Princeton University Press

Contractualist Liberalism and Deliberative Democracy
Author(s): Paul J. Weithman
Reviewed work(s):
Source: *Philosophy & Public Affairs*, Vol. 24, No. 4 (Autumn, 1995), pp. 314-343
Published by: Blackwell Publishing
Stable URL: http://www.jstor.org/stable/2961932
Accessed: 08/06/2012 08:03

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Princeton University Press and *Blackwell Publishing* are collaborating with JSTOR to digitize, preserve and extend access to *Philosophy & Public Affairs.*

http://www.jstor.org

PAUL J. WEITHMAN

Contractualist Liberalism and Deliberative Democracy

I

The requirement that government enjoy the consent of the governed is deeply rooted in our political culture and is arguably central to liberalism.[1] The most powerful and systematic elaboration of this requirement in recent years has come from liberals who are also contractualists. Contractualist liberals argue that governmental arrangements are justified only if they could or would be accepted by signatories to a hypothetical contract. They typically argue that the only arrangements which satisfy this requirement are those that guarantee freedom of speech, conscience and assembly, freedom of the press, and the right to vote and to hold political office.[2] Contractualists thus exploit a widely held idea about the necessity of consent to show how traditionally liberal rights and liberties—including political rights and liberties—are morally justified. Their ability to do so suggests that the social contract provides a very powerful model of political and moral argument.

Where contractualists have been less successful, some critics charge, is in their attempt to explain another idea deeply rooted in our political culture: the idea that democratic institutions enjoy a moral justification

I would like to thank Michael Byron, David Estlund, Sharon Lloyd, Loren Lomasky, Phil Quinn, David Solomon, and Todd Whitmore for helpful comments on earlier drafts. I would also like to thank Ellen Marshall of the U.S. Department of State for the opportunity to attend a State Department meeting on population policy at which I saw civil public deliberation on display. I am especially grateful to the editors of *Philosophy & Public Affairs* for their patience and their insightful criticisms of earlier versions of this essay.

1. See Jeremy Waldron, "Theoretical Foundations of Liberalism," in his *Liberal Rights* (Cambridge: Cambridge University Press, 1993) pp. 35–62.

2. See, for example, John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) p. 61.

that others do not. To understand the basis of this criticism, note that the political rights and liberties can be institutionalized in a variety of ways. They might, for example, be recognized in a pluralist democracy, in which political outcomes are determined by the constitutionally regulated competition of social and economic elites.[3] They could be recognized in a regime which combines universal suffrage with a scheme of weighted voting that favors the better educated.[4] Or they might be recognized in regimes of political egalitarianism, regimes in which opportunities to hold office and to influence political outcomes are equally distributed, and in which the political rights and liberties have what is sometimes called "fair value."

All of these political schemes have some claim to be called "democratic." The critics with whom I am concerned presuppose that political egalitarianism is the most truly democratic of these alternatives and enjoys the greatest moral justification. The problem with contractualism, they argue, is its commitment to the instrumental assessment of institutional possibilities for recognizing political rights and liberties: Contractualists think these possibilities are to be assessed by their effectiveness at promoting ends of which contracting parties would approve. Critics charge that arguments which appeal to institutional effectiveness fail to capture the reasons political egalitarianism is justified. The social contract may illuminate the justification of rights and liberties. But critics conclude that it cannot do the same for the institutions and practices in which political rights and liberties should be exercised.

The alleged failure of the social contract to justify political egalitarianism has led some to embrace an alternative model of political justification associated with "deliberative democracy." The centerpiece of this model is an ideal of democratic deliberation in which participants are free and equal. Political institutions are said to be justified insofar as their operations instantiate the ideal. The justification of these institu-

3. From now on I shall refer to democracy so conceived as "pluralist democracy." This may seem a departure from standard usage: the adjective "pluralism" seems only to imply that society is characterized by the presence of a number of autonomous organizations. But though Robert Dahl initially adopts this weaker definition of 'pluralism,' his subsequent discussion of the problems of pluralist democracy seems to presuppose that such organizations in fact are competitive, and that at least some of them are composed of or constitute elites. I follow the usage implicit in this discussion. See Robert Dahl, *Dilemmas of Pluralist Democracy* (New Haven: Yale University Press, 1982), Chap. 3.

4. See, for example, John Stuart Mill, *Considerations on Representative Government*, Chap. VII, "Of the Extension of the Suffrage."

tions depends, not upon their effectiveness at promoting morally required ends, but on the fact that their operations realize the political values of freedom and equality that the ideal exemplifies. Let us call institutions whose operations instantiate the ideal "deliberatively democratic." Since deliberatively democratic institutions are politically egalitarian, the ideal of deliberative democracy does what critics claim the social contract cannot. It furnishes a defense of egalitarian politics that does not appeal to the efficacy of egalitarian institutions. Deliberative democracy thus seems a more powerful alternative to the social contract, possessed of justificatory resources the latter lacks. Deliberative democracy has received a good deal of scholarly attention in recent years. Among the reasons for this attention is the justificatory power that seems to be associated with it.

This article challenges the conclusion that the ideal of deliberative democracy provides a better defense of democracy than the social contract does. I begin with the central features of deliberatively democratic institutions and with an argument for the claim that contractualists defend those institutions on instrumental grounds. The argument, I concede, is essentially correct. What is initially puzzling is why we should be disturbed by its conclusion. Proponents of deliberative democracy typically attach a high value to political participation, and it is tempting to suppose that they object to instrumentalist defenses because they provide too weak a foundation for the rights and liberties participation requires. I argue, however, that we should resist this temptation, for the objection is most plausibly construed otherwise. The real problem with appeals to institutional efficacy, I suggest, is that they seem to imply an undemocratic account of political authority.

I argue that contractualists should regard the social contract as itself a model of political deliberation among free equals fairly situated. This model can be instantiated by or embedded in actual political institutions. Contractualists should regard institutions whose operations instantiate the contract as justified in part because their operations realize the political values of freedom, equality, and fairness. I also argue that institutions whose operations instantiate the model of the social contract exhibit the features of deliberative democracy which its proponents regard as definitive. Thus not only can contractualists offer arguments for egalitarian institutions that are partially noninstrumental, but the institutions they defend are also deliberatively democratic. Finally,

I argue that the contractualist defense of deliberatively democratic institutions is complex and is partially dependent upon the acceptability of their outcomes. The contractualist defense of deliberatively democratic institutions therefore does depend, in part, upon instrumental considerations. The way these considerations are brought to bear in the assessment of institutions is not undemocratic. This more complex contractualist account of justification does not, I conclude, imply objectionably undemocratic accounts of political authority.

The availability of this defense of egalitarian institutions undercuts an important argument for the superiority of the ideal of deliberative democracy. My argument also raises questions about what differences there are between the social contract and the ideal of deliberative democracy. If the former like the latter models ideal democratic deliberation, and if institutions whose operations instantiate the former model also instantiate the latter, then we might wonder whether the two really are distinct models at all. This is a question I take up briefly at the end of the essay. I begin with the central features of deliberative democracy.

II

Joshua Cohen has isolated three features that are, he argues, essential to the operation of deliberatively democratic political institutions.[5] They are:

(i) Deliberation and debate about legislation and policy should be debate about what policy best promotes the common or the public good. Democratic politics should not take the form of competition among groups each of which advocates legislation on the basis of its particular economic, social or sectional interests.

(ii) "[P]olitical opportunities and powers must be independent of economic or social position—the political liberties must have fair value—and the fact that they are independent must be more or less evident to citizens."[6]

(iii) Democratic politics should shape the psychology of citizens. It should influence their self-understanding so that they develop a sense

5. Joshua Cohen, "Deliberation and Democratic Legitimacy," in *The Good Polity*, ed. Hamlin and Pettit (Oxford: Blackwell, 1991), pp. 17–34.

6. Ibid., p. 18.

> of themselves as politically competent and as free and equal. It should also influence their own understanding of their legitimate interests: They should come to believe that the interests with the greatest claim to satisfaction by political means are interests in the common good and in the free and equal status of all.

A society's political institutions include governmental organizations set up by constitutions, charters, executive orders, and statutory law. But let us understand the notion of political institutions more broadly so that besides these it also includes political parties and committees that lack constitutional standing, and various nonpartisan organizations that are politically active. For simplicity's sake, I consider (i)–(iii) features that may or may not be exhibited by the operation of all these political institutions taken collectively. Why think that contractualists must defend institutions whose operations exhibit (i)–(iii) by appealing to their efficacy at producing just outcomes?

Contractualism is a large and extended family of political and moral theories. I shall concentrate on the most familiar contemporary form of contractualist liberalism, according to which the objects of agreement in the contract are, in the first instance, principles of justice applying to society's basic structure. There seems to be an obvious argument for the thesis that contractualism so understood is committed to an instrumentalist justification of deliberatively democratic institutions. According to contractualist liberalism, the basic structure is just only if its operations conform to principles of justice agreed to in a properly specified social contract. The primary commitment of contractualist liberalism is to the justice of the basic structure. So contractualist liberalism entails that political institutions are justified only if they enact laws and policies that promote the justice of society's basic structure. Then contractualist liberalism entails that political institutions are justified only if the laws and policies they enact promote the conformity of the operation of society's basic structure with principles of justice agreed to in a properly specified social contract. So according to contractualist liberalism, political institutions are justified only if they are effective instruments for enacting laws and policies that promote the justice of society's basic structure. So contractualist liberalism entails that if institutions whose operations conform with (i)–(iii) are justified, then they are justified on instrumental grounds, because they enact, or generally enact, legisla-

tion and policy that promote the basic structure's conformity with the principles of justice.

The argument is straightforward and it is, I assume, the argument that critics of contractualism have in mind. Note what its conclusion does not say. It does not say that contractualists can defend deliberatively democratic institutions *only* on instrumentalist grounds. The argument implies that contractualist defenses rest in part on such grounds. In what follows, I shall not challenge this conclusion. Instead, I will challenge the claim that there is something objectionable about the way contractualists defend deliberative democracy. The problem is that it is hard to see why their arguments seem objectionable in the first place. It is hard to see what is wrong with claiming that deliberatively democratic institutions are justified in part because they effectively promote basic justice.

III

To see what might be wrong, note that instrumentalist defenses of deliberative democracy open the possibility of trading off political rights, liberties, and opportunities if greater social benefit—more resources for the worst-off, for example—could be obtained by doing so. The very possibility of such a trade-off seems problematic. It is a familiar idea that whatever rights are, they are not the sort of thing that admits of trade-offs. Rights should be taken seriously, it is said, and doing so entails that they not be sacrificed to improve the general welfare. Since as I concede constractualists are committed to instrumental defenses of deliberative democracy, since those defenses admit the possibility of trade-offs, and since the possibility of trade-offs is morally problematic, contractualists, it seems, are mistaken about how to justify deliberatively democratic institutions.

Why should political rights and liberties be taken seriously in the way the objection suggests? Assume for the sake of argument that there are some rights—the right to freedom of conscience, for example—that do not admit of trade-offs. It might then be argued that political rights do not admit of trade-offs because they are relevantly similar to the right to freedom of conscience. The right to freedom of conscience does not admit of trade-offs because of the importance of the activities the right protects. If political rights do not admit of trade-offs because of their

similarity to the right to freedom of conscience, it must be because the political rights protect activities of comparable importance. So on one reading of the objection, the argument that political rights should be taken seriously ultimately depends on claims about the value of the activities associated with its exercise, hence on claims about the value of political participation. Proponents of deliberative democracy typically attach great value to participation in politics.[7] It is tempting to suppose that this reading of the objection captures their reasons for opposing instrumentalist defenses of deliberative democracy. It is therefore tempting to suppose that it captures their reasons for objecting to contractualism. This is not, however, a temptation to which we should accede, for the assimilation of the political rights to the right to freedom of conscience rests on a mistake. More specifically, it rests on the mistaken claim that political rights do not admit of trade-offs because of the development and satisfaction citizens find in their exercise. As we shall see, the deliberative democrat's real challenge to contractualism lies elsewhere. I now want to take a closer look at what is entailed by taking the right to freedom of conscience seriously. This will show what is presupposed by the assimilation of political rights to the paradigms of rights that should be taken seriously. It will also show why that assimilation is mistaken.

Assume for the sake of argument that citizens are guaranteed all the fundamental rights and liberties—freedom of the press, of speech, of conscience, and the political rights and liberties—if not by a written constitution, then by some means of similar force. Despite this guarantee, the scope of these rights and liberties must be delineated in the course of ongoing political life. Determining what liberties the freedom of conscience confers may be matters of political debate and, ultimately, constitutional law. Whatever implied rights and liberties freedom of conscience entails are, it might be said, justified because they are necessary if some or all citizens are to develop and exercise their fundamental moral capacities in the way that the core freedom, free-

7. Cass Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press), p. 135, writes of his view that it "prizes citizenship. Of course it does not require that all decisions be made by town meeting; but it refuses to treat political participation as simply another 'taste' that some people have, or as dispensable in a well-functioning democracy. For this reason it seeks to ensure that political outcomes benefit from widespread participation by the citizenry. A system in which such participation is lacking is to that extent a failure."

dom of conscience, exists to protect. Thus if freedom of conscience implies a right to use peyote, to sacrifice animals, or to claim exemption from military service, then this implication does not depend upon instrumental considerations. Rather, the implication of these rights, if they are implied, depends upon the fact that freedom of conscience protects an extremely important sphere of human thought and activity, one in which human beings engage their fundamental moral capacities, find satisfaction, and endow their lives with meaning. Their implication also depends upon the claim that there are citizens who could not engage in the sort of activities freedom of conscience protects unless these implied rights were also guaranteed. Finally, these implied rights depend upon the fact that citizens' free engagement in that sort of activity is sufficiently important to override potentially countervailing considerations associated with the general welfare.

Now consider the claim that, like the right to freedom of conscience, political rights must be taken seriously because the latter are relevantly similar to the former. If the claim of relevant similarity is true, then it must be that the political rights and liberties protect a sphere of activity in which human beings exercise their fundamental capacities, find satisfaction, and endow their lives with meaning. It must also be that if these implied rights were not guaranteed, then some or all citizens would be prevented from fully engaging in the activities the political rights and liberties protect. Finally, it must be that the full engagement of some or all citizens in political activity is sufficiently important to override potentially countervailing considerations associated with the general welfare. The claim that political rights should be taken seriously for the same reasons that the right to freedom of conscience should be taken seriously therefore depends upon attaching very great value to the satisfaction and development available through the exercise of those rights.

Those who object to trading off political rights because they are relevantly like the right to freedom of conscience are therefore committed to a very strong claim. They must claim that the satisfaction and development available to citizens through participation in deliberatively democratic institutions are so important that they justify such institutions even if institutions which are not deliberatively democratic would more effectively promote basic justice. What is wrong with instrumentalist defenses of deliberative democracy, they must claim, is that they fail to capture the unconditional value of this sort of satisfaction and

development, and of all the rights, liberties, and opportunities necessary for it. As I noted above, proponents of deliberative democracy typically do attach a high value to political participation, and it may seem that this is what really distinguishes them from contractualist liberals. It may also seem that differences over how political institutions are to be justified must stem from this deeper difference over the value of political participation. Since the objection that political rights are relevantly similar to the right to freedom of conscience implies strong claims about the value of political participation, it may seem that this objection captures the deliberative democrat's objection to contractualist defenses of deliberative democracy.

But this objection cannot be what proponents of deliberative democracy have in mind, for the satisfaction and development available through political participation do not have the value the objection presupposes. To see this, note first that it is not clear such satisfaction and development are available only through participation in deliberatively democratic *political* institutions. Perhaps they are available through participation in the governance of nonpolitical associations. If so, then it is possible that citizens could realize these goods even in a society which traded off political rights to secure basic economic justice. In that case, it is hard to see what would be wrong with the failure to take political rights seriously, as the objection demands. Moreover, even in a society in which political participation is widespread, there will always be some who choose not to engage in politics for a variety of reasons. Some will have other commitments—to family, to religious organizations, to intellectual or occupational pursuits—that they find more satisfying and regard as more important. Others, to paraphrase Oscar Wilde, may simply want to leave their evenings free.[8] It is hard to see why institutions which enact legislation affecting the fundamental interests of those who choose not to participate should be arranged to accommodate those who do, at least if this requires some sacrifice of basic justice. It is especially hard to see why this should be if we suppose for the sake of argument that it is the least advantaged who choose not to participate. Their failure to participate in a deliberatively democratic scheme does not itself entail that interests will be slighted; this follows from (i). Still, it may turn out that they are less well-off than they would be under alter-

8. I have not been able to find a remark to this effect in Wilde's work. Michael Walzer attributes the sentiment to him in his *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge, Mass.: Harvard University Press, 1970), p. 230.

native institutions which more effectively promoted basic justice. In such a case, deliberatively democratic institutions sacrifice the interests of those who are worst-off so that others can enjoy the satisfactions of political participation. This is surely unreasonable. It is unreasonable for a people to sacrifice economic justice to the worst-off so that some of their number can develop and exercise their moral capacities in the way that deliberative democracy allows or encourages, particularly if opportunities for comparable development are available elsewhere. Yet the objection under consideration implies that it is not. If this objection does capture what proponents of deliberative democracy take exception to, then their argument against contractualism is uncompelling.[9]

There is, however, another way to interpret the objection to instrumentalist arguments and to the associated possibility of trading off the political rights and liberties. According to this interpretation, an account of why a political scheme is justified should show why that scheme is *authoritative*. I want to suggest that the problem objectors see with instrumentalist defenses of deliberatively democratic institutions is that they do not adequately account for the authority of those institutions.

In a democracy, political authority, including the authority to make laws and set public policy, is the authority of free and equal citizens as a corporate body. So the authority of legislative procedures depends upon their taking adequate account of the interests of citizens who are thought of as free equals. Where proponents of deliberative democracy believe they differ from contractualists is in how they think those interests must be taken account of if legislative procedures are to be authoritative. Deliberative democrats value participation because they think those procedures are authoritative to the extent that citizens participate and are represented as free equals in their *operations*. This requires, they think, that their operations satisfy (i)–(iii).[10] Deliberative democrats read contractualists as offering a different account of legislative author-

9. Thomas Christiano, "Freedom, Consensus and Equality in Collective Decision Making," *Ethics* 101 (1990): 151–81, pp. 161ff., argues convincingly against a variant of the thesis against which I argue here. Christiano argues against the thesis that the satisfaction and development available through political participation have the importance ascribed to them because they are necessary or sufficient for citizens' freedom. I am grateful to the editors of *Philosophy & Public Affairs* for this reference.

10. Some difficulties with this view arising out of social choice theory are explored in Jack Knight and James Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory* 22 (1994): 277–96. I am grateful to the editors of *Philosophy & Public Affairs* for this reference.

ity. According to their reading, contractualists think legislative procedures are instruments for attaining *outcomes* that satisfy the interests of free and equal citizens and are authoritative only if they do so.

To see why this might be exceptionable, suppose contractualists think that citizens have a higher-order interest in living under principles of justice acceptable to them as free equals. As a higher-order interest, the interest in living under these principles is to constrain pursuit of the lower-order interests citizens have in particular pieces of legislation in this sense. Legislation relevant to basic justice is morally acceptable only if it promotes the basic structure's conformity with the principles of justice. So the procedures for enacting legislation adequately take account of citizens' interests, properly constraining their lowerby their higher-order interests, only if the legislative outcomes of those procedures promote basic justice. The fact that legislation satisfies the principles provides citizens compelling (though perhaps not conclusive) moral reasons for complying with it. So treating legislative procedures as instruments for reaching just legislative outcomes suggests that the authority of those outcomes depends upon the authority of the principles of justice by which legislative outcomes are assessed.

The problem is that contractualists think the principles of justice can be determined only by determining what free and equal parties to a hypothetical contract would agree to. So if contractualists are correct in arguing that the authority of legislative outcomes depends upon their justice as defined by the principles, then the authority of those outcomes must depend upon the fact that the principles could or would be accepted by hypothetical signatories to a hypothetical contract. The authority of legislative outcomes must therefore be to some extent independent of the procedures by which they were actually enacted. But, it might be objected, democratic legislative authority has its origins in the decision of actual citizens, represented as free equals in actual political procedures. To the extent that contractualists locate the authority of law elsewhere than in the decisions of actual citizens, they offer an account of legal authority that is undemocratic. This is why proponents of deliberative democracy object to defenses of deliberatively democratic institutions that appeal to their effectiveness at producing just outcomes, and to the associated possibility of trade-offs. And this is why they object to contractualist defenses of those institutions.

One familiar reply would begin with the claim that there is nothing

inherently undemocratic about constraining the outcomes of actual political deliberations by principles which are the object of hypothetical agreement. If the conditions of the agreement are properly specified, the principles agreed to are based on the higher-order interests of actual citizens. So even if the authority of legislative procedures is partly rooted in the authority of principles of justice, it does not follow that legislative authority is not fully rooted in the interests of actual citizens, represented as free and equal. And if the principles really do depend upon the interests of actual citizens in this way, an account of legislative authority which appeals to the authority of principles is not ipso facto undemocratic.

I find this reply plausible and suggestive, and will return to it later. Before doing so, I want to look at another problem with the objection. The objection presupposes, I shall argue, that contractualists have a generally applicable test for the justice of legislation that is independent of the way legislation is enacted. This presupposition, I believe, rests on a misreading of contractualism. Correcting that misreading, in turn, is essential to showing how contractualists bring both instrumental and non-instrumental considerations to bear on the justification of deliberatively democratic political institutions. In the next section, I want to show why this misreading of contractualism might seem attractive. I then want to argue that, these attractions notwithstanding, contractualists do not have a generally applicable test of the sort the objection presupposes.

IV

The objection that contractualists are committed to an undemocratic account of authority depends crucially upon the claim that contractualists think there are independently specifiable criteria for identifying legislation that promotes or impedes the justice of the basic structure. To see this, consider an instrumentalist defense of (i) and (ii). Institutions that do not exhibit (i) are institutions in which, whatever their protestations to the contrary, factions in fact advocate public policy because to do so serves their interest. If political institutions also fail to exhibit (ii), then groups with greater wealth will be able to influence political outcomes and perhaps effect passage of public policy that they believe favors them. But legislation written in such a way that it seems to the economically privileged to favor them will, ceteris paribus, lead to distri-

butions which violate principles of basic justice. Basic justice can be achieved, a contractualist might argue, only if public policy is enacted by procedures in which (i) citizens are encouraged sincerely to pursue the public good and (ii) political power is independent of wealth and social position. And so, the contractualist might conclude, institutions that exhibit (i) and (ii) are preferable to those that do not.

This instrumentalist defense depends upon a number of claims. One is that legislation written so that it favors or seems to favor some privileged class leads to distributions which violate the principles of justice more often than other legislation does. Another is that legislation designed to promote basic justice and the public good generally does so. The most important is the claim that deliberatively democratic institutions would produce legislation that is both designed to promote the public good, and actually does so, more reliably than would other legislative institutions. These claims can be sustained only if the contractualist has criteria for assessing the outcomes of actual and alternative legislative procedures with respect to basic justice. They can therefore be sustained only if the contractualist has some idea of what legislation would effectively promote basic justice and some way of comparing that legislation with the legislative outcomes various political schemes do or would produce. The objection thus presupposes that contractualists have some way of identifying such legislation independent of how it was enacted, and some way of making the requisite comparisons.

But on what grounds could contractualists argue, for example, that a given program for campaign finance reform is more likely to produce just results than alternative programs? Or on what grounds could they argue that a piece of legislation, if adopted, would or would not lead to restrictions on liberty that are inconsistent with the liberty basic justice requires? Our views about the consequences of legislation and the justice of those consequences, can easily be distorted by prevailing circumstance. How are these distortions to be eliminated or corrected?

Here, objectors might think, contractualists have a ready reply. Imagine hypothetical parties ideally situated to assess the impact of various proposed pieces of legislation. Such parties would have to be able to determine the likely effects of actual and proposed laws. They would also have to be situated so that they can compare those consequences with what justice requires, free of the bias and distortions of actual circumstances. Finally, their motivation would have to be such that they

agreed to adopt pieces of legislation which effectively promote basic justice. Let us call the situation of these parties "the legislative point of view." Contractualists could identify the most acceptable legislation with legislation that could or would be accepted by parties in the legislative point of view. With this criterion of acceptable legislation in hand, the contractualist argument for one legislative scheme over another—for deliberative rather than pluralist democracy, for example—would be an argument that one scheme is more likely than another to lead to legislation that is most acceptable in this sense. A contractualist criticism of prevailing governmental arrangements might take the form of an argument that those arrangements do not reliably lead to legislation that is most acceptable.

The idea that legislation and policy must be acceptable to hypothetical parties in a legislative point of view seems to accord with the spirit of contractualism. It is, moreover an idea that some contractualists seem to presuppose and that others—like Rawls—seem explicitly to endorse.[11] The claim that contractualists do rely on a legislative point of view would receive further support if their work contained a detailed description of the point of view, or some account of how parties in the point of view conduct their deliberations. One way contractualists could provide this account is by treating the legislative point of view as a variant of the contract for choosing principles of justice. This is Rawls's strategy. Rawls notes that there must be significant differences between the legislative point of view and the original position. If parties in the legislative point of view are to make laws that promote basic justice, they must in some way be bound by principles of justice. They must know constitutional arrangements of their society and its legislative history. They must also know the needs that legislation and policy must address, and the resources that their society can bring to bear on political and economic problems. Parties choosing principles of justice cannot, of course, be antecedently bound by the principles, and it is arguable that they neither need nor should have the other information available to parties in the legislative point of view.

11. For Rawls, *Theory of Justice*, pp. 198ff. Judith Jarvis Thomson, "Abortion," *Boston Review* 20 (1995): 11–15 suggests that legislation restricting liberty must pass a contractualist test; see her pp. 14–15. For the version of contractualism on which Thomson relies, see T. M. Scanlon, "Contractualism and Utilitarianism," in *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), ed. Sen and Williams, pp. 103–28.

What is more important for present purposes is that there are crucial resemblances between the two contract situations. The legislative point of view, like the contract for adopting principles of justice, represents citizens as taking a fundamental interest in securing their status as free equals. Parties are to some extent deprived of information: They should be denied knowledge of their particular interests and conceptions of the good. The information allowed them is therefore not so great as to compromise their freedom and equality, or the fairness of their situation with respect to one another. They therefore reason about legislation and policy freely, equally and fairly, trying to address political, social, and economic problems while maintaining the justice of the basic structure. The legislative point of view realizes the values of freedom, equality and fairness, in the senses of 'fair,' 'free,' and 'equal' exemplified by the social contract. There may be other elaborations of the legislative point of view, and these may differ from Rawls's in philosophically interesting ways.[12] Other contractualists might, for example, dispense with informational constraints. Instead they might situate contracting parties fairly by building motivational constraints into the legislative point of view, stipulating that parties not act on some of the information available to them. What is crucial, if the legislative point of view is to provide a contractualist test of legislation, is that it realize the values of freedom, equality, and fairness.

The objection to contractualist defenses of deliberative democracy sketched in the last section presupposes, I have argued, that contractualists employ a standard for assessing the justice of legislative outcomes that is independent of the way legislation is enacted. I have raised the possibility that contractualists test legislation by determining whether it could or would be accepted in what I called the legislative point of view. I have done so because various contractualist views seem to contain or presuppose such a point of view, because the most prominent contractualist theory explicitly includes one, and because this suggestion seems contractualist in spirit. Since this test does not refer to the way legislation is actually enacted, it seems that contractualists do indeed presuppose what they must if the objection of Section III is to have any purchase. These appearances notwithstanding, I now want to argue that the legislative point of view is not a generally applicable and inde-

12. Thomson, for example, might elaborate her account differently.

pendent standard of legislation and public policy. To take it as such is to misunderstand the role that it plays in contractualism, and in the contractualist defense of deliberatively democratic institutions.

The possibility of employing the legislative point of view as an independent test depends upon the possibility of determining with some confidence what legislation and policy would be accepted in the legislative point of view. Suppose contractualists think that the justifiability of political procedures depends upon their reliably producing legislation that would be accepted in the legislative point of view. Since the rationale for a society's political procedures must itself be publicly acceptable, this confidence must be public confidence. So there must be a publicly acceptable way of determining what legislation and policy would and would not be accepted in the legislative point of view.

The success of traditional social contract arguments might suggest that this could be done. But consider the question of which principles of justice are justified for pluralistic societies under modern conditions. Rawls's description of this decision problem and his argument for its solution are, while not uncontroversial, relatively straightforward. The details of Hobbes's and Locke's arguments about the justified constitution are a matter of scholarly dispute. Still, the main outlines of their treatments are similarly clear. The clarity of Hobbes's, Locke's, and Rawls's arguments depends crucially upon their modeling these questions as decision problems facing contracting parties in idealized or abstract circumstances. In all three models, the list of alternatives facing contracting parties is relatively brief and clearly defined, because the alternatives are drawn from the history of political and moral theory. Moreover, in all three cases, the general facts about economics and political sociology play a relatively small role in the decisions of contracting parties. The primary determinants of those decisions are the interests of the parties in primary goods, the fear of death or "the preservation of their lives, liberties and estates,"[13] conjoined with their knowledge (or ignorance) of their own circumstances. To the extent that these features of the models clarify rather than mislead, it is because they mirror features of the decision problems themselves. The list of plausible conceptions of justice or viable constitutional forms is fairly well defined, so there is no oversimplification in the supposition that

13. John Locke, *Second Treatise of Civil Government,* Chap. 9, para. 123.

contracting parties in the models consider a small number of alternatives. General facts about economics, for example, are far less important in determining the best constitutional form or the most appropriate conception of justice, than are the interests of individuals who have to live under them. Thus these features of the problems under consideration make it possible to construct ideal and decidable models of reasoning about them.

But now consider the problem of choosing appropriate legislation or setting public policy. How could one construct a model of these problems? How could one lay out the legislative point of view so that the legislator's decision is nearly as clear as the decisions of parties in the original position or the state of nature? I noted features of Rawls's, Hobbes's, and Locke's problems that made them susceptible to modeling. Note that none is true of the problems associated with choosing legislation or making policy.

First, the list of alternatives is not nearly so short or so well defined. There may be areas of law in which the legislation of the past can serve as a guide, legislation in whose justice we may have some confidence. But there is no tradition of thought about legislation, analogous to theorizing about the best regime, to which one could turn for a list of alternatives. Indeed the list of possible pieces of legislation is limited only by the imagination of the legislators. One reason that this is so is that unlike the choice of principles of justice, the choice of legislation and policy is not made once and for all. Some pieces of legislation can repeal others, so that current choices are not in principle constrained by past decisions. Compensatory changes elsewhere in the law can always be made if a new piece of legislation requires it. This possibility greatly lengthens the list of potential legislation lawmakers can, in principle, consider. It therefore implies that the list of possibilities to be considered by parties in a legislative point of view is significantly different from, because significantly longer than, the list considered by parties in, for example, Rawls's original position.

Moreover, legislative bodies differ in their procedural rules: Some rely on simple majorities to enact legislation, while others require supermajorities, at least in some cases. Exactly what laws a given body enacts depends upon its procedural rules, and so this variation can be expected to produce varied legislative outputs. No one set of procedural rules is

obviously superior to another. So both are equally capable of producing acceptable legislation, though the legislation may differ because of the need to secure the number of votes required for enactment. If the legislative point of view is to test legislation for acceptability, parties will have to take such variations into account and recognize them as innocuous. It is not at all clear, however, how the legislative point of view can be structured so that they do that.[14]

Finally, general facts about economics and sociology, in particular facts about the long-term economic and social consequences of a decision, are far more relevant to the choice of legislation and policy than they are to the choice of principles of justice or of a particular form of government. This is not because different fundamental interests are at stake in the two cases. Rather, the difference between the two cases results from the fact that principles of justice affect those fundamental interests in one way, while legislation bears on them in another. The way in which legislation bears on those interests is by directing government agents to perform particular actions that have profound, inescapable, and long-term consequences, prominently including economic consequences, for citizens' freedom and equality. Since principles of justice do not affect citizens' fundamental interests in this way, general facts are relatively less important to their choice.

Modeling reasoning that takes account of these facts and consequences, and accords them a central role, would be an extraordinarily difficult task. It would, for example, require devising a system of weights that takes account of the consequences of a piece of legislation and the probability that a given outcome will result. Systems of weighting, the confidence of probability estimates, the certainty available, may well differ from law to law, or from area of law to area of law. In light of these very great difficulties, modeling the legislative point of view so that decision problems are solvable there will be a task of great complexity. Even if it can be accomplished, public arguments that a given piece of legislation would be acceptable in that point of view are bound to inherit the complexity, a complexity that stands in the way of public justification. The claim that a given piece of legislation would be acceptable in the legislative point of view is bound to meet with suspicion or cynicism if

14. I owe this point to one of the editors of *Philosophy & Public Affairs*.

the supporting argument is too complex and if other interests appear to be at stake. The legislative point of view therefore cannot serve as a publicly acceptable criterion of acceptable legislation.

It might be concluded that contractualists must rely on a criterion of just legislation different from the legislative point of view. But any independent standard imputed to them would, I suspect, be found subject to difficulties like those encountered by the legislative point of view. None, I suspect, would be sufficiently clear and publicly acceptable to do the work of publicly justifying legislation as just. This suggests that it is a mistake to suppose contractualists employ any such standard. Since the objection to contractualist defenses of deliberative democracy that I sketched in Section III depends upon that supposition, it follows that that objection is mistaken. From the fact that contractualists think legislation must promote basic justice as defined by antecedently specified principles of justice, it does not follow that they give an undemocratic account of legislative authority, or an objectionable defense of deliberatively democratic institutions.

In the rest of this paper, I want to indicate briefly how contractualists could and should defend deliberatively democratic institutions. Central to this defense is the claim that the legislative point of view should be regarded, not as an independent criterion of just legislation, but as a model or an ideal of actual political procedures. Thus where misreading the role of the legislative point of view supports the objection to contractualism sketched in the last section, appreciating its role as a model of actual procedures is essential to seeing how contractualists can defend deliberative democracy.

V

Let us say that actual political processes *embed* the model of the legislative point of view if and only if they are fairly conducted among free equals, in the sense of those values realized by the social contract and the legislative point of view, and this fact is evident to common sense. There are a number of ways political institutions could be organized so that they embed the legislative point of view. Rather than explore these diverse sets of institutional arrangements, I want to argue that there will be certain features common to all of them: All, I want to argue, exhibit (i)–(iii). Any set of political institutions that embeds the legislative point

of view is therefore deliberatively democratic. The contractualist liberal defense of deliberatively democratic institutions turns on the claim that only these institutions realize the forms of freedom, equality, and fairness to which contractualists are committed.

I mentioned that the informational constraints on the legislative point of view are important to its realizing the values of freedom, equality, and fairness. In Rawls's version of the legislative point of view, these constraints are imposed by a veil of ignorance that admits somewhat more information than the veil enveloping the original position. Clearly such a device cannot be imposed upon those who actually debate public policy. How, then, could the freedom, equality, and fairness achieved by the veil of ignorance be achieved in actual political processes in which participants cannot be veiled?

It might be thought that the informational constraints on the legislative point of view *define* standards of fairness for political deliberation. Parties in the legislative point of view know the principles to which a just basic structure must conform, the constitutional structure of their society, its legislative history, its resources, its state of cultural, economic, and political development, and the problems facing it that are amenable of legislative solution. They are denied knowledge of their own conceptions of the good, and of whether they belong to one of the parties, or classes, or regional, ethnic, social, or religious groups that enjoys some sort of prestige or political advantage. If these constraints do *define* standards of fairness, then actual political debates could attain the fairness of the legislative point of view only if participants observed very strict constraints on political participation. Citizens would have to refrain from appealing to their conceptions of the good, group interests, and political threat advantage and could not be moved by their various private interests. These constraints are too demanding: They ask too much self-restraint of members of some groups and the motivational constraint may, under some interpretations, be impossible to fulfill.[15] It

15. There is a rapidly burgeoning literature on this topic. For a representative selection of the philosophical literature, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), Essay VI and the writings cited at p. 214, n. 3; Bruce W. Brower, "The Limits of Public Reason," *The Journal of Philosophy* 91 (1994): 5–26; and the works cited at pp. 5–6, n. 1. See also Philip L. Quinn, "Political Liberalisms and Their Exclusion of the Religious," *Proceedings and Addresses of the American Philosophical Association* 69 (1995): 39–59; Fred D'Agostino, *Free Public Reason* (Oxford: Oxford University Press, 1995). For an accessible critical discussion of such self-restraint, see Stephen L. Carter, *The Culture of*

would, however, be a mistake to conclude from this that actual political processes cannot achieve the fairness of the legislative point of view. For rather than defining a standard of fairness, informational constraints on the legislative point of view should be thought of as a *guarantee* that parties to that point of view do not appeal unfairly to their conceptions of the good, their power, and their group interests. There are other ways to achieve the same end. If actual political deliberations are to achieve the fairness of the legislative point of view, it suffices that citizens refrain from appealing unfairly to their conceptions of the good, their power, or their group interests.

How exactly the standards of a fair appeal are to be specified and what restrictions they impose are themselves matters of debate. Rawls, for example, has argued that in justice as fairness, standards are to be specified by parties in the original position.[16] I have suggested that norms for public political argument are context-sensitive and should be specified in a series of contracts in which progressively more information is made available to contracting parties.[17] Others have proposed noncontractualist methods of specification.[18] As for the content of these norms or standards, I shall assume (as most who have tried to specify restrictions have argued) that they are somewhat restrictive. They may, for example, allow appeal to religious conceptions of the good. But those appeals will be fair only if they are appeals to religiously based claims about what is good for society as a whole, judged with reference to principles of justice, rather than to claims about what favors the religious group in question.[19] Of course, even fair appeals may occasion debate. What is required is that appeals not be unfair according to whatever standard of fairness is most defensible.

Disbelief (New York: Basic Books, 1993). I have argued that motivational constraints are too demanding in "The Separation of Church and State: Some Questions for Professor Audi," *Philosophy & Public Affairs* 20, no. 1 (Winter 1991): 52–65.

16. Rawls, *Political Liberalism*, p. 225.

17. See my "Taking Rites Seriously," *Pacific Philosophical Quarterly* 75 (1994): 272–94, pp. 287–88.

18. See, for example, Robert Audi, "The Separation of Church and State and the Obligations of Citizenship," *Philosophy & Public Affairs* 18, no. 3 (Summer 1989): 259–96.

19. Some religious groups may seek various special exemptions, from military service, from restrictions on the use of hallucinogens in worship services or from educational requirements. It is licit to lodge these claims only if those making them argue that it would be good for society as whole if such exemptions were granted. Whether the claims should be honored is, of course, another matter.

Thus public debate realizes the fairness of the legislative point of view only when citizens participating in public debate observe the most defensible standards of fairness. Moreover, only when they observe those standards do they refrain from unfairly using what political leverage they enjoy to secure enactment of legislation and public policy: Only then is no one subject to unjustifiable pressure by others either singly or collectively. Therefore only then are parties to public debate free, and equal in one of the senses of 'equality' realized in the legislative point of view. Finally, note that parties to the legislative point of view are equal in another sense. Since there is nothing in the legislative point of view that restricts entry to it, the legislative point of view, like the original position, is open to all: Anyone can enter it, in thought, at any time. If political procedures are to realize this sense of 'equality' they must be also be open to all. Therefore if actual political processes are to realize the freedom, equality, and fairness of the legislative point of view, they must be equally open to all, and participants must appeal to their conceptions of the good and group interests only when it is fair to do so. Are these processes deliberatively democratic?

According to (i), deliberatively democratic political debate is debate about what legislation and policies best promote the public or the common good, rather than about whose special interests will be satisfied and to what degree. I argued above that in political processes which embed the legislative point of view, appeal to conceptions of the good and to points of view associated with social classes and economic goods will be appeal to various views about what will be good for society as whole, judged with reference to principles of justice. Therefore in processes which embed the legislative point of view, debate will not be about how to satisfy various special interests. But will debate concern the public good in the sense of 'public good' that deliberative democracy requires? To see that it does, note that for some advocates of deliberative democracy, the content of the public good just is identified by whatever is agreed to by equal citizens engaged in fair deliberations about how to promote basic justice.[20] Thus Cass Sunstein says that answers to political problems "are understood to be correct through the only possible

20. In contrast to theories which rely on a substantive and independently specifiable conception of the common good: Thomist and neo-Thomist theories, for example; see Jacques Maritain, trans. Fitzgerald, *The Person and the Common Good* (Notre Dame: University of Notre Dame Press, 1966).

criterion, that is, agreement among equal citizens."[21] So on this view all (i) requires is that citizens be equally and fairly situated and that they not try to advance their special interests in political deliberation. Therefore political processes that embed the legislative point of view satisfy (i).

According to (ii), deliberatively democratic politics is open to all: All have equal opportunities to participate, to hold office, and to influence the political agenda. Political processes that embed the legislative point of view are, I have argued, equally open to all. And since citizens refrain from exploiting economic, social, or political power in political deliberations, all who participate will have equal opportunities to be heard, to advance arguments, to raise issues. Therefore processes that embed the legislative point of view realize the equality that (ii) requires. Since political processes embed the legislative point of view only if their egalitarianism is evident to common sense, so political processes which embed that point of view satisfy this requirement of (ii) as well. Moreover, the requirement of publicity follows from the contractualist liberal's commitment to equality. Suppose that the fact that political processes are open to all was not evident to common sense. Then at least some of those who did not know political processes were open to all have reason to think themselves at a disadvantage. If this belief discourages them from participating, then whatever induced their belief devalued or denied them an opportunity to participate in political processes. But what induced the belief were the rules, practices, and traditions governing those processes. Since contractualist liberals think those rules should provide equal political opportunity, they are committed to reforming the rules so that the egalitarianism of political institutions is evident.

According to (iii), democratic politics should shape the character of citizens, inducing in them a sense of political competence and of their own legitimate interests. As we have seen, citizens who participate in political processes that embed the legislative point of view are self-restrained. They refrain from trying to satisfy their own interests and advance views about what is good for society as a whole. The experience of governing one's participation in this way induces in citizens an ability to distinguish their legitimate from their illegitimate interests. Even those who do not participate, or do not do so regularly, know what would be expected of them if they did, have well-founded expectations

21. Sunstein, *Partial Constitution*, p. 137 (emphasis added).

about which of their interests will be satisfied by fair political process and therefore have a sense of their legitimate interests. Those who participate in processes that embed the legislative point of view not only develop a sense of competence, but one of the sort that advocates of deliberative democracy should favor: They will be competent at formulating positions that are calculated to favor the public interest and not just their own. Those who do not participate regularly in politics know that they could do so, and on a footing of equality with other citizens. They know that their society regards them as fully capable of participating, and of developing political skills and virtues should they so choose. They therefore have a sense of their potential political competence. Political processes that embed the legislative point of view therefore satisfy (i), (ii), and (iii) and are deliberatively democratic.

I mentioned earlier that seeing how the legislative point of view serves as a model for actual institutions is crucial to seeing how contractualists use both instrumental and noninstrumental considerations to justify deliberative democracy. I begin with the noninstrumental considerations.

The legislative point of view exhibits the values of freedom, equality, and fairness, just as does the social contract in which principles of justice are adopted. Actual political institutions that embed the legislative point of view realize those values in their operations. Since, as I have argued, institutions which embed that point of view are deliberatively democratic, deliberatively democratic institutions realize the values of freedom, equality, and fairness exhibited by the social contract and the legislative point of view. The importance of institutions that realize these values does not depend only upon the value of the legislation and public policy they produce, nor on this plus the psychological effects of such institutions on the citizenry, however important those effects might be. Freedom, equality, and fairness are great political values, particularly as they are exhibited by the social contract and the legislative point of view. Institutions that realize these values in their operations have intrinsic value in virtue of their doing so. The contractualist defense of deliberatively democratic institutions rests in part upon the intrinsic value of these institutions, and thus upon noninstrumental considerations.

Contractualist defenses of deliberatively democratic institutions also depend upon instrumental considerations, as I conceded at the outset. Instrumental considerations come into play, on the contractualist view,

because whatever intrinsic value institutions may have, they must also reliably produce effective legislation that promotes basic justice as defined by principles of justice. The problem with this view, I suggested earlier, is that it seems to take as authoritative the moral ideals or conceptions that justify the principles of justice, and to explain legislative authority by appeal to the authority of those principles and conceptions, and of the principles they support. It thus seems to make legislative authority dependent upon something other than the interests of actual citizens. Since democratic authority depends only on those interests, contractualism, it might be concluded, implies an undemocratic account of legislative authority.

This objection is mistaken in supposing that contractualists ground the authority of principles of justice in something other than citizens' interests. Contractualists argue that all citizens of democratic societies have an interest in living under principles of justice acceptable to them as free equals. To determine which principles satisfy this interest, contractualists imagine a hypothetical situation so structured that that interest, in effect, determines which principles are chosen. The chosen principles are justified and authoritative precisely because they can be represented as the object of a choice in which the interests in freedom and equality are determinative. The authority of principles depends in this way upon interests citizens actually have. So contractualists' reliance on principles of justice does not imply an undemocratic account of legislative authority.

The objection derives some of its plausibility from the fact that contractualists appeal to hypothetical and idealized, rather than actual, procedures to show how citizens' interests determine principles of justice. But it is hard to see how those who make the objection can avoid doing the same thing. No account of the authority of legislative procedures can ignore the question of whether they lead to just outcomes. So any account will have to appeal in some way to the principles by which those outcomes are assessed. Even if, as critics of contractualism insist, the authority of those principles must be grounded in interests all citizens actually have, it cannot be grounded only in choices those citizens actually make. For given actual circumstances, citizens' actual choices may not reflect their real interests. If principles on which contractualism's critics rely are to be authoritative, it must be possible to represent them as the objects of an idealized agreement. Contractualism's appeal

to a hypothetical agreement does not, therefore, make it less democratic than its rivals.

The objections also derive some support from the supposition that contractualists assess laws by standards that are independent of the way those laws are enacted. I argued in Section IV that this supposition is mistaken. That argument raises questions about how contractualists do assess the justice of legislative outcomes. It thus raises questions about how contractualists bring instrumental considerations to bear on the justification of the legislative schemes that produce those outcomes.

My suggestion is that the justice of legislation should itself be assessed by institutions and procedures which embed the legislative point of view. One reason for this suggestion is the intrinsic value of such institutions, value they have in virtue of realizing freedom, equality, and fairness. Another is the public acceptability of the assessments that would result. Claims about the justice of legislative outcomes play a central role in arguments about whether legislative procedures are justified. Those arguments must be publicly acceptable and so, therefore, must the premises about legislative outcomes on which those arguments rest. Those premises are most likely to be publicly acceptable if the arguments that support them are, as it were, open to public inspection. Assessments of legislation that rely on an independent standard are, as we saw in Section IV, subject to serious difficulties on this score. On the other hand, the difficulties I isolated would not affect assessments carried out by procedures which embed the legislative point of view. For when assessments are conducted by such institutions, they are conducted with the requisite openness. Thus the instrumental criteria in light of which political institutions are to be judged are themselves to be applied by institutions embedding the legislative point of view. The legislative point of view is a model, not only for the political procedures which enact legislation, but also for those institutions by which its justice is assessed.

To see how this suggestion might work out in practice, consider legislation that established a minimum guaranteed income as part of an attempt to realize Rawls's difference principle. Suppose that the legislation was enacted by deliberatively democratic procedures. The justifiability of those procedures, I suggested, depends in part on the justice of their outcomes. So their justifiability depends in part on whether the minimum is acceptable, and whether once passed it is adequately

adjusted over time to keep pace with changing economic circumstance.

One way to assess the minimum and its periodic adjustments would be to rely largely or exclusively on the expertise of social scientists. Economists and social psychologists, for example, might be charged with determining approximate levels of satisfaction with the minimum among those who receive it. Relying on survey data, analysis of economic indicators, and price indices, experts might regularly make their findings and recommendations available to the legislative body responsible for enacting and adjusting the minimum. The recommendations made by these experts on the basis of their data might then be taken as the benchmark against which to measure the minimum that is actually established.[22]

This method of assessing the justice of the social minimum has severe shortcomings. First, insofar as it relies on raw survey data about levels of satisfaction, it relies on actually expressed and revealed preferences of the least well off. Yet preferences are notoriously malleable, shaped by the pressure of prevailing circumstance. Reliance on actual levels of satisfaction ignores the possibility that the poor have adjusted their preferences to their expectations, and contented themselves with less than they should receive. If social scientists charged with data collection attempt to correct for this phenomenon, they inevitably rely on normative judgments. These judgments raise questions about how and to whom the norms informing those judgments are to be defended. This, in turn, raises another difficulty with relying on social scientific experts to set a benchmark for assessing the minimum. The methods used in amassing and correcting data are bound to be complex. Their complexity poses a serious impediment to the public acceptability of arguments that rely on them, since complexity can mask or invite the suspicion of bias and partisanship. Even if the social scientists in question were demonstrably evenhanded, ceding them authority to set the benchmark for assessing the minimum is ceding them a very important moral authority, since the justifiability of basic institutions depends in part on their enacting a minimum that satisfies the benchmark. It would be better, I have argued, to lodge that authority in deliberatively democratic

22. Here I adapt very freely a thought expressed by Jeremy Waldron in "John Rawls and the Social Minimum." The essay can be found in Waldron's *Liberal Rights* (Cambridge: Cambridge University Press, 1993), pp. 250–70.

procedures. It would, for example, be better to assess the social minimum in public hearings and debates. These debates may rely on social scientific experts, but they should also include the voices of the poor themselves, and of those who serve and work with them in schools, in churches, and in public and private social service agencies of all kinds. A benchmark determined on the basis of such inclusive debate stands a better chance of being publicly acceptable than one arrived at exclusively by experts. Legislative procedures enacting a minimum that satisfied the benchmark would, I suggest, have a better claim to justifiability.

Assessing the justice of legislative outcomes by deliberatively democratic procedures helps answer the objection of Section III. The authority of principles of justice, as I already noted, is rooted in the interests citizens of democratic societies actually have. Moreover, the authority to determine whether legislative outcomes satisfy those principles rests in procedures which embed the legislative point of view, and which are ipso facto deliberatively democratic. Contractualist defenses of deliberatively democratic institutions therefore rely on the intrinsic and the instrumental value of those institutions. Because of the way contractualists bring those considerations to bear, their reliance on them does not imply an undemocratic account of legislative authority.

VI

I want to close by discussing briefly two implications of the argument that contractualist liberals can defend deliberatively democratic institutions.

First, contractualist liberals are sometimes thought disdainful of ordinary politics and some critics have claimed that they want to replace politics with procedures that resemble judicial decision-making.[23] These critics presuppose that judicial decision-making consists in the publicly justifiable application of legal principles to cases at hand. They conclude that contractualist liberals want *political* decision-making to

23. For this charge, see John Langan, S.J., "Overcoming the Divisiveness of Religion," *Journal of Religious Ethics* 22 (1994): 47–51, p. 50f. See also John Gray: "What [Gauthier and Dworkin] have in common with Rawls is the deployment of an unhistorical or abstract individualism in the service of a legalistic or jurisprudential paradigm of political philosophy." A bit later, Gray writes that "the theoretical goal of the new liberalism is the supplanting of politics by law[.]" "Against the New Liberalism," *The Times Literary Supplement*, July 3, 1992, pp. 13–15, p. 14.

consist in the publicly justifiable application of principles of justice to problems at hand. But judicialized politics, they claim, is not politics at all, since real politics essentially involves conflict and compromise.

Critics are correct in claiming that politics which conformed to contractualist ideals would lack certain salient features of day-to-day politics in the United States and other democracies. Embedding the legislative point of view requires that political arguments be put forward as sincere proposals for realizing basic justice. Overt appeals to special interests and covert appeals disguised by posturing would be missing from contractualist politics. So too would the political disagreements and compromises resulting from the attempt to balance special interests. But it does not follow that contractualists are committed to excising *all* political controversy or that they think it possible to do so. Even where institutions are fully deliberatively democratic, hence where all are committed to basic justice, ample room for disagreement remains. Those sincerely committed to basic justice can disagree on the level of the minimum wage, on trade policy, on immigration and environmental policy, on funding for the arts, on inheritance, capital-gains and income taxes, on welfare policy, on education policy, on industrial and economic planning, and on gun control. If these disagreements are resolved, the resolution will be only temporary, until some citizens decide that circumstances have sufficiently changed that it is worth reopening these questions. And if these disagreements are to be resolved fairly, the resolution will be arrived at only after political discussion in which differences are fairly aired. Contractualists recognize the persistence of political conflict and political disagreement. What is important, from the contractualist point of view, is that political disagreement be civil, open, and deliberative, and that it contribute to the legitimation of political outcomes. Those who favor embedding the legislative point of view in political institutions therefore do not disdain controversy; rather it is political controversy that gives embedding its point.

Second, I have argued that institutions which embed the legislative point of view are deliberatively democratic. I have not, however, argued that all deliberatively democratic institutions embed the legislative point of view. What does the idea of deliberative democracy add to the model of the legislative point of view? If there are some sets of institutions which are deliberatively democratic but do not embed the legislative point of view, wherein do they differ from institutions that do?

I argued in Section III that some advocates of deliberative democracy take the great importance of political participation as axiomatic. Perhaps they also take as axiomatic the claim that, in addition to satisfying (i)–(iii), political institutions must encourage widespread and vigorous citizen participation in politics. Measures to encourage participation, whatever form they take, would be justified by the axiom that political participation is extremely important. If so, this distinguishes these advocates of deliberative democracy from liberal contractualists. Contractualists who favor measures to encourage to participation are committed to the view that these measures, if they are justified, are not justified axiomatically but must satisfy the same condition on justification that other political measures must: They must be the outcome of political processes which satisfy (i)–(iii). I argued earlier that the great importance critics of contractualist liberalism attach to participation is unjustified, and so cannot be taken as axiomatic. Therefore if contractualist liberals differ from these critics in the way that I have suggested, then contractualist liberals have the better of the argument.

This conclusion is especially important because of the scholarly attention the idea of deliberative democracy has received in recent years. This attention has been accompanied by imaginative proposals for reforming American politics so that it is more deliberatively democratic. These proposals for reform have been legitimated by historical arguments that locate the idea of deliberative democracy in important American political debates and especially in debates during the American founding period.[24] If the idea of deliberative democracy does not differ from contractualist liberalism in its implications for the structure of political institutions, or if contractualism should prove superior, then proposals for institutional reform could be explicitly contractualist instead. Given the length and impressiveness of the social contract tradition, explicitly contractualist reforms should enjoy at least as much popular appeal and historical legitimacy as reforms associated with a free-standing deliberative ideal. One implication of this article is that they enjoy at least as much intellectual legitimacy as well.

24. See Sunstein, *Partial Constitution*, pp. 17ff.