentiment common in American institutional thought, that constitutional design should aim at reducing overall the extent to which institutions must rely on public spirit." However, citizens can successfully deliberate among each other and with experts to produce stable and democratic institutional change--as was the case in British Columbia, Canada, where a group of deliberating citizens designed an electoral system that successfully circumvents a category of unfair outcomes. The "BC-STV" or single transferable vote system developed by the British Columbia Citizens' Assembly on Electoral Reform (2004) prevents vote wastage by making votes above those necessary to win or from those eliminated for having the fewest votes transferable to the next choice. This example of an intelligently designed electoral process stops what is often called 'the spoiler effect,' whereby a vote cast for a candidate with little chance of winning is in effect a vote for the opposition.

⁷² Olson (1991:126) states that because "[m]orality is in short supply . . . we should structure incentives so that we do not need to call on morality any more than we have to." Not only constitutional reform, but also morality policies that directly implicate citizen "debate over first principles"—e.g., about abortion, capital punishment, pornography, euthanasia—require, according to Mooney (2001:3), that policy-makers consider those moral norms that are widely accepted within their communities.

⁷³ Sandel (1996) characterizes Rawls's conception of personhood in the Original Position (where agents have no knowledge of their personal traits) as that of the "unencumbered self," and argues that humans are instead inextricably situated within the context of their community.

⁷⁴ The *Ethics* was written and published by Dewey and James Hayden Tufts in 1908, and then printed again in a revised edition in 1932. However, the parts cited were originally written by Dewey alone.

⁷⁵ Dewey writes: "He [the moral agent] is led to widen and generalize his conception of his act when he takes into account the reaction of others; he views his act objectively when he takes the standpoint of standard; personally, when it is an end merely as such. [. . .] An ideal spectator is projected and the doer of the act looks at his proposed act through the eyes of this impartial and far-seeing objective judge" (LW 7:245-6).

⁷⁶ According to Dewey, "the supposition of complete isolation is contrary to fact. Others do not leave us alone. They actively express their estimates of good in demands made upon each one of us. They accompany them with virtual promise of aid and support if their expectations are met, and with virtual threats of withdrawal of help, and of positive infliction of penalty, if we do not then take them into account in forming the purposes which control our own conduct. And these demands of others are not just so many special demands of so many different individuals. They are generalized into laws; they are formulated as standing claims of "society" in distinction from those of individuals in their isolated severalty. When considered as claims and expectations, they constitute the Right in distinction from the Good. But their ultimate function and effect is to lead the individual to broaden his conception of the Good; they operate to induce the individual to feel that nothing is good for himself which is not also a good for others. They are stimuli to a widening of the area of consequences to be taken into account in forming ends and deciding what is Good" (LW 7:224-5).

⁷⁷ While Dewey acknowledges that "choice signifies a capacity for deliberately changing preferences," choosing also reflects an agent's willingness to have his choices bounded by a system of intelligently designed constraints (LW 3:96). In other words, freedom does not constitute license. And choice is not the ability to arbitrarily select from an unlimited menu of options. For example, restricting the domain of acceptable preferences through a step-by-step deliberative process, as recommended by Dryzek (2000) and Dryzek and List (2003), does constitute a transactional response to the problem of majority cycling. In this respect, Kelman's (1987:253) claim that "[t]he solution to the 'paradox' of voting is public spirit" has merit. Khalil (2003:8) notes that "facts and mental constructs (i.e. constraints) are involved in a co-determination that amounts to a process of creation, viz., the creation of theories that cannot, and should not, be free from the context of the transaction."

⁷⁸ One advantage of implicit presuppositions and conventional norms over explicit rules is that rules can generate a rote and unreflective process of rule-following, whereby agents take little ownership for the consequences of their rule-guided actions. Ryfe (2005:63) notes that "during actual [deliberative] exchanges, rules help participants ensure that their judgments are reflective and based on a full range of information. [. . .] But rules may mean little if individuals do not feel accountable for outcomes."

⁷⁹ Bormann and Bormann (1980:49) affirm that when a group initially forms antagonistic behaviour, of which strategic action is a variant, can have a corrosive effect on the group's solidarity: "When the members of a new group meet for the first time, they begin to interact socially . . . A positive social climate . . . builds cohesiveness by providing social rewards, and it encourages people to speak up and say what they really mean . . . The opposite of solidarity is a show of antagonism to the group or another person [which] . . . make[s] the others uncomfortable."

⁸⁰ Dewey and Bentley do address signaling behavior in *K & K*. In their catalog of communication techniques, all varieties of sign-behavior, from pre-linguistic signaling (e.g. a porcupine bristling its needles) and verbal cueing (e.g. a yelp or cry) to ostension and linguistic naming (e.g. pointing to the sun setting over the horizon and uttering 'sunset') communicate meaning. Other sign behaviours discussed by Dewey and Bentley include designation, specification, characterization and symbol (LW 16:139-44).

⁸¹ Burke (1994:28) demonstrates how a form of life lower than human engages in what he terms "proto-inquiry": "[C]onsider something like a sea anemone at the bottom of the ocean. We think of these creatures as having relatively complex internal workings and also as subsisting within and as part of a characteristic setting on the ocean floor. [...] The ebbing and flowing of the seawater in which the anemone lives is as much a part of that system's constitution as are the workings inside its body. And, for instance, those currents are not always quite right (they are too fast or too slow, too hot or too cold, nutritionally deficient, etc.), in which case the sea anemone will move about in an effort to maintain a setting more appropriate to its needs. Dewey's theory of inquiry is able to explain this as a simple case of ongoing 'proto-inquiry' on the sea anemone's part."

⁸² Brighouse (2004:17, 19) states that "political principles must be feasible in order to count as good principles" because in "designing institutions, we choose those [institutions] that can best realize the principles we have offered, even if they cannot realize them fully." Luke (1987:185) describes 'ought'-based proposals bounded by a concern for 'is'-based implementation as "conditionally normative": "The conditionally normative, then, does not trade in categorical judgments but, rather, in operative imperatives that translate first-order principles of 'Ought' into the everyday 'oughts' of real political action." Such conditionally normative proposals have a greater chance of satisfying what Dryzek (2001:652) terms the "basic constraint of deliberative economy" and the demands of what Gutmann and Thompson (1996:40) call "middle democracy . . . the land of everyday politics, where legislators, executives, administrators, and judges make and apply policies and laws, sometimes arguing among themselves and listening to citizens, other times not."

⁸³ The premises of my argument for this conclusion go something like this: 1. If we ought to do X, then it must be possible to do X. 2. If we ought to engage in deliberation to produce stable democratic outcomes, then it must be possible to engage in deliberation so as to produce stable democratic outcomes. 3. Contrary to constitutional economists and some empirical researchers, it is possible to intelligently design institutions for engaging in deliberation so as to produce stable democratic outcomes. Note that this is not a deductive argument (if it were, it would be a formally fallacious instance of affirming the consequent). Instead, it is an inductive argument whose strength depends on the recruitment of ample empirical evidence to support the claim that it is possible to intelligently design institutions for engaging in deliberation which, in turn, generate stable democratic outcomes.

⁸⁴ In her study of contemporary town meetings in Selby, Vermont, Mansbridge (1980:47), quoting Ralph Waldo Emerson, beckons to the foregone times (particularly the 19th century), when town meetings were prominent forums for local governance: "In a town meeting, the roots of society were reached. Here the rich gave counsel, but the poor also, and moreover, the just and the unjust . . ." This nostalgic vision has led to what Leighninger (2006:52) calls "the stereotype of the citizen as deliberator."

⁸⁵ Laswell (1963:99) explains the rationale for running experimental or 'pilot' studies, which he refers to as the process of prototyping: "I think of prototyping as an innovation, typically small-scale, made in political practice primarily for scientific purposes. The institutional practice involved can be copied; hence, the practice may be incorporated into the institutional patterns of a body politic."

⁸⁶ To negotiate the problem of scale, Barber (2003:273) suggests "a form of town meeting in which participation is direct yet communication is regional or even national." Technological solutions to the problem of scale in town meetings and other deliberative forums abound, including internet-based and satellite-based communications that effectively widen participation. See London (1995), Davis et al. (2002) and Friedman (2006).

⁸⁷ According to Lukensmeyer et al. (2005:163 fn. 1), *AmericaSpeaks* is a Washington D.C.-based non-profit organization, started in 1995 with the objective of "engag[ing] citizens in the most important public decisions that affect their lives, at every level of government."

⁸⁸ In an interview conducted by Wallace (2005:29), the founder of *AmericaSpeaks*, Carolyn J. Lukensmeyer, comments on the role of technology in the Town Meetings: "The technology . . . allows the organization to synthesize the thoughts of a large number of people in an organized way. It also allows the organization to produce the results of the discussion immediately." Also, Parasie (2003:3594) gives a more detailed account of how results from the small group discussions are transferred to the plenary sessions: "Every opinion and idea raised at the summit was entered into a laptop and transmitted through a wireless network into a central database. Next, special teams assembled that data to identify the participants' most important themes and then project them onto large video screens around the hall." In this way, participants engage in what Yankelovich (1999:160) calls "proxy dialogue," vicariously experiencing the process and products of other participants' deliberations. See Friedman (2006:14).

⁸⁹ In a table categorizing types of deliberative forums, Button and Ryfe (2005:23) identify the mechanism for determining participation in town meetings as self-selection. However, with 21st Century Town Meetings, self-selection is not the method, but rather active recruitment based on a demographic profile of the affected community.

⁹⁰ There are technical differences between stratified random sampling and stakeholder selection. With the technique of stratified random sampling, the population is separated or stratified into target categories by issue-relevant characteristics, interests or values and then a random sample of individuals is taken from each target category. In contrast, stakeholder selection identifies those groups or organizations affected by the eventual decision and invites representatives from those groups and organizations. For discussions of the pros and cons of both approaches, see Smith and Wales (2000:57), Button and Ryfe (2005:23), and Clemons and McBeth (2001:26-9).

⁹¹ Bryson (2004:xiii) notes that “strategic planning is not the same as strategic thinking, acting and learning.” Rather than Habermas’s notion of strategic action whereby individual agents deceive, coerce and take advantage of their fellows for the sake of achieving personal success, strategic planning is a collective and organizational concept whereby agents coordinate their decisions and actions in order to achieve their common objectives. On similar theories of strategic decision-making, see Braybrooke and Lindblom (1963) and Lerner (1976).

⁹² Parasie (2003:3594) documents the high cost of the D.C. Citizen Summit. Official decision-makers may adopt or dismiss the recommendations of citizens participating in the Town Meetings at their discretion. Lukensmeyer et al. (2005:162) concede that there is no proof that, in the long run, the decisions of Town Meetings impact the content of public policy.

⁹³ It is possible to supplement some of these techniques for eliciting citizen input, particularly initiatives and referenda, with deliberation to make them effective and engaging means of popular policy-making. Mattson (2002:329) comments: “I believe that in states with the initiative and referendum (a prize reform of the Progressive Era) we could use citizen deliberation more effectively . . . To provide them with deliberative sessions where they could discuss pending legislation would both energize civic deliberation while also improving knowledge about initiatives [and referenda]”.

⁹⁴ In the U.S., citizen juries began in 1974 with Ned Crosby’s plan for “citizen committees” composed of representative members of the affected community who collaboratively worked to resolve complex policy problems. According to Crosby and Nethercut (2005:112), the project took form when “Crosby set up the Jefferson Center . . . to do research and development on new democratic processes. By 2002, the center had conducted thirty-one Citizen Jury projects in the United States.” Unfortunately, by the end of 2002, the Jefferson Center closed, but still maintains its website to document previous accomplishments and successful Citizen Jury projects abroad. In Australia, citizen juries have been employed to address environmental issues; see Goodin and Niemeyer (2003). In Britain, they have served as forums for making decisions about healthcare priorities; see Kashefi and Mort (2004) and Coote and Loughan (1997).

⁹⁵ Mansbridge (1993:98) confirms the importance of questioning during deliberations: “Institutions that lead people to transform their preferences and themselves tend to have several features. [. . . One, they] give individuals a chance to ask questions . . . [two, they] promote the human emotions of hatred and empathy . . . and [three, they] promote acting according to principle, or duty.” In Germany, Peter Dienel has instituted an ambitious government-backed Citizen Jury project run through the Research Institute for Citizen Participation. Smith and Wales (2000:56) report: “In Germany, where juries are known as ‘planning cells’ (Planungszellen), government bodies and agencies have commissioned the Research Institute to run planning cells, providing financial support and agreeing to take into account their recommendations and judgements in future decision-making processes.”

⁹⁶ One strong limitation on the control jurors exercise over the process is that the central question (or ‘charge’) for the proceeding is established by the staff of the organizing body and the sponsor, not the jurors themselves. The reason for granting this agenda-setting control to outside agencies is that, as Smith and Wales (2000:58) explain, “[e]xperiments with *complete* juror control of the process have found that participants, in the initial stages, do not have enough of an overview on a subject to deal competently with setting the charge, agenda organization or witness selection.”

⁹⁷ Recall that Fischer and Schön (see chapter five) also successfully employ the constitutional economist’s favored concept of contractual obligation in their model of informal policy-making contracts between citizens and experts. Smith and Wales (2000:61) explain the benefits of pre-jury contracts: “Under the conditions of this contract, the commissioning body is bound to either act on the jury recommendations or to give reasons why it has decided not to act. This not only increases the democratic legitimacy of the decision-making process, but also gives jurors the sense that their deliberations will be taken seriously.” Indeed, the pre-jury contract provides an institutional response to Mattson’s (2002:328) scepticism about the political efficacy of agents deliberating on public policy issues: “What would citizens *do* with their deliberations? There is nothing about citizen deliberation that can really have a direct impact on government decision-making. So why should citizens bother talking with one another?”

⁹⁸ The dominance of legalistic thinking in Western societies has led many democratic theorists to invoke the jury metaphor or to recommend modeling deliberations after jury deliberations. For instance, Farr (1993:389) writes: "Perhaps the jury can even help to spur the imaginations of democratic reformers in a call for 'citizen juries' or similar sorts of deliberative assemblies that might empower ordinary citizens." In response, Schroeder (2002:96) contends that deliberative democracy is an attempt by theorists to conceptualize democratic process in terms of legal procedures, and thereby to "turn politics into law."

⁹⁹ Gutmann and Thompson (2004:42) as well as Smith and Wales (2000:59) argue that deliberators should aim to criticize the context in order to show that reform can overcome a status quo that perpetuates injustice.

¹⁰⁰ Ackerman and Fishkin (2002:131) assert that "changing conditions changes the terms in which the problem is expressed, and the institutional modes through which it may be ameliorated, if not resolved." According to deLeon (1995:901), "[v]ariations in conditions (e.g., time, dispersion, magnitude) certainly require variations in perspective and means, i.e., a simple acceptance of a basic tenet of the policy sciences: different contexts require different approaches." "Where[as] biases or strategic manipulation by more powerful actors in the initial stage can be minimized [through constraints]," Smith and Wales (2000:61) assert, "juries offer [in the long-run] a conducive environment for deliberation and the development of a more active ethos of citizenship."

¹⁰¹ Dryzek (1989:111) argues "public communal reasoning toward policy positions moves the quality of decision to the center stage, downplaying the influence of strategic interaction or the preferences of temporary majorities."

¹⁰² Fraser (1992:122) defines "divided societies" as those "societies whose basic institutional framework generates unequal social groups in structural relations of dominance and subordination."

¹⁰³ Neo-corporatism is defined by Offe (1985:242) as when "[t]he institutional order of which periodic elections, political parties, and parliamentary government are the main elements is supplemented by a political arrangement consisting of major organized interest groups, their relative procedural status, and bodies of consultation and reconciliation." Similar to neo-corporatist arrangements, policy-making councils attribute public status--although not always legal status--to citizen interest groups as joint decision-makers in the policy-making process. See Schmitter (1983, 1988) and Schmitter and Streeck (1985). Lijphart (1977:25) depicts consociational arrangements as those where "the political leaders of all significant segments of the plural society cooperate in a grand coalition to govern the country." In contrast, the policy-making councils of Brazil do not preside over the affairs of the entire society, but only administer affairs in specific policy areas--in São Paulo, health-care policy and in Porto Alegre, budgetary policy. Barry (1991:136-40) criticizes consociational arrangements for being self-defeating in highly polarized societies.

¹⁰⁴ One of the most serious obstacles to realizing the deliberative ideal in São Paulo and Porto Alegre is the difficulty of transcending some aspects of the Brazilian context. According to Santos (1998:462), "Brazil is a society with a long tradition of authoritarian politics." Besides its history of dictatorial regimes, Brazil presents some other serious challenges. If as Dewey says, "democracy is a way of life," (LW 13:155; LW 14:226) then Brazil's social-cultural landscape, with its stark social and economic inequalities, would appear unsuited for democracy--let alone, deliberative democracy. According to Bell (1999:73), a divisive social context problematizes the achievement of deliberative democracy: "In a society deeply polarized between rich and poor, it is difficult to imagine that people will be willing to set aside their differences to discuss controversial issues in good faith. In such a context, the solution might be expropriation rather than deliberation."

¹⁰⁵ With the ratification of the Brazilian Constitution in 1988, community organizations and interest groups around the country petitioned the provisional government to include a constitutional mandate for citizen participation in local policy-making. "Underpinning such demand," Coelho et al. (2005:174) report, "was the belief that by opening spaces for citizens to participate, the policy making process would become more transparent and accountable and social policies would better reflect the needs of citizens." Coelho (2004:33-4) depicts the enormity of the Brazilian movement toward institutionalizing citizen involvement in the policy-making process. Cifuentes's (2002:6, 29) dissertation also provides valuable background on the Municipal Health Council in São Paulo.

¹⁰⁶ São Paulo's Health Council is "a permanent collective body that consists of citizens, health professionals, governmental institutions and providers and producers of health services" (Coelho et al. 2005:176). In addition, the Health Council is a deliberative forum in which participants discuss and debate proposals for new healthcare policies as well as the prioritization of existing healthcare policy goals. However, the real political influence of the Health Council emerges from its power to veto the local healthcare secretariat's planning and budgeting decisions, so that they are refused federal support and funding. Coelho (2004:36, 38 fn. 7) also notes that the government "offer[s] structural incentives for participation by low-income and low-status groups"--namely, for "the [public] goods [e.g. greater health care benefits] . . . that will accrue to the community rather than individual benefits."

¹⁰⁷ The constitutional economist Viktor Vanberg (2004:70) remarks, "[c]onsidering the opportunity costs of discourse, persons may well voluntarily agree on limiting the role that they want to play in carrying out their common affairs." Yet, the considerable opportunity costs incurred by citizen delegates do not dissuade them from

attending and participating in the Health Council meetings. However, Coelho, Pozzoni et al. (2005:180) report that “a review of the lists of attendance at the Municipal Health Council plenary meetings during the 2001-2002 term reveals that the majority of citizen representatives *do* attend the council meetings. Moreover, because their level of attendance tends to be slightly higher than that of the participants, and they often outnumbered the other groups [i.e. health professionals, governmental agencies, and healthcare suppliers/producers].” It should also be noted that the council has sixty-two members, thirty-one of which are delegates of citizen groups, and thirty-two of which are required for a quorum.

¹⁰⁸ Kelman (1990:185) writes: “If public spirit is important to achieving good public policy . . . then a new challenge for institutional design appears: the challenge of designing institutions to nurture the presence and to foster the development of public spirit.” The designers of the São Paulo Citizen Health Council have successfully met Kelman’s challenge by modeling a system of incentive-compatible constraints that are sensitive to the reinforcing effects of social-political context and identity-based commitments.

¹⁰⁹ As Coelho et al. (2005:181) report, vernacular proves troublesome for the more educated speakers to comprehend: “The tendency of citizen representatives [to the Municipal Health Council of São Paulo] to construct their arguments in a way that is regarded as unstructured, combined with their focus on highly localized issues, makes their speeches appear unclear, emotional, disruptive, or irrelevant to most representatives of the other sectors. Moreover, this style of speech tends to be, and it is regarded as not only ineffective but also virtually unintelligible.” In their study of deliberative democratic procedures for siting hazardous industrial facilities, Hunold and Young (1998:87) conclude that “[p]articipants . . . must be able to express their needs, interests, and opinions in their own way, and not be dismissed because they lack expertise or ‘proper’ speaking style.” In her own work, Young (1996:132) echoes this same theme that tolerance and inclusivity are mandatory features of deliberative procedures.

¹¹⁰ The institutional designers are perfectly aware of how both groups and individuals must serve as coequal units of concern in the process, and thus they affirm the value of methodological pluralism. Some participants go from being Regional Meeting participants to delegates representing their district and the community groups to which they belong. Similar to Habermas’s (1996:314) multi-track model of democratic discourse, the participatory budget process occurs along two tracks. In the first “public sphere” track, citizens, civic associations and community groups participating in the March Regional Meetings critically evaluate the previous year’s budget and elect delegates. Similar to Fraser’s (1992:123) subaltern counterpublics, these meetings bring “subordinated social groups” to the fore of the decision-making process.

¹¹¹ The occasion to elect delegates who will advance to the formal track also offers an opportunity for some of the participants to transition to the more cognitively-demanding phase, involving, first, becoming more educated about the technicalities of the budget issues (e.g. its dimensions or themes) and, second, reasonably discussing and negotiating the budget with official policy-makers “[A]s a general rule,” Kelman observes (1990a:206), “the more important a policy is, the less important will be the role of self-interest in determining that policy.” Hence, it is more likely that the citizen representative, as she moves from the cognitively undemanding early phase to the cognitively demanding later stage, will behave not simply as a delegate who is strictly accountable to her district or group, but also as a trustee vested with authorization to make independent judgments about what budgeted projects would be the best for the whole of Porto Alegre.

¹¹² Just because some processes in the governing of members of society are deliberative and non-coercive does not entail that all must be. As Mansbridge (1996:59) notes, “in their decision-making functions democracies need coercion, that the coercion need is usually far from fully legitimate, and that in using power [i.e. coercion], we must also fight it at the same time.” Schroeder (2002:124) likewise states that, “politics continues to be partially non-deliberative”

¹¹³ One danger of this extensive involvement of government in the education of delegates and the running of deliberative forums is that these activities will empty out parallel educational and participatory processes in civil society. Responding to this concern, Baiocchi (2001:55) asserts that, “[t]he Porto Alegre experiment has functioned more like a ‘school of deliberative democracy’ than as a vehicle of the co-optation or vacuum that hollows out civil society.” According to Coelho (2004:36), the Health Council is “a type of representation that is designed to complement the state rather than substitute for it.”

¹¹⁴ Only the delegates selected for the Intermediary Meetings receive extensive training in budget-making and economics as a prelude to their discussions with government officials in the Municipal Budget Council. By informing elected delegates about the technicalities of budget creation and economic viability, Porto Alegre’s participatory budgeting process develops civic competence, but only among a minority of its participants. Many of the poor and disenfranchised citizens participating in the Regional Meetings are never selected as delegates and consequently do not receive the experiential education that would enable them to engage in fruitful on-going deliberation and inquiry. Therefore, learning in the participatory budget process does not quite satisfy Dewey’s call

for government to engage in “the business of educating the people until the dullest and the most partisan see the connection between economic life and politics” (LW 6:245).

¹¹⁵ Porte Alegre’s participatory budgeting process also encourages the more learned and experienced deliberators within community groups to tutor the less informed and experienced, so that if any of their members are elected as representatives the group has greater influence on the final form of Porte Alegre’s budget. As Ryfe (2005:64) tells us, such activities can give rise to “a form of apprenticeship learning, in which individuals learn to deliberate by doing it in concert with others more skilled in the activity.” However, in Dewey’s estimation, dialogue “involves even more than apprenticeship in the practical process of self-government, important as this is” (LW 13:177). An alternative way to conceive the relationships between experts and citizens is as teachers and students, with citizens telling experts about the problematic situations within their communities, and experts educating citizens about the public consequences of their proposed actions to remedy these problems.

¹¹⁶ These deliberative forums provide what Schmitter (1983:898) terms a “mode of organized interest intermediation,” or a corporatist arrangement in which public deliberation within civil society influences government decision-making through formally designed channels. Mansbridge (1992:41) positively remarks on Schmitter’s (1988) proposal for corporatist deliberation.

¹¹⁷ Dewey and Bentley write: “Ecology is full of illustrations of the interactional (where the observer views the organism and the environmental objects as if in struggle with each other); and it is still fuller of illustrations of the transactional (where the observer lessens the stress on separated participants, and sees more sympathetically the full system of growth or change)” (LW 16:120). See Alexander’s (2002:21) similar invocation of ecology as a synonym for transaction and the idea of aesthetic growth. In the collection where Alexander’s article appears, Ralston (2004b:115) observes that with only some exceptions very little attention is paid to the notion of transaction and its role in Dewey’s logical theory. For a writer in another discipline, public administration, where ecology has been employed to better understand the subject-matter, see Gaus (2000 [1947]).

CHAPTER SEVEN

¹ Weinstock’s use of the term ‘operationalize’ should not be read too technically, as in the social scientist’s sense of converting a concept into a measurable variable for the sake of conducting empirical research. For guidance on how deliberation might be measured as a multidimensional concept, see Burkhalter et al. (2002:418-9).

² On the question of whether philosophers and public choice scholars can learn from each other, see Lomasky (2004), Sugden (2004), Buchanan (2004), and Kliemt (2000, 2005).

³ For a list of transactional scholars, some of whom employ the transactional approach to better understand deliberative democracy, see www.transactionalview.org.

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