Democratic Legitimacy and the Populist Radical Right: Rethinking public justification and political rights under nonideal conditions

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This thesis sets out the political rights that citizens are entitled to if they are to participate in a process of public justification, and proposes a framework for when these might legitimately be infringed upon. This framework is then applied to a series of controversial cases involving non-violent far-right parties in Europe between 1993 and 2007.

The early chapters of the thesis set out a Rawlsian ideal of public justification and defends this against the criticisms of contemporary theorists who offer alternative versions of public reason. I argue that laws must be justified using reasons that are accessible and, at some level, acceptable to all, and that a form of deliberative democracy is constitutive of public justification. Deliberative democracy requires that citizens have adequate status in political discussions. There is therefore an overarching requirement of the state to ensure that citizens are able to participate in politics as equals from which specific political rights can be derived. These include not only the 'negative' freedoms of expression and association, but 'positive' entitlements such as support for political parties and campaign groups.

Whilst under ideal conditions citizens are able to exercise all of their political rights simultaneously, under nonideal conditions some citizens behave in a way that prevents others from effectively exercising these rights. Dilemmas arise when such behaviour cannot be prevented without the state impinging upon some people's political rights itself. The thesis advocates a methodological approach to the application of ideal theory that characterises these dilemmas as choices between sub-optimal outcomes. In such cases there are strong *pro tanto* reasons for both state interference and non-interference in political rights that must be assessed on a case-by-case basis. Later chapters apply this approach to the real-world example involving far-right parties.

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A Note on Abbreviations

In the in-text references I use the following abbreviations when referring to Rawls' work:

> – *ToJ* – *A Theory of Justice (revised edition)*
> – *PL* – *Political Liberalism (expanded edition)*
> – *JFR* – *Justice as Fairness: A Restatement*
> – *CP* – *Collected Papers*

I also use the following general abbreviations:

> – FoE – Freedom of Expression
> – ToSB – Theory of Second Best

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Chapter 1: Introduction.

In contemporary political philosophy one of the dominant views about state legitimacy is that only laws that can be publicly justified may be enforced. The most oft-cited account of public justification is laid out by Rawls in *Political Liberalism.* It requires that all rules be justified in terms compatible with a basic structure acceptable to all reasonable citizens.

> "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. ... Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as the basis for public reason and justification". (*PL*: 137)

For Rawls, there are limits on the kinds of reasons that we can offer to defend the laws that we advocate. Laws may not rest on religious reasons, or other controversial moral claims that rest on a moral worldview that is only endorsed by some citizens. We owe each other justifications that draw on mutually acceptable reasons, because failure to do so violates a reciprocal norm of mutual respect (Larmore 2015: 79).

In recent years this vision of public justification has been under pressure. From within the academy, various accounts of public reason have emerged that seek to retain the core idea of justification to all citizens, but challenge Rawls' specification of the legitimacy constraint. Perhaps the most fully-developed alternative account of public reason is Gaus' *The Order of Public Reason* (2011). This work systematically lays out a version of public reason that does not require that we draw on a common set of reasons and challenges the view that public deliberation is necessary to the production of legitimate laws. He suggests that the set of publicly justified laws are actually those that are preferred by all citizens to any other law that addresses that issue, and to an absence of any coercive law whatsoever (2011: 323-4).[1] The implications of this alternative view in practice are widespread: religious reasons are now permitted in the deliberative sphere (Gaus and Vallier 2009), but redistribution of wealth to the extent that Rawls argues for in *A Theory of Justice* is, for Gaus, illegitimate (Gaus 2011: 511-521).[2]

The second, and more important, challenge facing public reason theorists of all hues is how to respond to the fact that, whichever of these forms of justificatory liberalism you accept, it is nowhere near being realised in any existing states. In fact, many states appear to be becoming less liberal. Stable democratic states across Western and Central Europe that have the institutional structures and public culture that might underpin a publicly justified state have seen a steady rise in support for populist far-right or illiberal parties since the mid-1990's.[3] In national elections across Europe, parties that could fairly be called 'far-right', and are most certainly illiberal, regularly secure a percentage of the vote in the mid-teens, if not higher. Whilst few of them have entered government (and even fewer have done so with any success), their influence can be seen in policies that continue to penalise migrants and members of minority groups. These in turn undermine the capacity of some citizens to hold their government to account.[4] A problem inherent to justificatory liberalism is how to justify the imposition of liberal norms on those who reject them or act in a way that undermines democratic institutions, and this is becoming more acute.

The aim of this thesis is threefold. First, to defend a broadly Rawlsian account of public reason, and suggest some flaws in the alternatives put forward by Gaus and others. Second, to set out the requirements that political deliberation must meet under such a system. In particular, I discuss the political rights and entitlements that all citizens must be able to secure if laws are to be legitimate. Finally, I set out a framework for determining when it might be permissible for the state to restrict political rights. I then apply this to a series of recent cases involving European far-right parties to illustrate how an approach informed by theories of public justification can address an ongoing political problem.

2. Public Reason, and the Relationship Between Justice and Legitimacy.

The initial challenge for a theory of public justification is how to combine the dual concerns of justice and legitimacy, and the procedural and substantive aspects of

democracy. A state may be procedurally legitimate but not just. There might be a process in place that meets a theoretical constraint for legitimacy, like Rawls' public justification principle, but still produce laws that lead to an unjust distribution of goods or fail to protect certain rights. Given that theories of both justice and legitimacy are concerned with enforceable obligations, there is no obvious way to resolve this tension. For Rawls the legitimacy of a regime may be undermined if it persistently presides over deeply unjust outcomes. Laws that are legitimate but not just may be enforced by the state, but only up to a certain level of injustice (*PL*: 428). The account of public reason I offer looks to reconcile this claim with the belief that the there are many reasonable, justifiable accounts of distributive justice.[5] I argue that a Rawlsian 'consensus' theory of public justification can best accommodate these two claims. Consensus views of public reason are those that insist that we draw upon a common set of reasons in order to justify our positions to others. This contrasts with 'convergence views', typified by Gaus, which argues that we can legitimately implement rules upon which there is agreement for different (and even possibly "disjoint") reasons (Weithman 2011: 333).

A major point of disagreement between the consensus and convergence views that impacts on their prescriptions for actual politics is over the role and nature of political deliberation. According to Gaus and Vallier, deliberation is not constitutive of public justification (2009: 65-7). In theory this means that laws might be legitimate, even if citizens have not had the chance to participate in a forum where they might deliberate - debate, challenge, discuss, and reconsider - policies. This marks a cleavage with a tradition of public justification liberalism that interacted with theories of deliberative democracy; indeed, some of the major works in the development of theories of deliberative democracy take a public reason perspective.[6] One of the contributions of this thesis is to defend the position that deliberation is a constitutive feature of public justification.

A second contribution will be to offer a sketch of what political institutions set up to enable the process of public justification through deliberation might look like, and what the rights and obligations of individual deliberators are. I shall suggest that this ought to

incorporate a system that enables citizens to participate with a degree of equality of political voice. To realise this will require not just 'negative' rights, like freedom of association and freedom of expression, but also positive entitlements, such as access to funding and institutional support for political parties and groups, and positive efforts to engage minority groups in the deliberative process.

3. A Framework to Determine When Political Rights Might Be Restricted Under Nonideal Conditions.

3.1. The Wrong of Undermining a Fellow Deliberator.

A deliberative account of democracy demands that citizens enter deliberation prepared to hear each other out, and to defend their own positions (Dryzek 2000: 15). Few, in practice, always behave like this; everyone who engages in political deliberation looks at some point to bolster their position through manipulation, or dismisses others offhand. A liberal state therefore cannot and ought not sanction all those who violate the norms of political deliberation.[7] It cannot because no state has the capabilities to regulate all unreasonable behaviour. It ought not because to do so would be to justify significant overreach by the state and place too much power in the hands of elites. It would mandate significant interference in the lives of citizens who, despite not adhering to the norms of deliberation, are undeserving of such invasive sanction. It would undermine the autonomy of citizens in a profound way.

There is, however, a severe wrong in looking to unfairly undermine the status of a fellow deliberator in the eyes of others, and the state has a stronger reason to regulate such conduct. To do so is to inflict what Fricker terms an "epistemic injustice" in the arena of political deliberation (2007). Fricker uses the term epistemic injustice to describe the wrong of being doubted as a knower within a moral discourse, or lacking the linguistic resources to articulate a case (2007: 2). It is possible to suffer epistemic injustice in deliberation, when someone is prevented from interacting with others as equals, and from discussing and scrutinising policies. The presence of epistemic

injustice in deliberation undermines the legitimacy of the laws produced. Therefore when citizens or parties use their political position to perpetuate an epistemic injustice in deliberation they *might* justifiably draw a political sanction. For example, 'hate speech' that re-enforces negative perceptions of a particular cultural group or race will lead to a situation where members of that group are not taken seriously during political deliberation.

3.2. Challenging the Distinction Between Reasonable and Unreasonable Citizens.

This presents a dilemma, as any sanctions that serve to remove people from the political sphere are inimical to political liberalism. Existing arguments about how to respond to illiberal behaviour focus too much on what to do about 'unreasonable people' as a category. Rather than seek to contain one section of the population, lower level sanctions ought to be used on a case-by-base basis.

A liberal account of justification is one that justifies rules to all *reasonable* people, or justifies rules using reasons acceptable to all *reasonable* people. The unreasonable are those to whom we need not appeal when justifying laws. Reasonable people in liberal theory are a hypothetical constituency of idealised individuals. In appealing to reasonable people, what we are actually doing is appealing using reasons that citizens would, in an ideal world, find acceptable. Much of the literature on responding to illiberal citizens focuses on what to do about this small group of citizens who seek to challenge liberal norms, and sit outside the justificatory constituency (Quong 2011: Ch 10). The language in these texts is a language of containment.[8] This works if one is thinking about how to respond to a small religious group with conservative or separatist views, for example the Amish or creationists who seek to absent their children from schools.

To try to mirror this divide in everyday politics, where most behave unreasonably but few belong to deeply unreasonable groups, would be a mistake. The standards of reasonableness set out by Rawls and others are fairly demanding, as are the equivalent

requirements posited by deliberative democrats and public reason theorists who offer a 'convergence' view.[9] If one accepts as a minimum that we ought to engage in deliberation in good faith, and are willing to be persuaded by others, then it is apparent that all of us fail to meet these standards at some time, and to some degree.[10] The question of whether a citizen is unreasonable is a matter of degree. It is hard to justify a stark distinction whereby a state excludes populist far-right parties and their supporters from the justificatory constituency, whilst leaving centre-right parties untouched, as neither of these groups advocate exclusively reasonable policies. This is especially so given that all sanctions that marginalise an individual in politics attach a stigma, so the effect of state sanctions will inevitably impose costs on an individual beyond merely preventing them from deliberating in the public sphere.

In contrast to policies that seek to contain unreasonable views, I argue that the state ought to take measures to mitigate for and deter behaviour that undermines the equal status of others in deliberation. This means that it is not only the content of views being expressed that determine whether they are acting in a way worthy of sanction, but the effect that their actions have on the status of others. Those in public office, and political elites, ought therefore be subject to more demanding standards than average citizens. This approach suggests that softer sanctions designed to limit the influence of certain groups ought to be used more widely in addressing illiberal conduct, such as 'no-platforming' and the removal of institutional recognition and support. On the other hand, criminal sanctions for non-threatening hate speech or activity can rarely be justified with reference to the effect of such acts on political deliberation.

To defend this position, I present a fuller version of this challenge to the demarcation of reasonable and unreasonable citizens in Chapter 5. Furthermore, I suggest that even unreasonable people have a *prima facie* case that their views be heard, as they may well have reasonable objections to certain laws, or reasonable interests that they ought to be able to advance. I defend the position that the state is required to allow all citizens to scrutinise policies and raise any reasonable objections, even if they seek to advance illegitimate positions, or subscribe to unreasonable worldviews. This more inclusive

view of democratic deliberation is better placed to realise the epistemic benefits to democracy.[11] Failure to do so is also a failure to realise the requirement of public justification that we appeal to all actual citizens in reasonable terms, not just the hypothetical constituency of the reasonable.

3.3. The Question of Restriction as 'Blind Alley'.

Having established when there might be a *pro tanto* case to restrict certain behaviours on grounds that they undermine a fair deliberative process, I propose a framework to better determine when to apply sanctions in practice. I suggest that we ought to leverage a split between ideal and nonideal theory. Ideal theory as I define it is constructed under the assumption that all citizens comply with the demands of a political theory (in this case with deliberative norms), and nonideal theory is therefore more like the world as it is (Simmons 2010: 7; Rawls 2001b: 13). Compliance is an especially acute question when we consider political deliberation because the efficacy of our political voice depends in part on the behaviour of others. They must be prepared to hear us out, and not act in a way that prevents us from conveying our opinions to others.[12]

My proposition is to frame debates around political voice under nonideal conditions as a choice between a set of actions all of which will impose unfair burdens on some citizens. On the one hand, citizens might use their own political voice and status to undermine the political voice of others or to stigmatise some groups, and so undermine them in deliberation. Inaction by the state in these cases is an abdication of its responsibility to ensure the status of all citizens in deliberation. On the other hand, liberals cannot be too sanguine about the effects of state interference in deliberation. Because a process of public justification is one that all can participate in, when citizens are excluded, even justifiably, the process of deliberation is impeded in a way that impacts the legitimacy of laws produced.

There are therefore cases where there are strong *pro tanto* reasons both to interfere and not to interfere in the political rights of citizens. I suggest that this is an insoluble

dilemma, and presents states with a choice between the lesser of two evils; I frame this choice by developing the idea of a moral "blind alley" used by Nagel and Schapiro in Chapter 4 (Nagel 1979: 74; Schapiro 2003: 333-334). Because of the nature of the dilemma - balancing various harms - and because an assessment of how (in-)action might affect a process of public deliberation that depends on numerous institutions to work will always be imperfect. There is no simple formulation of the kind 'political acts may not be restricted unless they contain content *x* and are of type *p*, when they must be'. Instead, we must balance the two competing sets of *pro tanto* reason on either side of the dilemma as best we can in each case, given the problems of ascertaining and comparing the impact of political actions on citizens' democratic voice. The role of ideal theory is therefore to provide a better understanding of either side of the dilemma, not to provide a resolution to it.

3.4. Responses to Various Challenges to the Use of Ideal Theory in This Way.

Having defended the limited use of ideal theory in such cases, I challenge the position that we can do away with it all together and ought to focus instead on resolving actual political dilemmas. According to some the role of political theory in these cases, if there is one, is to provide a systematic way of resolving these actual disagreements, based on real-life experience. This has some appeal, but is ultimately flawed because it underplays the unfairness of actual political deliberation. If we are concerned with improving a system of political deliberation, then we need a fairly developed account of what better deliberation would look like. As deliberation is a process that depends on the conduct of the actors involved, better deliberation will inevitably depend in part on better behaviour by those actors. We ought to think of nonideal theorising about deliberation in part as an attempt to mitigate for noncompliance by deliberators. In particular, a purely nonideal theory will not adequately address the wrong that citizens suffer when they are sidelined from deliberation, and the wrong of being the subject of laws generated through a political process that only is only partially legitimate.

Even if one accepts that ideal theory can be helpful in providing a framework for these

kind of dilemmas, there is still a debate to be had over how demanding the idealisations we assume are. Deliberative democrats such as Gutmann and Thompson, and 'convergence' public reason theorists like Gaus have argued for ideal theories that are much less demanding of citizens *qua* deliberators that the Rawlsian orthodoxy. They present their theories as more realistic and better at realising the liberal commitment to democratic inclusiveness (Gutmann and Thompson 2000: 161; Billingham 2016: 139). If these theorists are correct there is an obvious appeal to these less demanding accounts of public reason in general. Under such a scheme both citizens and the state have fewer duties in the arena of political deliberation, so fewer moral blind alleys will arise where these duties conflict.

I suggest that such schemes end up caught between two horns of a dilemma. The argument that they provide a more plausible and inclusive account of politics than Rawlsian public justification rests on the claim that they make less exacting and more realistic demands of deliberators. I suggest that the demands made of citizens in these theories are still not adhered to by the majority of citizens. There is still widespread noncompliance with the norms of civil deliberation governed by reciprocity, publicity and accountability suggested by Gutmann and Thompson (2000: 167), and with the requirement to cultivate epistemic and practical reasoning skills and commit to a good-faith deliberation that Gaus demands (2011: 276-8; 288-90; 294-303). They are therefore no more plausible, and a nonideal theory that mitigates for widespread non-compliance will still be necessary if we are to apply these theories in practice.

On the other hand, in stripping away the idealisations that they do, these accounts miss key aspects of what a system that produces laws that are respectful to all citizens would be like. Gaus in particular has railed against the use of idealisations in Rawls' theory - his most recent book opposes the use of ideal and utopian theory - but fails to acknowledge the idealisations required for his own theory of public reason to work (Gaus 2016). One of the problems with the convergence view is that it does not provide an adequate account of which laws are not permissible. Part of the reason that this aspect of the theory is underdeveloped, at least by Gaus, is a failure to acknowledge his

theory describes citizens in what is actually a highly idealised way. His argument rests upon citizens being able to order and articulate their preferences on specific issues in a way that real citizens, as far as we can tell, do not.[13]

3.5. Blind Alleys and a Response to the 'Price We Pay' Argument.

I use this framework to challenge those who see freedom of expression and association as inviolable if we are to form legitimate policies. Chapter 7 deals explicitly with the issue of hate speech, and challenges a variation of this position. Authors such as Dworkin (2009), have argued that to restrict any speech act necessarily serves to undermine the legitimacy of the political process. I characterise these arguments as 'Price We Pay' arguments, in that they claim that allowing unrestricted expression in political deliberation is the price we must pay if the laws we impose are to be legitimate.[14] For example, allowing people to use racial epithets in political deliberation is necessary if we are to impose anti-discrimination laws on those same citizens (Dworkin 2009: viii).

I acknowledge that restrictions on freedom of expression do distort political deliberation in the ways the Price We Pay argument describes. Where they are mistaken is not in how they characterise the costs of state interference, but in a failure to acknowledge that some speech acts can also undermine legitimacy. I draw on the account of justification that I have defined to show how persistent acts or behaviours that stigmatise groups might undermine their status in deliberation, and how this might undermine the legitimacy of the political process. It is at least possible that certain behaviours left unrestricted undermine the deliberative process in a way that causes a greater deviation from an ideal process of deliberation than state interference to limit this activity.

Because no one would undermine other citizens if they complied with a theory of political justice, none of this would occur under ideal conditions. Under ideal conditions the Price We Pay argument would therefore hold. The mistake of those who advocate the Price We Pay argument in real-world cases is a failure to acknowledge actual

conditions. Their defence of unrestricted freedom of expression ignores the perverse effects of noncompliance with deliberative norms, and existing injustices, on political deliberation. The Price We Pay argument articulates only one side of the moral dilemma that states are faced with when citizens engage in acts of expression that undermines the political voice of others. I characterise this as a moral blind alley in Chapter 4, where failures to curb such behaviour will allow some citizens to undermine the political voice or status of others, but preventative intervention will have the negative effect on democratic legitimacy that the Price We Pay theories draw attention to. In doing so it wrongfully implies that policy-making that adheres fully to liberal standards of legitimacy is possible; supporters of this position do not accept that state actors can find themselves in moral blind alleys on this issue.

A significant advantage of this framework over existing responses to the Price We Pay argument is that it gives due credence to the fact that state interference does distort political deliberation by marginalising certain reasonable opinions and excluding some people from the process of scrutinising policies. In practice there is no simple resolution to this dilemma of whether to restrict hate speech under nonideal conditions. There is no principle of the form 'speech acts *x* under conditions *p* must be restricted, but no others' in the same ways as there is not for political rights more generally. Instead, in individual cases of alleged hate speech, state actors ought to weigh up the effects that speech has in undermining the status of some as deliberators against the impact of marginalising the speaker of hate speech.

4. Applying this Framework to Real-World Examples.

The later chapters of the thesis seek to apply this framework to some actual examples of contentious cases where political actors were or weren't sanctioned. Chapter 8 considers various responses from within the political system, such as the threshold of popular support at which parties may be entitled to national representation, the obligations parties have in forging coalitions, when state support for parties ought to be withdrawn, and when individuals may be removed from office. Chapter 9 then considers instances

where party elites may justifiably be sanctioned, but measures that impact the political voice of activists or supporters of those parties are not. Both chapters engage in more detail with various reposes to the rise of the non-violent, far-right parties in Europe, in the period from 1994 and the ascent to minority partner in government of the National Alliance in Italy to the advent of the financial crisis in 2008.

Part of the problem of using an ideal theory to help determine how to respond in these cases is that it might require actions that have been proven to be ineffective. Policing of far-right parties can be characterised as overzealous, and has been successfully exploited over a number of years by far-right parties to foster the perception of an out-of-touch, censorious elite. Because of this, the question cannot be reduced to a dilemma about whether we ought to do something undemocratic in the short-term to preserve democratic institutions or alleviate an injustice in the long-term. Instead, the application of these theories is more context-specific, again highlighting the limited role of ideal theory.

I assess and refine some existing responses. I offer a sympathetic critique of two different suggestions for responses that highlight some important truths in these cases, but can be improved through a better integration of a theory of democratic legitimacy. Kirshner's 'militant' defence of democracy correctly points out that if we defend a substantive account of democracy, then we must protect institutions that enable democratic deliberation, as well as 'negative' political rights (2014). He rightly characterises existing regimes as flawed and partially legitimate, but still worthy of defence when the alternative is worse (17). He also sets out something like the moral blind alleyway that I do, acknowledging that extending democracy in practice might require actions that conflict with a democratic ideal (6). However, he is wrong to treat democracy as purely procedural, and to ignore the relationship between justice and democracy. He is also wrong to focus solely on macro-level democratic institutions and not on the mechanisms that enable citizens to exercise an effective democratic voice.

A second valuable approach to these issues is the 'concentric approach' of Rummens

and Abts. This is an empirical theory that interventions to sanction people who the public see as unthreatening to democracy will be counter-productive as it will appear censorious, whilst sanctions against parties seen to threaten core liberal rights will gain popular support (Rummens and Abts: 2010). The strength of this approach is the way it integrates concerns over both the legitimacy and efficacy of different kinds of sanctions. However it does not pay enough attention to what constitutes a 'core right'. The point at which a government ought to respond, according to this theory, depends in part on how they evaluate the threat to democratic institutions and core rights, but these are poorly defined. The theory is over-reliant on public opinion about what constitutes a threat to democracy being correct. Ideal theory can help in this case, by providing a fuller account of what it is that democratic citizens ought to expect, and in establishing what the fundamental requirements of a democratic process are.

The penultimate chapter applies the framework to the question of when a political party might no longer be recognised as 'official'. Political parties are entitled to the institutional support, recognition, funding, and access to public platforms, amongst other things, if they are to be effective vehicles for the political interests of citizens. Due to the increased threat to democratic institutions posed by far-right parties when they persistently achieve certain levels of support, this recognition may be withdrawn in some cases. For example, measures designed to exclude small parties from national government such as those used in Germany, may be justified on liberal grounds as the lesser of two evils choice when such limits are in place to prevent far-right parties gaining an electoral foothold. Whilst under ideal conditions a failure to represent people whose views are shared by, say, 4.9% of the population is not acceptable, under nonideal conditions the (imperfect) vetting process employed by established parties, even those that perpetuate some injustice, may be a necessary component in staving off threats to democratic institutions. I also explore the obligations that parties have when seeking to forge coalitions using the example of Vlaams Blok in Belgium. Finally I consider of *de facto* party bans, again using the example of Vlaams Blok, and external sanctions designed to put pressure on a government using the example of short-lived EU-level sanctions directed at Austria in the year 2000.

The final chapter of the thesis deals with the question of whether there are arguments that non-elite activists and members in particular might employ against the imposition of sanctions on them that might otherwise be justified. I suggest that there are two plausible defences that members can use: that they support far-right parties due to mistakenness about empirical facts, and that they support far-right parties as a way of challenging a political system that has let them down. When we weigh up blind alley dilemmas around political rights, both of these can count against state sanctions on some individuals.

In the first case, it is possible to be empirically mistaken about certain things - in particular the scale and impact of immigration - whilst still having informed yourself to the level that citizens can reasonably be expected to. Though this is hard to demonstrate, the advocacy of illiberal policies for empirically false reasons ought not warrant censure if citizens have informed themselves to the point that we might reasonably expect them to.[15] On the latter, an argument against the imposition of sanctions can be based on the view that the perpetuation of severe injustices undermines the legitimacy of a state, regardless of the democratic procedure from which it draws its mandate. Although the level of injustice at which this might apply is underdeveloped in the theoretical literature, this chapter argues that there are regions within countries in Europe that suffer persistent injustice of a level that this argument ought apply. Some supporters of far-right parties in these regions suffer severe enough injustices that this argument comes into play.

4.b. Why Use These Cases?

Beyond it being an interesting case study due to the number of contentious cases, the rise of the far-right in Europe is a pressing political problem. Support for non-violent far-right and populist parties has persistently grown over the past three decades. These parties now routinely enjoy the support of around a fifth of the population in many countries. Not only this, but their support has grown steadily. Support for the far-right

now transcends a populist protest vote or a challenge to elites, and there is clearly significant support for nationalist, illiberal or anti-democratic ideas in liberal democratic countries.

The reason that I focus on the period between 1994 and 2008 is that there are few exogenous events like economic crises that can explain this increase in support. The social and economic conditions that correlate with far-right support are ongoing. The main factors that correlated with an increase in far-right support were: anxiety about the effects of globalisation; persistent poor economic performance, especially in post-industrial towns and regions; increased mistrust in political elites; increasing perception that immigration has negative economic and social impacts (and generally a tendency to overstate absolute numbers of immigrants); and the removal of stigmas attached to the expression of racist and xenophobic views. Different political scientists and sociologists emphasise different factors. For example, Marxist theorists would tend to emphasise the combination of the economic hardship and the erosion of social institutions like unions, whilst conservatives might attribute this trend to a shift away from participation in religious organisations as a source of social capital.

For the purposes of my work, I try to take a more agnostic view, and acknowledge that all of these factors have affected far-right support. This is important, as it acknowledges both the complexity and entrenched nature of the problem - to address any one of these would be beyond any current government in a single term. Because the support for far-right parties grew consistently across this period, it is reasonable to assume that support for these parties will either remain stable or increase. At the time of writing there have proven to be no effective strategies to curb support for these parties in the long term, even under relatively stable conditions. This means that the question of how to address such parties cannot be collapsed into a debate about whether it is justifiable to use anti-democratic measures in the short-term to preserve democratic institutions in the long-term.

On the other hand, the coalitions of activists and voters that the far-right come to

represent are precarious and volatile, making it hard for them to dominate politics. When the far-right has seen declining fortunes it has tended to be as a result of in-fighting and the egotism of party figures combined with the fragility of their coalition of support, not because of concerted counter-measure by another party, or due to initiatives by the state. From a liberal perspective, a cause for optimism in addressing the far-right is this fragility of their support.

5. Aims for the Project.

The aim of this project is threefold. First, I set out to defend a variation of a Rawlsian account of public justification in light of recent developments and challenges, and to note some of the practical implications of implementing such a system of public justification. Second, I hope to make a general point about applying ideal political theory to actual political problems. I suggest a limited but essential role for ideal theory in providing a conceptual framework for political decision-making. I further argue that attempting to generate theories that apply directly to real-life is less helpful than articulating ideal theories and applying them in a way that properly respects and acknowledges the extent of the idealisations made. Attempts to smooth over this division of labour between ideal and nonideal theory with regards to public justification are doomed to fail. The sections of the thesis that deal with this, especially Chapters 4 and 6, make a more general contribution to debates around ideal and nonideal theory.

By applying this theoretical framework to real-life cases I show that it is possible to form coherent arguments in favour of a course of action drawing on both ideal theory and empirical work. The framework I suggest provides a conceptual grounding when considering a set of important dilemmas faced by states. The later chapters may be of value to political scientists and practitioners in this area. In particular, whilst there is significant discussion of how to respond to the far-right as a threat to democratic institutions the question of what is valuable about democratic institutions is often ignored. I use empirical examples to show that having a conception of democracy in mind is important when addressing these issues, and that it is possible to incorporate

these concerns in actual political decision-making.

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[1] Gaus accords a kind of lexical priority to rules that are preferable to no rule at all for all citizens. These form the "socially eligible set" which all Members of the Public will recognise the authority of. The optimising function, that rules that are seen as inferior to all alternatives be excluded, is subsequent to this. In his most recent work, he argues more clearly that for the purposes of determining when a law might be enforced by a collective body, the question of whether it is part of the socially eligible set is the more important threshold. Nothing that fails to meet this standard may be imposed (2016: 211-15).

[2] Admittedly, this issue is more complicated than can be fully addressed here. Gaus does not challenge the 'difference principle' or the two principles of justice directly; instead he argues that the two types of government that Rawls argues might realise theses principles, market socialism and property-owning democracy, will not be justified in his scheme (Rawls 2001b: 135-40; Gaus 2011: 512-3).

[3] Rawls sets out the institutions required to realise a process of public justification only briefly, see (Rawls *CP*: 425, *fn* 7) and a discussion in the next chapter.

[4] Citizenship in the theoretical sense that I use it – that is being subject to laws and entitled to participate in the political process – does not necessarily map on to real-world citizenship. For example, many recent migrants to a country who have not yet secured full citizenship fall into this category.

[5] This is something that Rawls acknowledges. He sates there are a "family of justifiable theories of justice" and that this "changes over time" (Rawls *PL*: 11).

[6] See, for example, Cohen (1997a) for an influential account of deliberative democracy with a Rawlsian foundation. Also, Gutmann and Thompson's paradigmatic work on deliberative democracy demands that citizens draw upon mutually acceptable reasons when interacting with each other (1996: 55). See next section.

[7] I use the term sanction here loosely to refer to any coercive measure that may have costs for the target. In the context of political rights, an effective sanction will amount to *de facto* exclusion from the sphere of political deliberation in some instances.

[8] The genesis of this may well be a footnote in *Political Liberalism*, where Rawls refers to "doctrines that reject one or more democratic freedoms". He argues that "[t]his gives us the practical task of containing them - like war and disease - so that they do not overturn political justice" (64, *fn* 19).

[9] I discuss this claim more fully in my critique of Gaus in Chapter 6. It is my conviction that he offers a more demanding account of citizenship than he intends, and this proves to be an issue in realising the purported benefits of his work.

[10] Though Gaus does not characterise his view as "deliberative", and rejects the term, he is still committed to this position. He requires citizens to engage in a level of practical reasoning and eschew strategic behaviour (2011: 276), and that they adhere to the rules of an 'Open Society' (2016: Ch IV).

[11] Whilst this is a separate, complex issue, I defend a conception of public reason in part based on its epistemic benefits - that is its capacity to generate more just outcomes, and to best reveal natural facts about the world relevant to politics. See Chapter 2.

[12] A particular problem for theories of freedom of expression that consider its impact on democracy is how to distinguish between someone who is given a fair hearing but whose position is rejected in good faith, and someone who is dismissed off-hand. Under ideal conditions we can stipulate that people will only reject others' views after hearing them out, but in practice this is hard to prove. We ought to be careful when claiming that others have disregarded certain views unduly.

[13] A recent, provocative volume on the matter describes the way citizens organise their actual beliefs as "thin, disorganised and ideologically incoherent" (Achen and Bartels 2016: 12). More generally there is a renewed move in political science that challenges the view that individuals can rationally order preferences, and emphasises the role of group identities and response to language in political decision-making (Chapters 8 and 9).

[14] I use the term Price We Pay because it is used by critics of this position, and I think captures the essence of the argument fairly well. Waldron in his critique of Dworkin and Kirshner in a comment on such views both use the expression in passing to describe this type of argument (Waldron 2012: 175; Kirshner 2014: 63).

[15] One of the ways in which I believe Gaus' account of public reason to be more idealised than he intends is his optimism about the knowledge and reasoning capacities of citizens.

Chapter 2: Justice and Legitimacy.

The aim of this project is to say something about the political rights citizens have, and when these might be infringed upon. In order to make such claims sensibly it is necessary to explain what a legitimate political process will look like. This chapter defends the claim that a deliberative account of democracy is constitutive of public justification, and therefore that political rights must be tailored towards these enabling participation in deliberation. This chapter suggests that a deliberative scheme of democracy is uniquely placed to produce legitimate policies given three assumptions: that something like Rawls' account of legitimacy pertains, that justice bears upon legitimacy and that there can be reasonable pluralism about justice. These claims are broadly Rawlsian, but not unique to Rawls, and may cover a wide range of views. The opening sections of the chapter sets out these three assumptions more clearly, and considers the implications of them.

The second half of the chapter suggests that a 'consensus' account of public reason best reconciles these assumptions, and that a form of deliberative democracy is best placed to ensure that citizens participate in a way that enables them to scrutinise policies according to these standards, and to advance their own interests legitimately. This account of law-making is then contrasted with Gaus' view that we ought to adopt the 'convergence' model of public reason, and that deliberation is not constitutive of the production of legitimate laws.

2. The Liberal Account of Legitimacy.

Rawls states that laws are only legitimate if
> "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. ... Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as the basis for public reason and justification". (PL: 137).

There are a range of theories that offer similar constraints that share two salient features:

that coercive laws be justified to all citizens, and using reasons that they can accept. Such theories are based on an ideal of respect for all and reciprocity. They accept a degree of pluralism about moral issues and argue that citizens ought to seek fair agreements with those who disagree with them on moral issues, rather than simply treating them as wrong. According to this position we are compelled to seek mutually acceptable arrangements in spite of these differences, because we should respect others autonomy and their capacities as reasoners even if we disagree with them (Larmore 2015: 68; 78). Any liberal political theory must look to balance two concerns: interpersonal standards and a respect for the person as a "self-authenticating sources" of moral claims (*PL*: 32; Nagel 1991: 29-30). Furthermore, it should acknowledge that citizens are disrespected when laws are imposed upon them that they do not accept (Gaus 2005: 291), and honours the fundamental liberal ideal that any interference with another citizen be appropriately justified (272).

A more general public justification principle might be conceived as "A coercive action C is justified if and only if each and every member of the public P has (a) conclusive reason(s) R to endorse C" (Vallier 2011, 262), though there is some debate about the nature of a conclusive justification. Joshua Cohen offers a variation on this, which emphasises that a democratic institutional structure ought to be designed to enable citizens to gain acceptance for their positions from others (1997a: 71-8). In this thesis I address all theories that offer a variation on what I refer to as the **liberal constraint on legitimacy**,[1] that is all accounts of political liberalism that look to justify rules through appeal to the reason of other citizens, rather than simply seek to resolve disagreement through some system of aggregation or bargaining (Larmore 2015: 78-9). This does not just include those who identify as political liberals, but is also a feature of most accounts of deliberative democracy: for example Gutmann and Thompson invoke a principle of reciprocity and an obligation to justify coercive laws to all other citizens as one of the underlying principles of their deliberative democracy (2000: 167).[2]

Though there is significant disagreement between these public reason theories, some of which I discuss below, I take a broad version of the liberal constraint on legitimacy as

the starting point for this discussion. Where I do not directly challenge these theories, the claims made in this thesis ought to be of interest for all public justification theorists who advocate this type of constraint on legitimacy.[3]

3. Justice Bears Upon Legitimacy.

The legitimacy constraint is, for Rawls, not conclusive. There may be laws that are legitimised through a process of public justification that are not just, and a subset of these laws cannot be imposed. His account of political legitimacy *in toto* "allows an undetermined range of injustice that justice might not permit" so long as they satisfy his variation of the liberal constraint on legitimacy (2005: 428). This rules out a Rawlsian position where justice and legitimacy are equivalent, and only just laws might be enforced (Quong 2011: 131). However, this is bounded by the fact that "laws cannot be too unjust if they are to be legitimate" (Rawls *PL*: 429): "[a]t some point, the injustices of the outcomes of a legitimate democratic process corrupts its legitimacy" (428).[4] Rawls further argues that a political system might attain legitimacy through adherence to a procedure, and indeed some existing political systems may be close to attaining this. In contrast, the "imperfection of all human political procedures [means that] there can be no such procedure with respect to justice, and no procedure could determine its substantive content" (2005: 429). In his defence of political liberalism, Quong offers a similar assessment, arguing that the liberal account of legitimacy means that we have a natural duty to accept the authority of regimes that are "reasonably", but not perfectly, just (2011: 133). Although he also suggests a substantive constraint on the legitimacy of policies, this is broad. It requires only that citizens accept as legitimate any policy that advances the cause of justice somehow and satisfies a justified democratic procedure (132-3).[5] In summary, it is possible under a Rawlsian scheme that a law be legitimate but not just. However, the ultimate enforceability of a legitimate but not just law will depend on its not surpassing a certain level of injustice.

In some ways the existence of a limited but not exhaustive set of legitimate-but-unjust-laws appears obvious - we can all think of examples of laws that, even if they enjoyed the support of the vast majority of citizens and could be justified with supporting public

reasons still should not be enforced. When we consider the specifications of the liberal legitimacy constraint and Rawls' own account of a just distribution of resources the relationship becomes complex. Both the legitimacy constraint, and Rawls' (and other liberals) accounts of distributive justice are accounts of how we might determine coercive laws and rules that treat citizens with equal respect. If this is the case, does the imposition of unjust-but-legitimate laws respect citizens or not?[6]

One possible answer, proposed by Valentini, is that liberal conceptions of justice and legitimacy both concern the question of how to generate and enforce laws that respect all citizens, but under different conditions (2012: 598; 2013: 177-180). When there is pluralism about the good, we ought to defer to a conception of political justice, but where there is reasonable pluralism about justice we ought to focus on legitimacy instead. There is an appeal to this position, in that if someone holds a reasonable view about justice, but one that is different from our own, we ought to respect them.[7] This account tends towards a procedural view of legitimacy. If we refuse to acknowledge that the set of enforceable laws can be bound by concerns of justice, then it is difficult to see how a theory of justice can fulfil its function as a guiding principle in democratic discussions. Even if citizens all hold reasonable views of justice, constructing the processes by which differing views interact in a way that ensures the formulation of fair policies is complex. Whilst constraints on legitimacy necessarily focus on the passage of individual laws, and the institutions that are concerned with democratic deliberation, theories of justice tend to incorporate a more general framework for analysing society as a whole.[8] They will encompass a wider account of state authority, and the organisation of society, as well as including principles governing the distribution of goods and the allocation of key rights. Valentini understates the extent to which an account of legitimacy will have to appeal a conception of a just political order (Larmore 2014: 27-8). Her view also risks compartmentalising the two such that certain questions of justice are relegated to secondary concerns. She suggests that more developed theories of justice such as Rawls' or Dworkin's should be treated merely as competing views amongst many (2012: 601). However, if you are an adherent to one of these theories it is not clear from this account that you should accept that whichever theory you subscribe

to ought to take such a reduced role in determining the legitimacy of laws.

Nonetheless, it is difficult to argue that a world where laws adhere to liberal standards of legitimacy, and are deliberated over by citizens who were all guided by reasonable conceptions of justice, would be one that could not justifiably impose laws. None of the concerns that I have raised amount to a successful argument that the system Valentini describes is somehow disrespectful to a group of citizens. However, a more significant problem with the theory emerges when we try to apply it in practice. Valentini assumes that the disagreement about justice amongst citizens in many actual states is reasonable (2013), something I disagree with. In reality citizens do not disagree reasonably on what justice is, and the political systems that we have in place do not meet standards of legitimacy. A more realistic perspective when seeking to apply liberal standards of legitimacy and justice in real-world cases is to treat both as evaluative accounts that can be applied to existing political systems. Real-world polities are typically, in liberal democracies, somewhat legitimate (or illegitimate), and are more-or-less just. Whilst Valentini is correct that justice and legitimacy embody the value of respect applied to different conditions, the conditions are unlikely to arise where one ought to take complete priority over the other. Instead, a complex relationship of the kind that Rawls describes whereby concerns of justice provide enforceable limits on the extent of legitimate policies, and act as a guiding principle in our political discussions, is more helpful in addressing actual political decisions.

Justice is something that can be realised by degrees. We can compare two states of affairs that do not meet some principle of distributive justice, like the difference principle, but say that one better adheres to that principle than the other, and is therefore more just. Similarly states might reasonably be said to be more-or-less legitimate. Existing liberal democratic states can be seen as somewhat legitimate to the extent that they have *prima facie* authority over citizens. Citizens ought to obey state laws in modern liberal democracies most of the time, but there are exceptions to this because of the failure of such states to adhere to liberal standards of legitimacy completely. Dworkin explains this position:

"Is legitimacy also a matter of degree? Yes, because though a state's laws and

policies may in the main show a good-faith attempt to protect citizens' dignity, according to some good-faith understanding of what that means, it may be impossible to reconcile some discrete laws and policies with that understanding. A state may have an established democracy, provide for free speech and press, offer constitutional tests through judicial review, and provide adequate police service and an economic system that enables most of its citizens to choose their own lies and prosper reasonably. Yet it might pursue other polices that cannot be understood other than as a flat denial of the principles on which that attractive general structure is based… These policies may stain the state's legitimacy without destroying it all together." (Dworkin 2011: 322-3).

When we consider what kinds of policies might undermine the state's legitimacy, these should be those that undermine the process of producing legitimate laws through public justification. For example, they might be rules that serve to exclude some from the political sphere. Such policies will also include the failure to protect citizens from substantial material injustice. For example, if the state fails to provide adequate healthcare or education for some citizen or group on citizens, this impacts on the extent to which it might be considered legitimate. In Chapter 9 I consider more fully the way in which material injustices might impact the extent to which the state might coercively police democratic norms. For now I have sought to defend the claim that legitimacy is partially but not completely realised by existing democratic states and that severe injustice bears upon legitimacy. This will have some bearing on how a liberal constraint on legitimacy might be realised in practice.

4. Justice Pluralism.

Having established a liberal constraint on legitimacy, and that a substantive account of justice bears upon this, the inevitable question that arises is what account of justice we ought to adopt. Mapping this relationship becomes much more complicated if one accepts Rawls' position that his account of justice is "but one" of a "family" of such accounts that satisfy the criteria of justification (*CP*: 581).[9] Reasonable citizens seek to articulate and abide by fair terms of cooperation, acknowledge the burdens of judgment, and reason in a "more or less coherent" fashion. None of these imply that they will converge on a single account of justice or that there is a uniquely reasonable conception of justice in any given situation (*PL*: 59). Public justification requires that we respect

citizens who reach reasonable beliefs not that are optimal, but that are arrived at in a "more or less coherent fashion" (Rawls *PL*: 59). It is psychologically possible to accept that our views on a particular issue are correct, whilst acknowledging that others might hold other views as a result of reasonable consideration and without disrespecting us (Quong 2011: 253). The distinction between unreasonable and reasonable positions is a distinction between various views on an issue that we see as incorrect, or at least sub-optimal, whereby only reasonable views may ground coercive obligations. Reasonable disagreement therefore provides a reason to withhold from implementing coercive laws in some circumstances (Quong 2007: 335). More generally, there may well be a divergence of views on what the correct principles of justice are amongst citizens who all hold a common "moral commitment" to treating people as free and equal (Quong 2012: 56). If there are multiple theories of justice that are reasonable then it is even more difficult to establish how justice bounds legitimacy, as the kinds of injustice that would undermine the legitimacy of a law would be injustices that are severe according to any reasonable conception of political justice. This section defends the claim that it is unfair to impose laws on someone according to one reasonable standard of justice amongst many, rather than reasonable conceptions of justice in general. However, if this appears to make law-making an infinitely complicated process, Rawls' account of the justification of theories of political justice can provide some guidance on this matter in this chapter.

The important claim here is that people who are reasonable will not necessarily converge on a single conception of justice that they agree upon. Individuals may be committed to finding laws that are mutually acceptable to others, and to a polity that is stable in the Rawlsian sense. This is not to deny that Rawls', or anyone else's, accounts of justice would, if realised, generate a uniquely just, stable society.[10] It is to say that citizens who advocate policies and draw upon a reasonable conception of justice to defend their position ought to be accorded a certain status in political deliberation. Citizens can invoke reasonable conceptions of justice to challenge laws. When they do so their views ought to carry more significant weight than arguments that seek to challenge legitimate laws on grounds that deviate significantly from any justifiable

conception of justice. If there is a law that produces an injustice that is severe enough according to one reasonable conception of justice to undermine its legitimacy, but that is compatible with some other reasonable conception of justice, then the law may be legitimately enforced. If a law caused a severe injustice according to all conceivable reasonable conceptions of justice, then it may not. The problem here is mapping 'all reasonable conceptions of justice'. However, we can identify certain characteristics of this set by looking at the way that Rawls suggests any reasonable conception of justice will have to be justified. In this chapter, I argue that the way that Rawls conceives of justification can provide some guidance when defining the set of political conceptions of justice. In this way, a properly constructed process of political deliberation will be able to realise policies broadly consistent with justifiable conceptions of justice in general.[11]

5. Reconciling Justice Pluralism and the Idea that Justice Bears Upon Legitimacy.

If it is true that there is reasonable pluralism about justice, and also that justice bounds legitimacy the issue that arises is how to reconcile these two ends. The issue is how to stipulate the limits justice places on legitimacy when there is disagreement about what justice entails. Clearly, we cannot just impose *a* reasonable conception of justice over others. Going against a democratic decision to impose laws upon citizens that they do not support citing concerns of justice in situations when they advocate justifiable alternatives is unfair. Valentini describes this scenario, in which some citizens advocate distribution according to the difference principle - one of many justifiable distributions:

> "For those who advocate the difference principle on grounds of justice, citizens are treated respectfully only if the distribution of income and wealth benefits the worst off. But under circumstances of thick reasonable disagreement, we cannot unproblematically assume that this is what equal respect for persons requires. Some reasonably hold this view, but others equally reasonably believe that respect for persons has different distributive implications. Under such circumstances, a state cannot claim to show equal respect for its citizens if it simply imposes one, reasonably contestable, view of justice on them. To do so would be to fail to recognize their equal status as rational and autonomous agents." (2013: 193).

This would not be the case if the difference principle were a uniquely justifiable account

of distributive justice, because the counter-proposals other citizens offer would not carry the same weight. There are reasons to respect laws that are underpinned by reasonable conceptions of justice, even if we do not see them as optimal or conclusively justified.

Legitimacy must therefore be bounded by either the set of all reasonable conceptions of justice, or the set of all reasonable conceptions of justice held by members of that political community. The second of these two options, however, is deeply problematic epistemically. In practice, most citizens do not hold settled, coherent views on what justice is and how it might be realised. There are a range of principles of justice that people appeal to in political deliberation, some of which are justifiable and some not. The defences offered for individual laws will draw on these to varying degrees. The range of laws that are legitimate-but-unjust will therefore include those that can be defended using public reasons, and that satisfy the liberal constraint of legitimacy, but are not consistent with a single theory of justice. For this reason, we ought to approach the task of delineating when a law is likely to produce injustices that bear upon its legitimacy by appealing not to a single conception of justice, or to the set of conceptions of justice held by citizens, but to general characteristics about all reasonable conceptions of political justice. At this point it might seem hopeless to attempt the task of determining when the injustice caused by a law undermines its legitimacy. It might seem that a better course of action is simply to ignore this claim and focus on the interpreting and implementing the liberal constraint on legitimacy.

A key claim in the liberal literature that goes some way towards mitigating the apparent tension between concerns of justice and legitimacy is that a legitimate political process will tend to produce more just outcomes. Whilst a liberal constraint on legitimacy does not necessarily produce more just outcomes, it does produce a *tendency* towards just outcomes (Quong 2011: 135). A democratic procedure that fulfils the liberal demand for legitimacy, which also seeks to justify laws to all citizens, can be constructed in such a way as to produce a "tendency to be correct" (Estlund 1997: 195).[12] As Estlund argues, although legitimate democratic procedures are not "infallible" and may produce unjust laws (as I have argued), it has, when properly implemented - a unique epistemic

advantage over other systems in terms of producing just laws in the same way that the authority of a jury system is based on its tendency to produce fair outcomes in criminal cases and its superiority to other systems, rather than its own infallibility (2008: 7-9). The general point of Estlund's work, that I agree with, is that a political system that depends on the general acceptability of laws by citizens, and that is structured in such a way to ensure that citizens are able to participate in politics in such a way that their consent be considered adequate, will tend to produce more just outcomes (2008). We can call this tendency the **epistemic function** of a constraint on legitimacy, and contrast this with the **justifying function**. In a liberal state, the **justifying function** of a democratic procedure is to ensure that the state offers a sufficient justification for laws to citizens that it might have *prima facie* authority to implement them. The **epistemic function**, is to structure democratic relationships so that the laws produced are more just.

This tendency remains even if we are not certain about a single conception of justice that is correct. That is to say, following a legitimate political procedure will tend to produce outcomes consistent with *any* reasonable conception of justice. My conjecture is that the two functions, whilst logically distinct, are in practice co-dependent. This is because there is a logical symmetry between just laws and those that might meet the liberal legitimacy constraint, at least within a Rawlsian framework. The test for the justification of reasonable conceptions of justice that Rawls describes in the *Reply to Habermas* is in many ways a more demanding version of the liberal test for legitimacy. There are three stages to the account of justification. The first is "pro tanto justification", that stipulates that reasonable answers are provided to all political conceptions surrounding the constitutional essentials (2005: 386). Secondly comes "full justification" where citizens embed the principles of justice that are suggested into their own comprehensive perspective (386). This means that the theory of justice must be connived in a way that citizens can balance the obligations placed on them by their comprehensive doctrines with those that a political conception of justice suggests. Finally comes public justification in the form of an overlapping consensus amongst reasonable citizens (387). A theory of justice can be "publicly but never finally"

justified (388). Whilst it is still controversial to make any claim as to which theories of justice could satisfy this process, and which couldn't one possible way out of this confusion in actual politics is to attempt to mirror this process in actual political deliberation. Whilst the liberal constraint for legitimacy demands that laws be acceptable to all by limiting the content of their reasons, just laws will also be those that are part of a freestanding system, and also that are compatible with existing reasonable doctrines. In describing an epistemic proceduralist account of democracy, Estlund argues that the epistemic tendency of a democratic procedure arises due to its commitment to equality in justification (1997: 173). This equality is present in the liberal legitimacy constraint. If one accepts a Rawlsian account of how the test a reasonable account of justice must satisfy, then we must accept that the set of just laws is also defined by commitment to equal justifiability, but to equal justifiability of a deeper kind. Citizens need not always provide these deeper justifications in justifying individual laws, but they must be cognisant of the obligations of justice that are underpinned by this.

Whilst the co-dependent relationship between the legitimacy constraint and more just laws is theoretically sound, how the two interact in practice is much more complex. Most actual liberal democracies are partially legitimate, or nearly legitimate and partially or nearly just. This means that such states have a general, *prima facie* authority, but there are plenty of exceptions where laws either ought never be imposed, or where individual citizens have a right to resist imposition. Given the complexity of designing institutions that actually meet a liberal standard of legitimacy, and given the partial realisation of these, the **justifying** and the **epistemic** functions may become decoupled. We should be aware that a regime might satisfy the **justifying** function well, but not cultivate public discourse in a way that realises the **epistemic** function. A process may be quite well-designed in terms of canvassing a range of opinions, but not allow for the kind of interaction and exchange of ideas that are a part of deliberative democracy, and that are necessary to realise the epistemic benefits of the system. The fact that laws be justified in terms of laws that all can accept, and the liberal constraint on legitimacy are therefore necessary conditions of actual legitimate authority, and are sufficient to

ground a *prima facie* authority claim, but not an all things considered one. This is because if the **epistemic function** is not cultivated, eventually the cases where injustice undermines legitimacy will become more regular and systemic.

The epistemic function of democracy is better realised through a more inclusive system, as the logical connection between the content of justice and a democratic procedure is based on the fact that the content of justice is itself determined by wide acceptability. An inclusive system of political deliberation can be constructed a way that it mirrors the process by which conceptions of justice are justified in deliberation amongst actual, reasonable citizens. The **epistemic function** is best served in a system that mirrors the process of justifications for a reasonable conception of justice. The provision of adequate opportunity to reason as equals means that even citizens who do not actually think of political deliberation in terms of full or *pro tanto* justification can nonetheless participate in a system that produces a tendency towards more just outcomes by any reasonable standard of justice. Because of this a system of deliberative democracy properly conceived will produce laws that are less likely to deviate too markedly from any and all reasonable conception of justice. To realise this benefit, state institutions and actors will need to adhere to the inclusive ideal, and mitigate for noncompliance by ensuring that political disputes can be resolved as fairly as possible. By providing suitable fora properly constituted, a polity can better replicate both the inclusive ideal and fulfil the **epistemic function** of democracy

In practice, the greater number of reasonable viewpoints that are considered in political deliberation, the greater the number of objections to a policy that are raised, the greater the number of amendments debated and the wider the consideration of comprehensive doctrines, the more just outcomes will be. In order to realise the epistemic benefits of such a system we ought to, in the absence of complete knowledge, appeal as far as is practicable to all other citizens. Such inclusiveness will also introduce better scrutiny and a check on the concentration of power.[13] Under nonideal conditions these will tend to be political fora where groups and parties can challenge each other and look to garner support; this will tend to be more confrontational than the ideal. The best approximation

to an ideal deliberation will be a product of respectful contestation between groups rather than a discussion between respectful interlocutors.[14] Democratic inclusiveness ought even to be extended to unreasonable citizens, insofar as they will often still some reasonable contributions to discourse - something I cover in Chapter 6.

6. Deliberation as Constitutive of Public Justification.

The appropriate system of democratic institutions to realise both the **justifying** and **epistemic** functions will be one that lies within the broad spectrum of views typically called deliberative democracy. These are views of democracy that "favor governance arrangements in which political decisions are decided according to the exchange of reasons and arguments (broadly conceived and defined) that appeal to shared objectives (e.g., economic growth) or values (e.g., individual liberty or fairness)" (Fung 2005:401). The main implication of this emphasis on deliberation is that we ought to prioritise political rights that ensure participation in deliberation.The enforceability of rules under nonideal conditions depends on a process being adopted that in part resembles the account of justification that Rawls offers. This means that greater emphasis needs to be placed on the capacity for citizens to participate in the justification process - political rights, capacities associated with political participation, political voice - as opposed to the ultimate endpoint of justice.

A further requirement is that where possible deliberation includes all citizens, or at least all viewpoints on a particular issue. In practice, pluralism and fora where citizens can challenge each others views can provide a way of exposing underlying and implicit biases amongst dominant groups, and ensure that they do not bypass the process of public justification (Peter 2007: 347). All of these are strong reasons to advocate a more inclusive account of political justification.[15] Exclusion of a significant number of citizens, even if they are unreasonable, would go against the inclusive ideal. However, in my account, because the process of deliberation is doing a lot of the work by which the enforceability of laws is determined, exclusion has more significant costs, because it removes people from the process of public reasoning and justification upon which the

potential justice of arrangements depends.

7. Gaus' Objection.

The claim that a liberal society where citizens' political rights are secured provides the best way of establishing more just laws over time is also made by Gaus. He argues that due to the epistemic limits of citizens we ought to allow a plurality of views in political deliberation in order to achieve the most just possible outcomes. His argument is essentially a Millian one, but he draws on a wide range of social epistemology to ground this. I agree with this point, but disagree with the argument that Gaus makes elsewhere that deliberative democracy is not constitutive of public justification. In this section I expand a little on the idea that ensuring a plurality of opinions will produce more just outcomes, but challenge Gaus' other, concurrent claims about the faults of 'consensus' views of public justification and deliberative democracy.

Both the orthodox Rawlsian account, and Gaus, offer epistemic defences of public justification, in that they justify their account of what legitimate policies are in part due to the capacity of these schemes to produce more just outcomes. They conform to Estlund's broad definition of democratic authority based on the "truth-tracking" nature of the system, where statements about justice such as 'sexism is unjust' are treated as statements of truth (2008: 7-9). Estlund describes his position as one of "epistemic proceduralism" (1997; 2008), and the accounts of public justification fall broadly into these camps. There are two components of public justification through deliberative democracy that make it truth-tracking in this sense - interaction in deliberation between knowledge enables people to generate and affirm more just laws, and the bounds of reasonable discourse preclude some very unjust outcomes.

Where the accounts differ is in how this might be realised, especially the role of deliberative democracy. The case against a necessary tie between deliberative democracy and public justification is two-pronged. First, Gaus and Vallier argue that by forcing citizens to adhere to the structures of deliberative democracy, we actually block

the process of knowledge transfer between individuals upon which public justification relies. They propose, instead, an aggregative model of democracy that draws upon Hayek's defence of free markets as best placed to solve the local knowledge problem in economics (2009: 67-8; Hayek 1945). Furthermore, they charge that a political system ought not try to shape the inputs of the democratic process, as deliberative democracy does by stipulating both norms of conduct and that citizens restrain themselves from articulating some views. Their case is as follows:

> "Instead of taking seriously the task of constitutional design as a way to help generate publicly justified outcomes in light of highly imperfect citizen inputs, justificatory liberals have spent inordinate time developing ethical constraints on the activity of justification, with the apparent hope of so perfecting the inputs (views of citizens) that electoral and legislative institutions could be largely relegated to registering these vastly improved inputs. This is a misguided hope: given the reasonable pluralism and the centrality of convergence, the relevant knowledge of such system-wide justification is simply not available to even enlightened and public-spirited citizens. Rather than seeking to restrain citizen inputs, the important project for justificatory liberals is to develop the theory of constitutional government that takes the real-world imperfect inputs we confront, and yields laws that tend to be publicly justified." (70).

In his most recent work, Gaus has developed the argument that political deliberation that encompasses the greatest possible pluralism of opinion can generate most just outcomes. Whilst the belief that greater diversity of perspectives within political deliberation will tend to produce more just outcomes is held by many deliberative democrats, most still argue that in order to derive this benefit there must still be some agreement on fundamental matters of justice or at least on certain principles. Conversely, Gaus believes that this 'truth-tracking' function of democracy is realised even when there is significant disagreement about fundamental values, and that it may actually be enhanced by this deeper disagreement; in his scheme, citizens need only acknowledge that certain common evaluative standards hold some weight for the truth-tracking function to work (2016: Chapter 3). In particular, inputs that draw upon differing ideologies and religious views can be combined in discourse and used to generate proposals for more just outputs (148). Liberalism and deliberative democracy require that some of these disparate positions be suppressed in deliberation, so undermine this process which is akin to the **epistemic function** that I describe.

The second part of Gaus' attack is a worry that the actual realisation of deliberative democracy will involve coercing citizens in a way that is deeply illiberal. He argues that attempts to impose the norms required by deliberative democracy are doomed to "authoritarianism and oppression" (2011: 387). He argues instead for a range of negative political rights and "devolved" decision-making as a a way to best realise the possibility of publicly justifying laws, and that we ought to eschew collective decision-making (388). In addition, he argues that societies ought to reform gradually, and that an Open Society that introduces change gradually represents the best chance of producing more just outcomes over time, in a stable fashion (2016: 237-9).

On the first stage of this critique, Gaus is correct that we ought to seek to include a variety of perspectives in our deliberation, but most deliberative democrats are committed to an ideal of inclusion of others (Cohen 199b7: 417-8). The difference of opinion, then, lies in the question of whether deliberative democracy provides an appropriate avenue for the transferral of knowledge, or whether it prevents certain positions being aired in a damaging way. On the specific question of the transfer of knowledge, Gaus and Vallier argue that an aggregative system of democracy in an Open Society will enable us to obtain information about the preferences, projects and needs of other citizens similar to how in a market economy the price system conveys, in part, local knowledge about others' needs and desires for resources (2009: 68-9).[16] It is not obvious why this might be so. For example, they argue that even political arguments that are based on inadequate reasoning should be given a fair hearing, as this will enable us to appreciate what it is that angers our fellow citizens (69). This is quite right, but a deliberative system of democracy is surely superior in this regard. If angry citizens could be persuaded to participate in deliberation, then others would have the chance to both better appreciate their grievances, and to challenge them in a respectful manner that might lead to them revising their own views. Moreover, deliberative democracy, through its emphasis on discussion and the process of formulating policies, provides a better platform for minority perspectives.[17]

By making a greater demand upon us to engage with other views, and by ensuring all citizens equal standing in deliberative fora, deliberative democracy might actually be better at collating the "dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess" (Hayek 1945: 519). Gaus' stance that greater pluralism can help generate just outcomes relies in part on a process whereby different perspectives are used to search for a "local maximum" which is the most just state of affairs. This relies on the drawing together of different perspectives, which in turn depends upon a "handing over the baton" process whereby different citizens who hold different perspectives search for and pursue justice as far as is possible given their epistemic limits. They must then seek to 'hand over' to others with different perspectives to further refine this conception (2016: 111-2). This process of handing others involves the pooling of knowledge both about the nature of justice and our individual circumstances. Deliberative democracy may not be necessary for this process to occur, but it appears unlikely to be inimical to it; of actually existing social practices deliberative democracy seems as plausible a candidate as any to govern these interpersonal relationships. I suspect that part of the charge that deliberative democracy does not solve the problem of local knowledge is motivated by a mistaken belief that it is necessarily a highly centralised form of decision-making. This need not be the case; many of the political spheres where deliberative democracy has been successfully pursued have been in local politics - school boards, local residency groups, and police forces (Fung 2007). There is much greater scope for deliberative democracy to be incorporated into a scheme of multi-level governance than Gaus and Vallier let on in their critique.

More generally, their case relies on an analogy between an aggregative form of democracy correctly conceived and the price mechanism in market economics. In an economic market, scarcity of some good will influence the price of it, thus indirectly conveying information of sorts to other participants in the market place who might not be aware of why it is becoming scarcer, or how (Hayek 1945: 527; Cited in Gaus and Vallier 2009: 68). The analogy with democratic decision-making is, at best, tenuous. Say I have a preference to bring my child up in a certain way that is different to how

you would bring up yours. There is no equivalent of the price mechanism whereby my preferences become known to you if you are not one of my acquaintances and I am not someone with a large public platform. Aggregative voting mechanisms cannot serve this purpose, as they are less responsive than the price mechanism, and we rarely vote either on specific issues, or for representatives who directly share our views. The bluntness of aggregative democracy in terms of articulating our specific values and preferences contrasts unfavourably with deliberative democracy, where we at least have the option to speak up about certain issues in a process that is conducive to others listening to us, may be the best form of knowledge transfer.

Gaus and Vallier's response here might be that even conceding this, the norms of deliberative democracy require us to suppress certain kinds of sentiment, opinion, or reason in political deliberation, and it is here that the danger to democracy lies. The worry is that deliberative democracy and a consensus account of public reason require a set of rules that severely limit the basic liberties of those deemed unreasonable. In response, it is worth re-iterating that the justificatory constituency, that is the hypothetical set of citizens (typically reasonable citizens) who laws must be justified to, do not enjoy a distinct set of basic rights and liberties. In real life unreasonable citizens are not systematically excluded from the political realm – they do not have their negative liberties infringed upon, and so the assumption that restraint in some political fora and negative rights are incompatible is incorrect (Quong 2011: Ch 10).

More broadly, there is an inconsistency in Gaus and Vallier's assumption that any attempt to impose norms upon the process of determining the inputs of democratic deliberation is necessarily authoritarian. If the knowledge transfers and 'baton passing' that their theories depend upon are to function, there are going to need to be some pre-political norms that citizens adhere to. People do not form social knowledge through the accumulation of pieces of knowledge like building blocks, but through social interaction. How productive this knowledge-gathering is depends on how the participants conduct themselves. It is impossible to have an epistemic account of democracy, broadly conceived, that does not require some social norms to be observed

if it is to function, even if these norms amount simply to a commitment to take others seriously in discussion and inform oneself adequately. Otherwise, it would be possible for citizens to *de facto* exclude others from deliberation and to disrupt the transfer of knowledge. The imposition of these norms will require coercive structures that govern knowledge gathering and interactions that shape knowledge-formation. This suggests that deliberative democracy is not unique in requiring state coercion to function in the way that Gaus and Vallier suggest. Instead, any form of democracy that performs the epistemic function that they claim will require certain democratic norms to be enforced through state coercion or the threat thereof.

8. Conclusion.

In this section, I have defended the idea that a consensus-based account of public reason is unique in producing legitimate laws given two assumptions: pluralism about justice, and a relationship between justice and legitimacy where the former bears upon the latter. I then argued that deliberative democracy is constitutive of such a scheme, and challenged Gaus and Vallier's objection. In Chapter 6 I engage once again with Gaus' work, and argue that many of the features of deliberative democracy that I identify are actually necessary features of his system. Having defended a particular account of public justification and argued for deliberative democracy in general, the next chapter suggests some of the institutional requirements of realising such a scheme. To do so requires more conscientious effort by the government to ensure that individuals can interact in different fora as equals, compared to the consensus schemes of public justification that can be achieved through essentially aggregative forms of democracy. It also requires that citizens are furnished with a full set of political rights.

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[1] Other theorists have referred to this as the public justification principle, but I use this broader term as some variations do not present the argument as a neat principle.

[2] See also Bohman and Rehg, who identify this as the common feature of various accounts of deliberative democracy including Rawls', Habermas', Cohen's and Elster's at the start of their edited volume on the subject, (1997: xiii)).

[3] Given the broader commitment of liberals to the justification of laws to all citizens, there should be at least some compatibility between my work and most liberal theories. See Waldron (1987) for an account of liberalism that places the process of justification at the centre of the liberal tradition

[4] This view is held by Estlund as well, who acknowledges that whilst there is a tendency for democracy to produce more just outcomes, and that this is the source of its legitimacy. He further argues that where it fails to do so, concerns of legitimacy might be trumped by those of justice derived from independent moral reasons (2008: 8).

[5] A liberal legitimacy constraint will also inevitably limit the ways that citizens can pursue more just outcomes. Chambers notes that to impose the economic system that Rawls advocates will require a degree of political upheaval that is not possible if we observe a liberal constraint of legitimacy and participate in democratic deliberation (2012: 17-18)

[6] This is a specific liberal manifestation of a problem that various accounts of the relationship between justice and legitimacy run in to. This is that if both justice and legitimacy constraints are concerned with enforceable laws it is not clear how we should adjudicate in cases where they conflict (Valentini 2012: 597-8).

[7] I return to this in the next section.

[8] On this I agree with Gaus that "to make sense of ideal justice we need to suppose a set of institutions, practices and spheres, and the agents that act in them, and all this requires some account of how institutions or agents… operate and how various spheres are demarcated." (2016: 20).

[9] This claim about a plurality of reasonable views about justice is distinct from the separate point that citizens may accept a single theory of justice but disagree about the specific demands this places on them and how it might be codified in law (Weithman 2011: 338).

[10] Here I use Rawls' definition of a stable society as one that is "well-ordered" such that those who grow up in such a society develop a "sufficient allegiance" to the institutions of such a society, and a sufficient sense of justice such that they "normally act as justice requires" (*CP*: 479).

[11] Although there is not space to explore it here, my instinct is that the extent to which many political liberal citizens see different policies as legitimate (or not) depends at least in part on how widely they conceive of the justifiable set of conceptions of political justice.

[12] In this article Estlund also argues that Rawls' scheme incorporates a degree of this "Epistemic Proceduralism", see (173-6).

[13] See Sunstein (2000).

[14] The model of deliberative democracy I have in mind here is therefore similar under nonideal conditions to that presented in Dryzek (2000).

[15] These claims are explored in more detail in Chapter 5, where I argue that unreasonable people generally ought to retain political rights.

[16] Gaus uses the term Open Society in the same way that Popper does in his classic text (Popper 1945).

[17] I return to this in the next chapter on political rights.

Chapter 3: Political Rights.

The last chapter defended, in fairly abstract terms, a conception of public justification as the correct constraint on the legitimacy of laws. This depended on political deliberation amongst citizens, and the use of shared underlying reasons. I now provide a more systematic account of the political rights that a state must ensure in order to realise a legitimate political system as I have conceived of it, and when these might be violated.

The major claim in this chapter is that deliberation of the kind necessary to realise the public justification of laws requires that citizens are able to participate in politics with equal status. The political voice that citizens have must be equal in certain formal and substantive senses, that I describe below. The kind of consent that public justification theorists envisage as underpinning legitimacy requires that citizens at least have the chance to raise reasonable objections in fora where such objections might be taken seriously. We should have the chance to try to persuade open-minded fellow citizens to revise their views, or to consider other reasonable options.

The practical upshot of this is that legitimacy depends, in large part, on institutional design that incorporates fora for debate. It is insufficient to protect negative rights - specifically the rights of freedom of expression and association. The first section of this chapter fleshes out the discussion of what an ideal of deliberation will look like, and then set out some of the ways the rights and entitlements required by such a scheme. I suggest that Steven Wall's concept of a Constitutional Settlement provides a good way of conceiving of the regulations in this area (2013a). This is because the process of deliberation depends in many ways upon dynamic institutions: how existing groups interact; the history and political context of each nation; the interaction between different branches and levels (for example local vs national) of government; and the role of media and communications technology to name but a few. The rules governing institutions like local government, consultation, support and funding for parties and media regulation cannot be distilled to simple rules that might form a constitution. However, such arrangements cannot be subject to change in 'day-to-day' politics, and

must be protected from the self-interest of politicians. The Constitutional Settlement sits at a level between laws and constitutions. It provides a way of resolving the tension between the fact that the rules of deliberation ought to form part of what Rawlsians would think of as the 'Constitutional Essentials' of a country, whilst at the same time offering scope to respond to the dynamic and context-specific institutions required to facilitate institutions.

The second half of this chapter begins to make the case for when these political rights might be violated. In general, political rights may be compromised in order to preserve the process of deliberation. If citizens use their political rights and entitlements in a way that either undermines the process of deliberation or that prevents others from participating in it, the state may limit them. The injustice that citizens suffer when they are *de facto* excluded from, or marginalised in deliberation mirrors what Fricker calls epistemic injustice. This is the injustice that is suffered by those who are not treated as epistemic equals during deliberation. Importantly, we can undermine others' status as deliberators without directly compromising one of their 'negative' rights, such as their freedom of expression. An epistemic injustice can arise in political deliberation without anyone being excluded from politics through coercion and violence. Instead, an epistemic injustice can arise as a result of other citizens acting according to entrenched underlying norms that stigmatise others; this will become important when I consider whether hate speech generally or the proclamations of public officials can undermine citizens *qua* deliberators in Chapter 7. Finally, I suggest that because of the nature of deliberation and the way that people can be excluded partially, in some fora but not others, we can curb unjust behaviour through limited sanctions, such as the withdrawal of recognition from parties and political organisations, rather than criminalising such behaviour. This suggests that there might be ways of imposing the norms required for legitimate policy-making through political deliberation without permitting egregious overreach by state institutions.

2. Equal Political Voice.

Before discussing what equal political voice will entail, I argue that we ought to aspire to an inclusive ideal of democratic deliberation. By inclusive here I mean a model of deliberation that seeks to incorporate as many citizens as possible insofar as they are obligated to participate or desire to. In the previous chapter I set out two co-dependent functions of a legitimate democratic procedure. The **justifying function** is the requirement that citizens are able to participate in such a way that that the liberal constraint on legitimacy is met. Deliberation must be widely inclusive as well if the constraint is to be met. The second function I called the **epistemic function**, which is the function of democracy that produces more just outcomes. This requires a more inclusive ideal because greater pluralism in deliberation correlates with more just outcomes, and because the logical structure of how political conceptions of justice are conceived means they are defined in part by compatibility with the complete range of reasonable perspectives in society. Ultimately, the extent to which states adhere to these norms depends at some level on the conduct of citizens during deliberation.

2.i. The Justifying Function.

So far I have not said much about the **justifying function**, assuming that it is an obvious purpose of a liberal constraint on legitimacy. After all, it is the essence of justificatory liberalism that citizens are entitled to an explanation for the laws that they live under. Publicity, in the sense that we need to be able to observe that laws are being obeyed and that governments are behaving in the way they claim, is a necessary component of legitimate law-making. Christiano notes the centrality of publicity to the realisation of fairer policies - the "intrinsic fairness" of publicity makes it a necessary part of enforcing fair laws (2004: 269). Weithman goes further, centralising the problem of mutual assurance that others will adhere to laws as a defining political issue within Rawlsian thought, and argues that the 'political turn' in Rawls is a response to (2010). The state must therefore obtain consent, of sorts, from all citizens. Restrictions on political rights inevitably undermine this.

For the purposes of this chapter, I highlight two features of political institutions that

satisfy the **justifying function** of public justification: opportunity to scrutinise policies and opportunity to advance one's own reasonable interests. Public justification depends on acceptability to all citizens. Whilst ideal theories of public justification define this as universal acceptance amongst reasonable citizens in an abstract sense, in practice the best conformity to this ideal will be better realised through widespread inclusion in political deliberation, and consultation. The chance for citizens to explain their objections to policies and propose amendments will ultimately render those policies more compatible with the ideal. In an approximate way, a policy that is more widely accepted in the real world is more likely to conform to an ideally justified policy than one that is not. Although we cannot say with certainty that a theory conforms to an ideal of universal reasonable acceptance, a theory is more likely to approximate to it if it has been presented to a wider group of individuals and not been rejected (even if it has been modified). Similarly, a reason that citizens might object to a policy under ideal conditions is if it prevents them advancing their own interests on unreasonable grounds. In practice, a political system that does not allow citizens to convey what their interests are to others as a part of political deliberation will deviate more significantly from this ideal.

2.ii. The Epistemic Function.

There are also epistemic reasons to engage with other citizens as equals within a certain framework (Estlund 1997: 179). By epistemic benefit here I refer to the benefit of producing more just outcomes over time. This is a tendency that Rawls argues for (Daniels 2003: 252), but that is bounded by the constraint that justice places on legitimacy.[1] Political liberals argue that we can accept that on comprehensive moral issues that we might disagree with others, and believe them to be wrong, without asserting the dominance of our own doctrine (Quong 2011: Chapter 8). More politically just outcomes are distinct from comprehensive moral views, in the sense that we can say something is more just even as it deviates further from our own comprehensive moral views more.

Recall from the discussion in the previous chapter that there are two ways that inclusiveness and deliberation can combine to produce more just outcomes. First, in a shallow sense, greater inclusion can mitigate for our own limitations as knowers. This is a broadly Millian argument, that we can refine our own positions through exposure to others. The epistemic benefit provided by inclusion is two-fold: as a contributor of information, and as a process of refining of proposals for policy and law. The latter is achieved through exposure to a variety of different positions. Greater inclusion in deliberation allows us to overcome our own mistakes and enables us to critically reflect on and refine our positions through the act of debating them with others.

Second in a deeper sense, greater inclusion produces more just outcomes because a more inclusive deliberation that treats citizens as equals better reproduces the process by which reasonable theories of justice ought themselves to be constructed and justified. Because theories of justice depend, for justificatory liberals, on acceptability to all and on a kind of consent, more inclusive political systems produce outcomes that have a stronger tendency towards justice. If the justice of laws depends in part upon treating all citizens with fairness and respect, then it ought to follow that the credentials of justice of a given law or policy are burnished by the acceptance of a wider-range of the populace. If all citizens have had the chance to challenge and scrutinise a law, and a modified version persists, we can say that this law is more likely to be just than one that is of a similar form, but has not been subjected to the same scrutiny.[2]

I believe that both of these epistemic benefits accrue to systems that adhere to the liberal constraint on legitimacy, thought the latter is more fundamental to liberal legitimacy as it binds the content of justice to the fair treatment of all citizens. If neither of these epistemic benefits were real, there might be an epistemic case for a society run by experts deliberating under certain conditions (Cohen 1997b: 417-419). However, as I noted in the previous chapter, there are many reasonable conceptions of justice. The set of justified conception of justice is defined in part by compatibility with existing reasonable doctrines. Therefore a theory of justice is more robust if it is tested against the full variety of existing views. In the previous chapter I suggested that only

deliberative democracy and a 'consensus' view of public reason might satisfy this. Here I would add that it behoves a state to be as widely inclusive as possible in how it structures deliberation.

2.iii. A Note on Potential Tensions.

A recurrent theme in this thesis is the fact that these two demands may come into tension. That is, an institutional system in practice that might be best placed to realise the epistemic benefits of deliberative democracy may not be the structure that best ensures that all have the opportunity to scrutinise policies. In some cases, epistemic benefits might best be realised by giving priority to the views of experts within a broadly inclusive framework. There is also the question of whether unreasonable citizens forfeit their right to participate, which I address in Chapter 5, where I argue that such individuals do retain such a right on both fairness and epistemic grounds.

At this point, it is sufficient to note that there is a general correlation between legitimate laws and more just ones. The reason for this is because of the fact that, as noted in the account of justice pluralism in Chapter 2, the content of justice is in part shaped by the beliefs and perspectives of citizens. Whilst we can never be certain of the content of justice we can reasonably assume that laws that are produced under a more inclusive political system are likely to be more just. Having seen the potential benefits of an inclusive deliberative system, I now turn to how this might be realised.

3. The Requirements of an Equal Political Voice.

In the last section I suggested two requirements of a political system: that it enables citizens to participate in such a fashion that laws might be legitimate, and that it does so in a way that tends towards more just outcomes. I also suggested a degree of congruence between these two goals, and argued that generally systems that better realise one also better realise the other. This is in part because of a logical connection between inclusiveness and the justice of laws produced. In this section I argue that we

must have an equal political voice in order to simultaneously realise the legitimising and epistemic functions of democracy as best we can.

Participants in all democracies tend to have two basic rights in any political discussion, that is to scrutinise policies, and to advance policy suggestions of their own. By scrutinise here I mean only the minimal sense of approving, disapproving or proposing revision to proposed laws. These might typically be ensured throughout the protection of 'negative' rights. The language of rights is appropriate here, in the sense that a political right provides "special reasons against interference" by the state that prevents citizens exercising this right (Waldron 1981: 31). I use the term negative rights to refer to those rights that amount to a protection from interference by the state or others, mirroring the classic distinction between 'positive' and 'negative' liberty (Berlin 1969). These will include freedom of expression and association, the right to vote and protection from intimidation, and equal opportunity to participate in public office.

Deliberative schemes of democracy require more than this, though. In a deliberative democracy, citizens must have the chance to "influence" others through deliberation, not just "impact" the result of political deliberation through a vote (Dworkin 1987: 9). In order to advance our own interests in a deliberative democracy we do not just require the opportunity to articulate them publicly. We must be able to advance them in cooperative discussion with others, and be willing to justify them in the face of challenges. One of the obligations we therefore have as reasonable citizens is that we should be prepared to defend our views, and revise them in response to scrutiny (Dryzek 2000: 15). We must enter deliberation in an open-minded fashion, and be prepared to revise our own views (Heyman 2009: 172). For Rawls, in a well-ordered, just society citizens are treated as "self-originating sources of valid claims", in that "their claims carry weight on their own without being derived from prior duties or obligations owed to society or to other persons, or, finally, as derived from, or assigned to, their particular social role" (*CP*: 330). Citizens in a well-ordered society have the capability to form and revise a conception of the good, and the ability to recognise the weight of their claims on others (331-3). A deliberative system must therefore allow citizens access to a

platform for them to try to persuade others of their views, and allows them to scrutinise the claims of others to ensure that they are adhering to the demands of a reasonable conception of justice. Similarly, if citizens are to scrutinise policies in an effective deliberation, they must be able to influence them, not just impact them by effectively vetoing them in votes. This involves having access to information and a platform through which to challenge those proposing laws. In practice our status as deliberators depends on the "recognition" of others and on access to certain material resources (Cohen 1989: 737).

Gutmann and Thompson set out as the three major components of deliberative democracy "reciprocity, accountability and publicity" (2000: 165; 169).[3] These provide a useful institutional template that might be adopted in order to facilitate the kinds of policy discussion required by deliberative democracy.[4] For these ideals to be realised will require the active provisions and maintenance of relevant deliberative fora, and the policing of norms concerning interaction in these areas. The capacity to influence others in the ways that an ideal of deliberative democracy dictates will require both procedural and substantive provisions be made for citizens: procedural in the sense that citizens must have access to fora and positions where they can influence policies, and substantive because they need to have equal access to relevant resources (Knight and Johnson 1997: 280-2).

In practice, this will require the existence of political fora where citizens exercise roughly equivalent political voice. These will depend not just on negative rights, but 'positive' ones to. By positive rights I mean entitlements that we are entitled to as a matter of right. In the case of positive political rights they are things that a state must ensure the provision of, and universal access to, if it is to be considered legitimate. In order to fulfil the two functions of democracy suggested by justificatory liberals, positive rights will typically include the maintenance of a parliamentary system with adequate provision for debate; the maintenance of other fora where citizens can air views; policy-making processes that incorporate consultation to an appropriate level; support for political parties and groups that act as a vehicle for scrutiny or the advancing

of interests; adequate civic education; and the maintenance of a public discursive sphere, amongst other things. They are positive rights because in practice the state will have to fund and regulate these ventures, and may have to coerce some citizens to participate or act to maintain them. For example, the state will force citizens and law-makers to engage in a consultation process when they propose laws in certain areas. This will ultimately be costly to them, but it is justified because it will enable other citizens to have the opportunity to scrutinise their plans (a form of publicity) and to raise potential objections in an appropriately structured discussion. In the next section I examine some of these key political rights in more detail, and propose a structure for managing the specific arrangement of these.

4. What Political Rights Are We Entitled To?

This chapter sets out a set of rules that are required to ensure an equal political voice, and that satisfy the **justifying** and the **epistemic** function of public justification. Recall that both require that citizens possess an equivalent political voice. This requirement generates relational obligations for participants in deliberation, because it depends upon all participants being taken seriously by others in a respectful dialogue. It is, to use Williams' terminology, a right that we must "secure", rather than something that can be possessed formally" (2005: 107). It can only ever be secured in a provisional and contingent way through institutional arrangements, as it depends upon the behaviour and dispositions of other citizens. In practice the capacity to secure this voice requires a complex set of institutional and social arrangements. In the first half of this section I suggest a range of rights and provisions that citizens are entitled to.

The second half deals with the legal status of these rights and entitlements. I deploy Wall's idea of a constitutional settlement as an intermediary level between fundamental or constitutional rights and everyday laws. I suggest that this level is appropriate because many of the facets of realising an equal political voice that are to some degree context-dependent and cannot be articulated in 'constitutional' level decrees, but ought

to be shielded from the meddling of politicians and the vicissitudes of everyday politics. For example, the media will have some role in deliberation and will need to be regulated, but how a particular country's media fulfils its role of supporting deliberation will depend on background culture, the technology available, and other institutions.[5]

4.i. Rights and Entitlements.

I have argued that deliberation must be structured in a way that ensures that all people are given an adequate chance to both participate in and scrutinise policies. For this to be the case, the state must do more than simply police certain rights like that of freedom of expression and of association - it must provide structures that enable citizens to participate in deliberation. This means providing substantive opportunity to participate rather than just protecting basic rights. For example, the duty of the state is not just to permit citizens to band together and form a party free from interference, but to ensure that this party can participate in deliberation. This might mean ensuring they are given a platform, funding (such as 'short money' in the UK), and ensuring laws are in place to enable them to administer their parties efficiently whilst safeguarding their members. Under nonideal conditions there is the further complication that 'negative' rights might require positive intervention to secure. So, for example, the right to an equal opportunity in the employment process might require intervention by the state to provide additional training and procedures to offset gender and racial biases in the recruitment process. Below I set out a broad but not exhaustive range of rights and entitlements that citizens ought to have if they are to participate properly in deliberation.

The Rights to Freedom of Speech and Association.

A liberal state must guarantee freedom of expression and association, as well as a right to protest against government. Any interference with the government in these rights will mean that citizens are unable to either advance policy positions as they would want or scrutinise policies. It is also necessary in order to realise the **epistemic function** of a system of democracy. This is because interference by the state naturally undermines the

inclusiveness and pluralism of deliberation.[6] Interference by the state to limit freedom of expression or association undermines the political standing and equal political voice of its targets, thus distorting deliberation as a whole. In a deliberative system, these rights necessitate the provision of opportunities to give voice to concerns within a political forum as well as a lack of interference. Freedom of association is only useful insofar as one could, with enough support, plausibly exert an influence over policy. When this right is curtailed it is often done indirectly, but effectively. The most obvious example in present Europe is the threshold in Germany where 5% of the popular vote that is required to enter the Bundestag, a law that restricts minor parties in order to guard against the risk of extremists gaining a foothold.[7] Similarly, no-platforming, or preventing demonstrations may not be the equivalent to censorship in severity, but they act in a similar way by removing certain viewpoints from the public sphere.

The Provision of Deliberative Fora.

This is a wider category, which incorporates all manner of hustings, consultations with officials and ensuring the infrastructure is in place to manage a functioning public debate. There will be two major aspects of this provision: the cultivation of these fora, and ensuring equal opportunity amongst members of the public to access, participate in or observe these. Appropriate fora will include political institutions, media platforms, and informal deliberative spaces. An important part of deliberative democracy if it is to serve its function in public justification is that it must be deeply engrained and multi-level. It is insufficient that parliamentary representatives decide things in debates that adhere to deliberative norms. Instead, citizens themselves must have as much opportunity as is practicable to participate.

Support for Parties and Groups.

Two major problems to implementing deliberative democracy in practice are widespread noncompliance with deliberative norms, and the 'scale' problem (Parkinson 2003). This thesis is mostly a response to the issue of noncompliance. As I alluded to in

Chapter 2 section 5, a realistic deliberative system will be one of mediated conflict between different groups rather than the ideal of co-operative dialogue. The best approximation to an ideal of deliberation will be realised where citizens and groups compete to advance their interests on equal terms, and in an environment that causes them to emulate the process of ideal deliberation, even when their intention is simply to advance their own interests come-what-may. I talk much more about noncompliance in the next chapter. At this stage, it is worth focusing on the rights and entitlements required to equalise group conflict, and shape it into something approximating to a deliberation in which citizens actually adhere to the norms of deliberative democracy. The major policy set that facilitates this is institutional support for parties and accredited campaign groups, or charities. Political parties are typically entitled both to financial support, and a degree of recognition in public life that other associations are not. This is vital to ensuring that group conflict, whilst far from ideal, does not become dominated by one group. It allows parties to perform the functions of scrutiny and advancing members' interests in a parliamentary setting.

The scale problem is the problem that in practice, whilst all citizens in a modern liberal democratic state can vote, it is impossible for them all to participate in a meaningful deliberation on a given subject. It is impossible for all citizens who are entitled to participate in deliberation in practice over all issues that will seriously affect them. In setting out this problem, Parkinson suggests two possible solutions. The first, which he rejects, is to limit the things that are decided by this kind of deliberation to only certain decisions (185). As he states this is not really a solution, as it just means that the problem applies in fewer cases; realistically it is still present even when we debate whatever we consider to be the 'core' laws essential to governing a society (185-6). To this I would add that to apply deliberative democracy selectively is to undermine what makes it valuable in a publicly justified scheme: the fact that it confers on all citizens an equal status. The second solution that Parkinson identifies is that in practice deliberative democracy will require the intermittent exclusion of some from deliberations. His worry is that this process of partial exclusion will be unfair or arbitrary.

The question of how to limit discourse is therefore not how to eliminate such exclusions, which would be impossible, but how to do so in the least arbitrary and unfair way. Completely inclusive deliberation is impossible, as Parkinson acknowledges, because existing deliberative schemes are based on both existing power structures, and are nowhere near conforming to an actual universal deliberation (191; 181). One way we can solve the scale problem in a democratic system in general is, of course, to entrust representatives. But deliberative democracy poses an additional problem compared to aggregative schemes, in that representatives must combine the role of delegate with that of trustee (190). They must represent the interests of their constituents, but at the same time, if deliberation is to be beneficial they must participate in it fully. This means, amongst other things, being prepared to change their minds over the course of a deliberation, and to forge new solutions with other representatives.[8]

This tension in the role of representatives is to some degree insoluble, but there are ways that a proper deliberative scheme can mitigate for this, and should. Parkinson's own solution is to emphasise that representation is to some degree context-specific and varied. His own solution is to ensure that there are a range of options for representation across different levels of both the public sphere and formal institutions (185-191). These include both formal political avenues and the protection of spaces for activism by individuals, as well as different sized groups in between. These different groups throughout the polity must be governed in such a way that the struggle between them and the power relations that inevitably arise do not lead to some being marginalised. In practice, this means that citizens should have the opportunity to join different groups at different levels of government, and to entrust different representatives at different levels of politics. In this way, we can entrust representatives to deliberate for us over specific issues where we feel they align closely with our views. The problem that they might not deliberate as we would hope they would is somewhat mitigated then, as there is more chance that representatives will deliberate roughly as we would within a fully-inclusive deliberative sphere.

This argument builds on Dryzek's more general position that in deliberation particular perspectives or discourses must be represented (2001; Dryzek and Niemeyer 2008). Dryzek's system emphasises the discursive aspect of public deliberation. He advocates a process by which different groups represent particular discourses in a de-centred institutional environment.[9] The important point about the way that political groups and representation are organised is that, through regulation and the conduct of representatives, the discursive landscape amongst deliberators ought to mirror the "constellation of discourses" in the public sphere that encompasses the actual positions of citizens (Dryzek 2001: 660-5). This approach works because there are broadly speaking fewer discursive positions than there are citizens (Dryzek and Niemeyer 2008: 485). This means that the scale problem is somewhat alleviated because citizens might, under favourable circumstances, be able to find a representative at some level to deliberate on their behalf who shares most of their central beliefs. This understates slightly the competence gap between citizens and entrusted deliberators. Designated deliberators will have much more time, resources and, once they have been in the role for a while, competence in deliberation. Representatives will therefore posses a degree of autonomy in practice that causes a deviation form an inclusive ideal. However, the central point is correct that in order for anything like an ideal delineation to be reached in a necessarily representative system - because not all can deliberate all the time - there must be a range of options for representation. The various groups that represent citizens at all levels of government must be mediated in a way that is fair, and ensures that each has an equal political voice (mirroring an ideal of deliberation amongst all citizens). This requires that the state devolve power to different fora, and more importantly for my purposes, provides support for groups and organisations that can act as representatives or proxy deliberators for citizens looking to advance and refine particular discursive positions.[10]

The Right to Information.

The state ought to provide people with relevant information about political matters and ensure that it takes all reasonable steps to make information available. It is a necessary

feature of the requirement of publicity. Citizens need access to information so that they can inform themselves about issues they are deliberating over, and so that they can scrutinise policy effectively. A government that withholds information and is willingly not transparent is in effect blocking the scrutiny function, and therefore cannot be considered legitimate. What reasonable steps are might change over time: in the age of widespread internet access the state has a duty to make information available online, where it obviously would not have done twenty years ago, because this can be done at relatively little cost. An interconnected, but much bigger topic I do not address here is that access to a level of **education** sufficient to make use of this information and participate in deliberation is also a political right. Of course, the benefits to deliberation of widespread access to information depends on citizens having the capacity and disposition to seek out relevant information that is available to them and use it sensibly. I investigate our obligations around this in the final chapter.

The **media**, and **oversight of the media**, will play an important role in mediating information. There is therefore a weighty obligation on the state to ensure that the media is appropriately regulated, pluralist, and not subject to monopolies. It might even encompass public support for media institutions. Habermas makes this point in calling for the subsidy of broadsheets in Germany by the state, because in his eyes the media facilitates public accountability by focusing public criticisms (2009: 133-5). Whilst I am not suggesting a specific right of access to the *Times* or *Guardian* for all citizens, the state has a responsibility to ensure that public debate adheres as far as possible to the template of political deliberation that enables all to fairly participate, and ensures the public can scrutinise decisions. This might mean persevering with current affairs broadcasting over state media even when it is not commercially viable due to lack of interest. Whilst I do not engage much with media regulation in this piece, it is important to factor in differences between media landscapes and wider political spheres between countries in discussions about freedom of expression. This is because it will affect the way that 'hate speech' impacts behaviour, and shapes background norms, which will in turn determine appropriate regulation.

Finally, there will need to be a certain level of **material equality**, and restrictions on how wealth can be used in political campaigning, to ensure sufficient equality of political voice. Cohen makes the point forcefully, in criticising against campaign finance arrangements in America (1997: 426). These restrictions might also include laws governing the membership of parties, how donations are made and declared, and some regulation of how political organisations use advertising. More generally, deliberative democracy as defended by most liberal theorists and public reason-based theorists requires a more equal distribution of wealth to function than exists in many modern states (Fung 2005: 397-8). This is independent of the way that material inequality undermines legitimacy if it is too severe, and may be more or less demanding in terms of the requirement for redistribution. It might be, given differences in wider public culture, that the level of inequality distorts deliberation more in some national contexts than others. There are some measures that can be taken to mitigate the effects of inequality on deliberation, such as the positive support of parties and groups. One of the harmful behaviours that might warrant the restriction of political rights is undermining these measures.

4.ii. The Constitutional Settlement.

I assume that the underlying political value we ought be concerned with is respect for others, which is the core of justificatory liberalism (See Chapter 2, Section i). There is an agreement under ideal conditions that we ought to provide public justifications for coercive laws and respect others in deliberation. The authority of the state to enforce laws is based on the idea the there is agreement about the role of respect for citizens and the role of public justification in general. However, the laws that facilitate deliberation will not be subject to reasonable consensus. There is not complete agreement about how to facilitate actual political deliberation so as to realise this. There can, though, be a settlement upon laws that we can reasonably believe generate the circumstances of deliberation at any given time, and that can secure the support of the vast majority of the populace. This is a variation of Schwartzman's claim that public reason can accommodate disagreement about how to realise constitutionally just principles within

an ever-changing political environment, and that a conclusive justification for laws is not necessary where a legitimate constitution is respected (2004: 207-9). This is important, because as populations shift the best way to structure institutions so that they cohere with a liberal ideal will change. At the same time the constitutional settlement will not be subject to the whims, or potential abuse, of individual governments, because of the requirement of near-consensus to change it.

Some of the political rights I have set out are clearly binary; the right to freedom of expression is something that we generally have, except when it is withheld for justifiable reasons. Others, such as access to appropriate political fora, are not, and can be realised in different ways depending on context. We can have partial access to a certain political platform, or have access to a platform but be placed at a position of disadvantage in discourse - for example a political party may not be banned from attending a political meeting, but may not be allowed to take a seat on the presentation panel, instead only being permitted to interject from the 'floor'. The balance of these rights and entitlements in a process that produces legitimate policy is complex, and changes over time in response to technological or cultural factors. For this reason, the principle that citizens ought to have fair access to deliberation ought to be enshrined at a constitutional level, but the specific rights attached to this cannot be because their effective realisation is contingent both on other rights being realised and context. For example, the BBC can be seen as an important part of political deliberation in Britain - it provides information for citizens and plays a role as gatekeeper in providing a platform for various political groups. The controversy its (alleged) bias elicits is testament to its central role in British public life. However, it seems implausible to enshrine, for example, the existence of a state broadcaster, its funding level or the particular way it must cover politics at a constitutional level. It is not clear that there could ever be a reasonable consensus about this one component of political deliberation alone, because the institutions, cultures and practices associated with deliberation are in a complex and dynamic relationship. On the other hand, something this essential to political deliberation surely needs to be protected by more than 'everyday' legislation that can be overturned by any government with a parliamentary majority. The political

rights people have and the policies that enable them to utilise these ought to be protected by the technocratic branches of a legitimate liberal state.

My aim, then, is to set out political entitlements and rights that are in some sort of balance at a level that is sub-constitutional, but at the same time retains a status above that of day-to-day rules. This deviates slightly from Rawls' view, that the constitution is designed so as to protect and ensure the basic liberties, and stipulate a legitimate procedure for political decision-making, and that other may matters be decided in 'everyday politics' using this legitimate procedure (*PL*: 339). Whilst it is correct that elements of a legitimate procedure be protected at a constitutional level, actual political deliberation depends, as I have argued, on a range of rights and entitlements, as well as institutions functioning in a certain way. The specific rights and entitlements we have, and the general cases where they might be infringed upon, therefore need to be enshrined at a level of law-making that is above normal legislation, but sub-constitutional, as specific rights ought not be accorded the same priority as the basic liberties. Applying this to the BBC, it ought to be protected from the whims of specific governments to a degree, but it must also be open to change to reflect new media environments. It seems implausible to think that British citizens' entitlement to a public broadcaster that behaves in a certain way is a constitutional right.

A viable route to resolving this is to leverage Wall's concept of a "Constitutional Settlement". Wall defines this as: "complex on-going social practices that both express certain values to which political societies are committed and establish procedures for resolving disputes among members of these societies" (2013a: 481). Under a constitutional settlement a set of rules and institutions could be established that were subject to agreement amongst most members, as Wall states (486). Crucially, although always requiring the adherence of a large majority of citizens, these would be subject to change over time (496). I use the concept selectively - Wall suggests that this is an alternative to consensus-based theories of public reason. He extends this to all laws and practices, rather than simply political rights. I disagree, and believe that the basic institutions of society must be fully publicly justified. However, for the arrangements of

political deliberation rules that are subject to the (less demanding) kind of constitutional settlement that Wall describes can carry *prima facie* authority. The authority of the constitutional settlement is only possible where it is underpinned by such publicly justifiable principles, and it exists to supplement a just constitution. However, laws that are included within it are enforceable even where there is not public agreement that they are the best way of implementing just principles, so long as they are seen as sincere attempts to realise such principles and enjoy the support of a significant majority.

A strength of the constitutional settlement is that it can incorporate, and where necessary account for, national differences between polities. It is able to incorporate a more systematic account on the limits on the use of political expression that acknowledges the history of the country and its political parties. Because it is somewhat flexible, a constitutional settlement can respond to the role of convention and unstated norms within politics. It includes rules, institutional structures and the obligations of public officials, so can be constructed in a way that deliberation within best responds to the existing political context. In France the idea of Laïcité is intricately inter-woven with the kind of institutions that make a liberal polity possible. Therefore there may justifiably be greater restrictions on expressions of religion in France compared to other places because this secular culture is bound to the possibility of public discourse.[11] These restrictions are part of a set of institutional practices that enable some approximation to a liberal ideal of legitimacy.

5. Epistemic Injustice.

These rights act in combination to best replicate, given the practicalities of organising a bureaucracy on the scale of a modern state, the conditions of deliberation. In the remainder of this chapter I suggest that these rights might be violated when people use them to undermine the process of deliberation. First, though, it is worth thinking about the injustice that citizens suffer when they are prevented from exercising their political rights effectively. This is because it is not simply a case of having a political right or entitlement restricted - rarely can someone be completely silenced or completely

prevented from participating in political organisations by another citizen - but the problem that arises when others prevent a citizen from using their combined political rights and entitlements to exercise an effective political voice and shape policies. In making the case that some can undermine the rights of others, we must therefore make reference to the overall process of deliberation, rather than just the right itself. So, in the chapter on hate speech, I suggest that if accredited parties use racial epithets in campaign material this may warrant sanction as it inculcates background norms that prevent the targets of these speech acts being taken seriously in public fora. Often when political rights are restricted, then, there is a general loss of ability to be able to utilise one's rights effectively, rather than the complete loss of an individual right. The targets of anti-democratic behaviour are undermined *qua* deliberator.

The underlying norm that is being violated when citizens seek to undermine the political rights of others is the requirement to treat other citizens as "epistemic peers" (Peter 2012: 28). The idea of treating each other as epistemic peers is central to political liberalism, and is a necessary condition of satisfying the **justifying** and the **epistemic** function. When we are not being treated as epistemic peers we suffer, within the confines of political fora, a version of what Fricker calls epistemic injustice (2007). This is the injustice of not being trusted as a knower, and as a participant in discourse. Fricker separates this injustice into two elements: "testimonial injustice" whereby citizens are not taken seriously and "hermeneutic injustice" where the language available to articulate a case is not available to certain groups in society. When someone is prevented from utilising political rights she suffers a testimonial injustice in deliberation, because she loses the capacity to make her case, advance her interests and scrutinise policies effectively. Similarly, the use of certain language persistently, a subset of what is often referred to as called 'hate speech', can lead to a hermeneutic injustice in political deliberation. I investigate this latter point, and demonstrate how epistemic injustice plays out in relation to speech acts, in Chapter 7. At this stage, as we start to consider when political rights must be compromised, it is worth noting that this is the general type of injustice that we suffer when we are marginalised from deliberation.

6. When These Rights Might be Infringed Upon.

In the preceding sections I have laid out some broad sets of political rights that citizens are entitled to. These have included negative rights of noninterference, and positive rights and entitlements to access certain resources necessary to deliberate effectively. I have suggested that these rights are meant to fulfil the **justifying** and **epistemic** functions of democracy required in public justification. There are two reasons in principle when these right might be violated. First, if citizens are using these rights to inflict severe harms or injustices on citizens, they can be withheld. I assume that a variant of the 'harm principle' is publicly justifiable and required by liberal justice, and that, as I mentioned in the discussion of the role of legitimacy, severe injustices acts as a limit on legitimate state authority. Both of these imply that when citizens are making use of some right to inflict harm or injustice beyond a certain point, the state is obliged to intervene.

Secondly, the state can interfere in political rights where citizens use them in a way that undermines deliberation such that the requirements of legitimacy can no longer be fulfilled. This happens when one citizen acts to subvert a democratic institution and inflict an epistemic injustice on another citizen or (more likely) group by preventing them from participating fully in deliberation. Political rights only fully perform their function of enabling a deliberation that produces a legitimate outcomes if they are all realised by all citizens simultaneously. Rights of association and freedom of speech might, for example, conflict with the requirement that wealth cannot have undue impact on the political process, meaning that the rights of wealthier citizens may have to be curtailed to ensure the continued functioning of the entire process. This trade-off requires a fair process to resolve these tensions.

The process of producing legitimate laws and institutions incorporates a dynamic system of rules, practices and institutions many of which are positive entitlements that must be provided in part by the state. It is therefore wrong to approach the problem by

thinking of it as something that functions perfectly, then imagining how this system responds to unreasonable citizens who do certain things. Instead legitimacy is only possible because of ongoing practices and is therefore contingent on active assent and participation by state actors and citizens. There is a *pro tanto* harm in curtailing the political rights of anyone, but the two types of case that I set out above are instances where the harm of non-interference may outweigh this. It is important to note that neither of the two criteria that I set out for justifiable interference are fulfilled simply as a result of the content of an actor's political views. To either induce harm or exclude from deliberation requires that we pursue certain political ends or express certain political views in a certain context, over time. So racist language used in certain contexts might be a case of either or both of these harms - it encourages acts of violence or social stigmatisation, so causes an undue harm, and if allowed to go unchallenged it serves to marginalise the target group within deliberative fora as well. On the other hand, there are certain unreasonable views that will rarely serve, however they are expressed, to produce either of the kinds of harm I describe. Mainstream centre-right politics in Europe tend not to be reasonable, but party rhetoric rarely violates either of the two criteria that I propose.

6.ii. Political Rights and Epistemic Injustice.

There are cases when political rights might be restricted to prevent an epistemic injustice. These are instances where political rights are (ab-)used in a way that the actions of citizens undermine the process of political deliberation required by the liberal constraint on legitimacy. The purpose of political rights is to enable a political process that closely enough resembles a process of political deliberation such that laws can be considered legitimate. If this process is undermined there is at least a possibility that the concern with ensuring legitimate laws can continue to be produced would overcome the strong reasons against interference in political rights that liberals typically subscribe to.[12] Political rights could be violated in cases where citizens were using them in a way that undermines the political rights of others or the institutions that enable citizens to make effective use of their democratic voice.

Restrictions on political rights, then, are justified in part by the violation of an ideal of reciprocity, in that they are retained only insofar as citizens respect the same rights of others and allow them to make use of them. Waldron defends a similar system whereby political rights can only be exercised insofar as they are compatible with the rights of others as a whole (1993: 222). This echoes Rawls' view that the basic liberties are "self-limiting", in that we cannot claim greater liberty for ourselves where we cannot grant this same liberty to everyone else (*PL*: 341). Quong develops this, arguing that political rights can be invoked only when they are "consistent with the overall moral idea which the system of rights is meant to uphold" (2011: 308). A frequent example that is drawn upon in this work is the case of a group of neo-Nazis who held a rally in Skokie, a predominantly Jewish neighbourhood. In both of these schemes, for example, Nazis cannot invoke liberal political rights to freedom of expression because they seek to use such rights to actively undermine the values underpinning it (310). In this vein, given that the purpose of political rights under political liberalism is to ensure that all citizens are treated fairly, as equals, and to facilitate a process of deliberation, political rights and entitlements cannot act as a 'trump' over other concerns where they undermine this process.

It is easy to dismiss the invocation by rallying Nazis of a right to free speech, but the actual far-right often includes individuals who are not seeking to actively undermine all liberal institutions. According to my proposal, it is not the nature of the views that a citizen uses a political right to promote that undermines it, but the fact that they use it in a way that undermines deliberation. Under my scheme, the Nazis would retain the right, even when they argue against the values underpinning it if they were using it in a way that did not undermine deliberation or harm others; of course in reality Nazis inevitably try to harm others or undermine deliberative institutions, but restrictions on their political rights would need to show one of these two things and not just be based on the content of their views. The important point is that there is no underlying justification for the state to seek to control discourses because of their content alone. Instead, restrictions may be used only when political acts serve to cause harm or undermine deliberation,

and this attempt is likely to succeed. Action by the state to shape discourse will be unnecessary if it can ensure a close approximation to an ideal of deliberation because if all participate freely in a respectful environment, those who do not hold anti-democratic views can challenge, persuade and censure those that do. Of course, if a majority hold anti-democratic views then there will be a practical issue whereby various state institutions may be required to defend themselves on a legal level, say through judicial review or other checks and balances.[13] This, though, is a separate issue.

There appears to be, then a *pro tanto* case for interference in the political rights of some citizens, at least insofar as they prevent other citizens from using their own political rights for the purposes they are intended to. This, though, does not really help us in many real-world cases where there are various other factors to consider. There are sensible reasons that militate against state interference in deliberation, and many argue that these trump the concerns I have raised here. I have therefore only made a *pro tanto* case for state interference in such cases. There are opposing practical concerns that will come into play in deciding when someone's political rights have been *de facto* undermined by another. There are also questions of the efficacy of sanctions in realising their intended results; often attempts by the state to remove certain groups from some public discourses only serve to embolden them. I explore all of these themes in later chapters. For now, I have shown that there is a harm to the undermining of political rights, and that this harm is that it creates an epistemic injustice in political deliberation. I have shown that the state has a mandate to act to mitigate such injustices, and that those causing the injustices cannot coherently appeal to the same political rights that they are undermining to escape sanction.

7. Conclusion.

In this chapter I have argued that in order to facilitate deliberation that is capable of producing justified laws, citizens must have access to a range of political rights and entitlements. These ought to be protected at a sub-constitutional level that is flexible in order that rules and entitlements can reflect changing circumstances. They must also be

able to use these effectively. When they are prevented from doing so, they are undermined *qua* deliberators and suffer an epistemic injustice within the political sphere. The state has a *pro tanto* reason to act to prevent such injustices, as failing to do so undermines the possibility of legitimate policy-making.[14] Those who are being sanctioned in such cases cannot appeal to these political rights as a 'trumping' reason, at least not citing their own status as deliberators, because they are acting contrary to the purposes of the constitutional settlement in which these rules and entitlements are stipulated.[15] In the next chapter I build on this, arguing that in specific cases, this *pro tanto* case for interference should be weighed against the *pro tanto* harm to inclusive, equitable deliberation that occurs whenever the state becomes involved. I suggest that this is a question for nonideal theory, and that the two sets of conflicting reasons are to some extent irreducible to each other. The best we can do is argue in terms of such reasons on a case-by-case basis, rather than seeking to resolve the tension either way.

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[1] See chapter 2, Section 3.

[2] This mirrors Rawls' argument that a theory of justice must be tested for compatability with existing reasonable doctrines, something he calls *pro tanto* justification (2005:386).

[3] There is a difference in how Gutmann and Thompson use the idea of reciprocity compared to public reason liberals. For them reciprocity is not some first order virtue, but something that "governs an ongoing process" of deliberation.

[4] Whilst the ambitions of their scheme is different, I suggest that political liberals ought to advocate practical institutional arrangements that in many ways mirror those proposed by Gutmann and Thompson. I deal more fully with the differences between mine and Gutmann and Thompson's approach in Chapter 6.

[5] As a basic example, how the media supports deliberation will be different in countries where there is a strong public broadcaster. The BBC, for example, holds a particular status in the British media landscape that is unique compared to other similar organisations, and has a disproportionate role in public deliberation that impacts on other branches of the media.

[6] As noted previously I assume that a more pluralistic deliberation will produce a tendency to more just outcomes.

[7] In Chapter 8 I argue that this is justified.

[8] This is not a problem unique to deliberative democracy but it is particularly acute.

[9] Parkinson describes this as "decentred, multi-noded, flat-structured networks typical of some new social

movements, an organisational type which exhibits many features of the ideal communicative situation", in his account (2003: 185).

[10] This type of theorising provides a *prima facie* rebuttal of Gaus' glib charge that deliberative democrats are all advocates of a sprawling centralised state.

[11] This is because compliance with deliberative institutions in France is dependent on an acceptance of a particular kind of secularism. This is not to say that I support all policies that have been implemented in the name of this form of secularism.

[12] These strong reasons are: that state interference undermines the deliberative process; and the general presumption liberals make against state interference in individual affairs.

[13] Unfortunately this situation appears more likely than it did when I first drafted this chapter – see Conclusion and Epilogue.

[14] Or in the case of partially legitimate (i.e. real) states, causes a greater deviation from an ideal of legitimate policy-making, rendering the state less legitimate.

[15] Again, this does not rule out that there might be independent justifications for specific rights.

Chapter 4: Ideal Theory, Nonideal Theory and Moral Blind Alleys.

In the previous chapter I argued that there is a *pro tanto* case for interference in political rights when citizens use them to undermine the deliberative status of others. Whilst I acknowledge that in such cases there are *pro tanto* reasons for the state to act, because if it does not do so the possibility of legitimate law-making is undermined, I resisted claiming that there are a set of instances where the state is always required to intervene. The case for interference in political rights that I defended ought to be weighted against other *pro tanto* reasons against state interference. In this chapter I argue that the best way of approaching real-world decisions about whether to limit political rights is to use political theory to gain a better understanding of the issues on either side of the debate, and to come to conclusions about the rightness of state interference to limit political rights on a case by case basis. There is not a formulation analogous to the 'harm principle' of the form 'The state must limit the political rights of citizens who perform action A in Context C'. Instead, there will be powerful reasons for and against the state limiting the political rights of citizens who engage in anti-democratic behaviour that are to some degree insoluble and irreducible to each other. We are confronted with genuine dilemmas where both action and inaction by the state to limit political rights will result in an unfair cost being inflicted on some citizens.

The theoretical framework that I adopt requires a division of labour between ideal theory, defined as 'full compliance' theory, and nonideal theory. Under ideal conditions, citizens would not engage in the types of behaviour that would undermine the deliberative status of others, so there would be no need for the state to interfere in citizens' political rights. Not only that, but due to the problems of state interfering in a notionally inclusive justificatory process, it would be wrong to do so. Under nonideal conditions many citizens do not comply with deliberative norms, and where they undermine the deliberative status of others there might be a case for the state to limit their political rights. However, the harms of state interference are not fully diminished. This means that even justified state interference in political rights, properly understood, is a harmful intervention to secure the best possible (or least bad) outcome amongst

many suboptimal outcomes that are available. I characterise these situations as moral 'blind alleys', drawing on this concept as it is used by Nagel and Schapiro, where any course of action or inaction taken by a moral agent leaves some citizens suffering an injustice. The central portion of this chapter outlines the *pro tanto* reasons that militate on either side of typical dilemmas around political rights that fall into this category. Due to the indeterminate nature of resolutions to such moral blind alleys, I suggest that we think of particular instances of anti-democratic behaviour on a case-by-case basis, and use limited sanctions to penalise and mitigate for such behaviour.[1]

Adopting this framework relies on two concurrent methodological claims. The first is that there is any point in using ideal theory at all. An alternative stance approaches the actual problems that arise concerning political rights without drawing upon an ideal theory of deliberation to guide our actions. I deal with the specific question of why we ought be guided by an ideal of what deliberation would look like, and not try to construct political institutions to accommodate actual political behaviour, in Chapter 6. In the first section of this chapter I defend in a more general sense the use of ideal theory, defined in the orthodox Rawlsian sense. The second methodological claim that I make is that there is no conclusive way of resolving the moral blind alleys I describe. In the second half of this chapter I consider an approach that I characterise as the 'Price We Pay' approach, which argues that in trade-offs between the harm of state interference and non-interference in the political rights of citizens, interference by the state will always be the most harmful. According to this view the effect of state limitations on political rights undermines in a fundamental way the possibility of approximately legitimate policy-making in a way that means that it always ought to be avoided. This approach is misguided, and does not fully grasp the role of both the state and individual behaviour in maintaining partially legitimate states where deliberation bears some resemblance to an ideal. Whilst the argument holds under ideal conditions, it understates the limitations that widespread noncompliance places on the kind of deliberation we might achieve. In Chapter 5 I reject the view that we ought to just exclude some very unreasonable citizens from all political discourse, thus eliminating the need for more careful consideration of the moral blind alley in such cases.

2. Defining Ideal Theory.

Rawlsian ideal theory assumes two conditions: compliance amongst citizens with the prescribed norm, and favourable background conditions (*ToJ* 7-8), where these conditions include the absence of naturally arising obstacles to justice and facts about society that make the realisation of justice implausible (Simmons 2010: 15). An ideal theory seeks to represent the best possible social arrangement, even though human fallibility means that no society can "fully publicly embody justice", and many contemporary societies suffer from widespread non-compliance and, as a result, injustice (Christiano 2004: 274). Compliance here has a relatively demanding definition, namely that citizens accept and internalise certain norms, rather than just acquiescing to state demands.

In taking this position on the use of ideal theory, abstractions are relevant only insofar as they can be seen to embody some prior moral commitment, namely an attempt to realise justice through establishing fair terms of social cooperation. This contrasts with alternative views of ideal theory that define it based on its use of idealisations or abstractions. For example Stemplowska defines ideal theory as any that does not produce "achievable, desirable" outcomes (2008: 324). Similarly, Estlund treats it as an abstraction away from everyday politics and decision making (2008: 1-4). In common with my approach, both of these defend ideal theory as being useful for telling us something about how to approach a moral problem, and to understand moral values (Stemplowska 2008: 336-8).

There are two issues with the way Stemplowska sets out ideal theory. The first is that there is no good reason why an ideal theory ought not be both achievable and desirable, especially if one gives an adequately broad definition to such terms. A situation might arise where people were behaving, on matters of basic justice, as I believe they ought to. Using a conventional Rawlsian definition of ideal theory, this would mean an ideal theory was being, for the most part, realised; for Stemplowska, this would cease to be

an ideal theory, which appears counterintuitive. Secondly, it implies an extremely broad definition of ideal theories - thus a Rawlsian scheme would be included, but so would G.A. Cohen's "fact-insensitive" use of ideal theory, despite its (very different) aim to define justice in its purest form, independent of any facts about human nature (Valentini 2009: 265; G.A. Cohen 2008: Chapter 2). Given Stemplowska's definition it is unclear whether one can say anything meaningful about ideal theory in general, as it would include theories with too broad a range of intentions.

Ideal theory ought to be action guiding, but in nonideal circumstances will only be one reason amongst many that we might have for acting. Taking this approach raises the question of how to ensure that ideal theory carries any weight; might there not be other, compelling reasons in most cases? The answer lies in the types of reason provided, and also the types of justification. I define reasons to act on moral issues in the Scanlonian sense that:

> **"**A reason is a consideration that counts in favour of judgment-sensitive attitude, and the content of that attitude must provide some guidance in identifying the kinds of considerations that could count in favor of it. If it does not, then the question of whether something is a reason for it will make no sense, and any answer will be truly arbitrary. Even when … the categories of possible reasons are vague, they at least provide us with some direction in looking for an answer" (1998: 67).

This is broad, in that it attaches no "ontological" status to reasons, but instead defines them solely through the way that they weigh upon us (56). The question with ideal theory then becomes: why might these reasons bear particular weight upon us, and specifically why would reasons that are the product of conjecture about how we ought to behave if everyone complied with certain norms apply when they do not?

The role ideal theory plays in influencing our judgment is a combination of evaluative and action-guiding (Stemplowska and Swift 2012). It can be directly action-guiding, in that ideal theory typically generates specific demands on citizens. Ideal theory also provides an evaluative framework to judge states of affairs that can generate reasons that bear upon us in the way I describe. This evaluative role is itself split between the dual roles of providing some sort of conceptual framework for moral theorising, and

evaluative procedure (Swift 2008: 369). In the same way, ideal theorising about fair terms of social cooperation can come to provide a reason to act - Swift notes that a moral evaluation will inevitably influence an agent's actions (367). His defence of ideal theory, which I agree with, rests on the fact that it can still illuminate moral decisions by helping an individual to contextualise their own position and the obligations brought to bear upon them, even in the context of widespread noncompliance (365; see also Jubb 2012: 241).

2.i. The Role of Ideal Theory and the Issue of Non-compliance.

To illustrate this, imagine a society that is perfectly just. Now imagine that one citizen is a Dissenter, who violates the public reason constraint by advancing a position on political issues that other members of society cannot accept. There are two possible options open the state in responding to this. One is to accommodate these views, and reach some sort of compromise with other citizens. Full compliance with some alternative set of principles (to those of justice) may still be possible, as new principles and structures could be reached that all citizens might choose to internalise and comply with. In this case, though, compliance would not be the product of a shared account of justice, and the possibility of justice as fairness is, in the production of such a settlement, removed. To place this in the terms Cohen used to critique Rawls' ideal account of justice, citizens would now be endorsing the settlement in part due to "expediency" rather than belief that their actions furthered the cause of justice. (G.A. Cohen 2008).

The second option is that the Dissenter is deemed unreasonable. This denies the possibility of full compliance, and therefore even if other citizens continue to behave justly, and manage to somehow exclude or isolate such citizens, the possibility of Rawls' state of justice is negated because this is justified in part through acceptability to all citizens (2005b: 387). The actions of this citizen will cause others who are associated with the Dissenter to adjust their own behaviour - it is implausible and unfair to burden ourselves by behaving as if others are complying when they are not. In this case then,

even those committed to justice become Unwilling Dissenters. In nonideal circumstances the best approach using ideal theory in our own moral reasoning can best be understood by considering how an Unwilling Dissenter ought to behave. These are citizens who behave unjustly only insofar as the actions of others dictate it.

Ideal theorists therefore require a more systematic understanding of non-compliance with the requirements and underlying norms of justice, as this is the main issue of application citizens will actually face in nonideal circumstances. In this thesis I provide an account of why one particular set of non-compliers might be subject to coercion that others are. In this sense my approach mirrors Korsgaard's suggestion that the main problem facing Kantian moral theory in nonideal conditions is how to confront evil (1996: 135). This is not just a matter of solving practical problems, because nonideal Rawlsian theorising still provides deontological constraints, some of which will conflict with an attempt to bring about justice. The nonideal theorising I hope to do provides a justification for such coercion with certain principles in mind, not as a route map to a just state of affairs.

The action-guiding role that ideal theory plays can be seen in how it informs decisions that involve trade-offs in nonideal circumstances. It is these trade-offs that the likes of Sen and Farrelly have in mind when they argue that political action need not be motivated by an understanding of justice. They argue that it is possible to make comparisons between different states of affairs and to perceive severe injustices without using ideal theory as a reference point (Sen 2006; 2008; Farrelly 2007). In response, Swift considers a situation where one can choose between a policy that lifts some out of absolute poverty or one that vastly improves material equality within a nation (2008: 375). This situation is a choice between a set of outcomes that ultimately remain unjust, and most ideal theories will not have a clear ordering of principles that can readily apply in such situations. What ideal theory can do in this situation is clarify the various countervailing reasons at play. It can help to provide a better understanding of the injustices of the two possible outcomes which can, in turn, inform our judgment.

An understanding of the nature of injustices suffered can provide important information for adjudicating such trade-offs, even when they are to some degree insoluble.[2] An example of this can be seen in debate surrounding the treatment of women and vulnerable individuals within certain religious groups. In liberal multicultural literature there is significant debate around the extent to which certain groups might be granted exemptions under the law, or even continue to be tolerated, whilst subjecting some of their members to unjust behaviour (Spinner-Halev 2005: 157). In some cases an inclusive democratic ideal that seeks to respect the autonomy of citizens on moral and religious issues can conflict with the demands of liberal justice, in a way that is difficult to parse (Okin 2005). These debates typically focus on whether victims of unjust behaviour within groups are entitled to protection by the state, and whether the groups ought to be subject to coercive measures. A failure to understand the reasons we think a person is being treated unjustly in this situation might lead to flawed decisions in all but the most 'cut-and-dried' cases. Defences of such groups argue that even victims of injustice participate willingly in them, and that this participation forms part of their identity (Murphy 1997: 597). Any response will therefore require an account of freedom that is fairly developed, and an answer to the question of whether individuals can freely choose to participate in such practices and how potential injustices relate to universal moral principles. In adjudicating whether to prevent someone from participating in such groups, therefore, a developed account of both the nature of autonomy and the reasons it is important within a theory of justice is necessary.

The claim that an ideal theory of justice bears some weight can also be justified negatively, by imagining attempts to make trade-offs of this kind without trying to contextualise these relative to an ideal. Simmons makes this point when considering one analogy Sen uses to argue against the use of ideal theory. The analogy is whether we need to know that Everest is the tallest mountain in the world to compare two hills. Sen argues not, and suggests that a comparative approach is adequate (2006: 222). Simmons' response is that we do require some sort of conceptual basis and prior knowledge in order make such a comparison - whether height is measured from sea level or lowest point of the valley might be an example (2010: 35). He also rejects the

notion that meaningful comparisons in politics can be made in a pairwise fashion, suggesting that ideal theory helps us to understand judgments about how to improve society as a whole (22). There remains a problem with a purely comparative approach about how to judge comparatively without some sort of ideal or principle from which to derive a metric (23). Sen's position mischaracterises the function of ideal theory as being to provide all-or-nothing accounts of political decisions. In fact, to import a political system that would work in ideal theory would be dangerous in situations of noncompliance (Swift 2008: 366). The usefulness of ideal theory lies instead in providing the kind of conceptual basis for moral decisions that theorising of the kind Sen advocates relies upon.

It is important to note that even Rawls does not commit to a definitive theory of justice - the proposed outputs of an ideal theory of justice may be subject to change. It is only the assumed conditions of full compliance that are not subject to change - so ideal theories assume compliance with whatever the requirements of justice are, not with any one conception of justice (Thomas 2014: 250). This is because Rawls' account of justification depends in part on compatibility with the different reasonable beliefs of citizens.[3] The only assumption that can therefore be made about what an ideal society will be like prior to some knowledge about these, and the background conditions of a society, is that citizens will comply with the requirements of justice once these have been established, and if they are overseen by a legitimate state.

2.ii. Non-compliance as an Acute Problem in Deliberative Democracy.

There are some unique challenges around systematic non-compliance for deliberative democracy. There is near universal partial compliance with the norms around deliberation, but almost no one complies with them all the time. Even the most ardent political liberal will look to manipulate or browbeat others at some point if they are serious about getting things done in actual politics. However, almost all citizens have some basic sense of fair play, some respect for others and some respect for democratic institutions. Applying an ideal of deliberation to real-world problems will have to factor

in this kind of persistent partial compliance.

A further, deeper challenge presented by deliberative democracy is that it relies on citizens fulfilling obligations as deliberators, and many of these are unenforceable. We are entitled as deliberators to a fair hearing; this means that others are required to hear us out, and to take seriously what we have to say. This is essentially unenforceable, as the state cannot force people to take an idea seriously, and to force someone to feign taking an idea seriously would be deeply illiberal and counter-productive.[4] The possibility of legitimate policy making therefore involves people behaving in a certain way, and not just acquiescing to the coercive mechanisms of the state. It is worth noting that in the cases that I have defined where state interference in political rights may be permissible, it is not in order to make some citizen take another seriously or change their beliefs. The worry is that their actions will contribute to underlying norms being established that cause their target not to be taken seriously by others, in a systematic fashion. Status in deliberation is a necessary but not sufficient condition for being taken seriously, and, perhaps troublingly, the system is only as strong as the adherence to the norms underlying deliberation by each and every individual.[5] These norms form the culture and conventions of political institutions. This poses a challenge to the disaggregation of full compliance from "favourable background conditions" in a Rawlsian account of ideal theory, that I address below.

2.iii. A Note on Favourable Background Conditions.

In introducing full compliance Rawls aims for the best theoretically possible outcomes, so assumes "reasonably favourable" background conditions (*JFR*: 13), and attempts to formulate a conception of justice based on these. Rawls notes that his theory only applies to "modern constitutional democracies" (*CP*: 389). These have "constitutional governments", "large market economies" and are societies in which norms of toleration generally prevail (*CP*: 390). These conditions are "administrative, economics, technological, and the like" (*CP*: 425 *fn* 7). From this we might infer that the institutions within such a society must be capable of performing certain tasks, most notably the

enforcement of basic rights and laws associated with the principles of justice (Simmons 2010: 13-14). The claims Rawls makes about background conditions are "but (empirical) assumptions or conclusions that can be re-examined and revised. The only definitive feature is the rootedness in the here and now", (Raz 1990: 6). Raz notes that Rawls extrapolates from these assumptions in constructing ideal theory, but crucially not in a way that limits the theory prescriptively (6-7). Rawls limits the assumptions he makes about background conditions to those "known by common sense" (*CP*: 425 *fn* 7).

Implicit within this is a tacit normative commitment to the institutions that form such conditions, which Rawls does, after all, describe as favourable. At the very least, a Rawlsian position must acknowledge that there is no need to overturn or remove these institutions completely. If existing democratic institutions were so deeply flawed as to be irredeemable then there would no pressing objection to their being undermined; if they were that unjust citizens might even be normatively required to set about reforming or even dismantling them. This is a modest claim, but it is important that the separation is made with more radical and anarchistic positions. The reliance on existing institutional arrangements in Rawls' work has even been criticised by some liberals. Ackerman argues that Rawlsian liberalism is "parasitic" on existing institutions, and too dependent on liberals possessing authority (1994: 376-7). He sees liberalism as, historically, a radical doctrine that can provide a critique of existing practice, and that this should once again be the focus of liberal theory (368). The divide between Rawls' position and others who charge him with an inherent conservatism, and bias towards the *status quo* even where it supports injustices, is that he separates a democratic culture from the empirical assumptions he makes about the capacity of institutions to perform certain tasks (*CP*: 425 *fn* 7). It is not inconsistent from a Rawlsian perspective to argue both that certain institutions perpetuate significant injustices, and that the existence of these institutions and the kind of role they occupy within society form a part of the favourable background conditions required to realise an ideal theory of justice.

Critics such as Ackerman are therefore guilty of an uncharitable reading of Rawls when they conflate empirical claims about the kind of institutions that can be drawn upon and

an endorsement of existing practice and culture within such institutions. Rawls acknowledges this "omission" of a specific discussion of structural injustices in passing when he reflects on *A Theory of Justice* noting that "[t]he serious problems arising from existing discrimination and distinctions based on gender and race are not on its agenda, which is to present certain principles of justice and then to check them against only a few of the classical problems of political justice as these would be settled in ideal theory" (*JFR*: 66).[6] He is correct that it is not a "fault" of his theory to ignore certain underlying structural injustices, and I have argued above that ideal theory constructed in this way can be useful in addressing such injustices.

Whilst the limited scope of Rawls' discussion here does not, then amount to a tacit endorsement of existing injustices, the omission limits the usefulness of his account of deliberative democracy. When appraising actual democratic institutions, empirical claims about the efficacy of institutions in performing certain roles cannot be made absent an account of individual behaviour within such institutions - behaviour that will involve the compliance or non-compliance with deliberative norms. The omission is problematic in terms of core political institutions, because in practice deliberative democracy is not best thought of in a way that separates the capacity of institutions from the compliance of participants in such institutions with deliberative norms. Institutions that facilitate public justification have an institutional character and culture that in part defines their role, and this cannot be separated from discussion of compliance. The capacities of a parliament, and the precise nature of a separation or powers, for example, depend in part on the conduct of politicians operating within that parliament, or judges who preside over constitutional cases. For this reason, the issue of background norms, such as those that encourage discrimination on grounds of race, gender or religion, cannot be completely disaggregated in practice from the question of institutional capacity in the neat way that Rawls states.

This is a particular problem of deliberative democracy. Rawls' separation does make sense for ideal theorising in general wherein the task is determining an account of political justice that is the best *possible* given existing institutional arrangements, not

the most likely. An account of background conditions will always need to be mindful of making substantial concessions within an ideal theory solely in the name of plausibility.[7] A good example of this is Rawls' idea that there ought to be different branches of government institutions concerned with different aspects of economic management, such as an "allocation branch" charged with ensuring efficient use of resources within a market system and a "transfer branch" that presides over redistribution to ensure all possess the "social minimum" (*ToJ*: 243-5). Existing practice and institutional culture precludes this, but it is not a far-fetched empirical claim that such an institution might exist in developed nations that might be able to discharge these duties. There are examples where the separation is less clear but still useful. For example, consider the attempts of Front National in France to strengthen the executive branches of government, and to gain influence over the police and judiciary in order to pursue a political agenda. These are mostly attempts to shape discourse, and underlying culture, but also to undermine administrative institutions to a point, in seeking to empower police to treat immigrants in a harsher fashion without redress. Nonetheless, thinking of this problem as one primarily of non-compliance and unjust behaviour (by Front National and some police officers), rather than one about the capacity of the police to enforce laws, is a viable and useful way of approaching it.

Public justification is different because it depends on a network of institutions operating in tandem (and sometimes in tension), and appraisal of real political institutions will need to make reference to both the compliance of actors within these institutions and their capacity to perform roles that are important to public justification. This appraisal will need to be wary of the fact that the capacity of institutions to perform these roles depends on the compliance of societal actors with certain norms. The close interrelation between compliance and institutional capacity is uniquely acute for deliberative institutions. Rawls' separation between the two requirements of ideal theory works in general, and cannot fairly be interpreted as a blindness to certain injustices. However, his use of this distinction and lack of discussion about the nature of institutions - recall that he tends to treat claims about the capacity of institutions as 'common sense' - is problematic when we seek to apply his ideal theory of public justification to real world

questions around political rights. The threat posed by some political behaviour is a complex mixture of threat to institutional capability and attempts to shape citizens' behaviour.

3. The Dilemma Around Restricting Political Rights.

In the previous chapter I described an ideal of deliberation that is heavily dependent on conduct by citizens. Citizens rarely keep these standards, but despite widespread noncompliance it is possible to construct real democratic institutions that approximate to this ideal of deliberation. These institutions that combine with the set of political rights and entitlements that I described in Chapter 3 to create a situation of roughly equal competition between different groups at different levels of politics, and ensure the equal status of citizens. Whilst there is widespread partial compliance with deliberative norms states can still attain partial legitimacy. This raises the practical question of actual state authority in practice, because even a partially legitimate state imposes laws that some citizens can rightly argue are not adequately justified to them. The state cannot, according to political liberalism, simply impose the norms of deliberative democracy coercively. This is because there are unique costs to state interference. To actually impose deliberative norms would require significant overreach by the state. However, there are some cases where interference may be permissible. In Chapter 3, I suggested that there are certain behaviours that undermine citizens' status as deliberators or democratic institutions more broadly that renders the problem of non-compliance with deliberative norms more acute, and seriously diminish the partial authority of actual states. In such cases the state has a *pro tanto* reason to interfere with citizens' political rights to preserve its authority; the curbing of political rights in such cases is not automatically illegitimate, and failure to limit political rights is to permit a significant injustice.

Even when the state seeks to limit political rights in the cases I describe there are still costs attached to this action. State interference that ultimately seeks to shape behaviour in a way that conflicts with citizens' deeply held beliefs still involves restrictions on

liberties that ought to be universal. I examine the costs of restrictions of this kind, in conjunction with a discussion of the rights of 'unreasonable' citizens more generally in the next chapter.

A further problem of state interference to restrict political rights in the cases that I have described is that state interference undermines deliberation and the process of justifying laws. Because of the way that I have set out the liberal account of legitimacy, there is an ideal of inclusion and equality in discourse, and state interference naturally undermines this. As Rawls puts it, any restriction on free speech "implies at least a partial suspension of democracy" (*PL* 354). This sentiment ought to be extended to political rights in general, as any such suspension limits the effective political voice of citizens. Even those who disrespect others are entitled to participate in the political process and to articulate reasonable positions and objections to policies. There is also damage to the epistemic or truth-tracking properties of democracy if we exclude citizens from parts of political deliberation.[8] There is not a coherent ideal theory of legitimacy based on public justification where restrictions on freedom of speech are permitted. This is before we even consider the real concerns about overreach by the state under nonideal conditions should it be permitted to limit the political rights of some citizens.

There appear, then, to be two sets of competing reasons in any situations where citizens engage in the kinds of behaviours I describe. On the one hand, there are strong reasons to restrict political rights in some cases, in order to ensure others can participate. Not to interfere takes us further from the possibility of legitimate policy-making. On the other hand there remain good reasons not to want the state to interfere in political discourse, as to do so also partially undermines the process of legitimising laws. Crucially, the reasons we have for not wanting the state to limit the political rights of those engaged in anti-democratic behaviour ultimately draw upon the same set of reasons we have for limiting them, namely concern for the maintenance of a fair, equal political voice for all and the impact that unfairness in deliberation has on the process of producing legitimate laws. This problem would not occur under ideal conditions, as citizens would not behave in a way that necessitated state curtailment of political rights. However, under

nonideal conditions the state (or citizens acting *qua* citizens) are faced with a choice when confronted with the specific anti-democratic behaviour that I describe of whether to act in an unjust and illegitimate manner to prevent a different injustice.

Understanding the choice in this way suggests three possible courses of action. Firstly, we might argue that although the reasons on both sides of this debate are grounded in the same principle of respect and concern with a process of justification, that one side will always trump the other in practice. I do not accept this, and challenge this position on both sides later. The final section of this chapter challenges what I call the 'Price We Pay' argument, that state limits on political rights are never justified due to their distorting effects on deliberation. In the following chapter I refute the argument that in cases where there are abusers of political rights of the kind I described in Chapter 3, there is an all things considered, rather than a *pro tanto* reason to limit political rights, and that the state should always impose restrictions.

A second course of action might be to establish some metric concerned with deliberation that means that we can pseudo-quantitively measure the effect of state interference and non-interference in such cases. From this perspective, we can use ideal theory to come up with a metric that at least definitively tells us which way we should act in specific cases, even if it does not provide an account of how to act to in these cases in general. This may work in some areas of policy, but the way that deliberation under political liberalism relies on many institutions working in conjunction, and on the adherence to non-consequentialist norms by participants means it is a non-starter. I discuss this below, and briefly illustrate this with reference to the 'Theory of Second Best' in economics.

The rejection of these two positions leaves a final, less satisfactory - but I feel correct - option. This is that there is a genuine conflict in a set of cases around the provision and limiting of political rights, where both sides present strong *pro tanto* arguments in favours of the course of (in-)action they advocate, and where there is no simple resolution that can see one side subsumed into the other. There is no way that one side,

in such cases can be shown to have conclusively justified their position to another.[9] Instead there are strong reasons on either side that ought to bear upon our decision-making process. This does not mean, though, that there are not better or worse justifications for either course of action. For these reasons, we ought not simply accept that such situations are completely irresolvable. Ideal theory has an important role here in determining which are the relevant reasons on either side, and better helping us to understand the effects of different courses of action. In particular, given that both sides must be defended in terms of causing the least harm to the process of public justification, ideal theory can better provide an account of what these harms are. This is in keeping with the role for ideal theory that I described in section 2 of this chapter. Nonetheless, we must be aware that we are applying ideal theory in nonideal conditions, where any course of action has indirect or direct moral costs, and where there may be other prudential concerns bearing upon us. We are therefore faced with indeterminate choices between the 'lesser of two evils'. Below I expand upon what is at stake when we make this choice *vis-a-vis* political rights, and show that states and citizens find themselves in a particular kind of moral 'blind alley'.

3.2. Moral Blind Alleys.

An important feature of this position is that it acknowledges that under conditions of widespread noncompliance we are often left with decisions where any course of action we take introduces harmful actions. The language we use ought to reflect this, which is one reason why I refer to such situations as moral 'blind alleys'.

This concept is introduced by Nagel to describe situations in nonideal conditions when one is being drawn in two incompatible directions whilst making a moral decision as a result of two different, valid moral reasons - one deontological and one consequentialist - that are insoluble. In such cases, any course of action will lead to regret of some kind (1979: 74). This appears inevitable, as any actual decision in nonideal circumstances will need to consider the consequences of an action in light of the noncompliance of others. This is not a situation that would occur under Rawlsian ideal conditions because

citizens would only engage in reasonable behaviour justifiable to all others. The concept of blind alleys is further refined by Schapiro, who suggests that there might be times when two deontological principles conflict in a similar fashion (2003: 332-4). Again, whilst we would not face such dilemmas under ideal conditions, because under ideal conditions people act in a way that is consistent with a basic respect for others, it is easy to see how such dilemmas might arise in practice. There might well be times when a person is left in a position where any course of action will end up violating the basic liberties of someone, a salient example being any response to a political group that seeks to use its basic liberties to somehow undermine the basic liberties of others.

Schapiro sets up an example to illustrate this from the film L.A. Confidential. In a climactic scene a police officer, Edmund Exley, confronts his corrupt superior Dudley Smith.[10] Knowing the damage Smith's corrupt activities are causing to the force, he is faced with a decision as to whether to shoot him or let him live, knowing that if he chooses the latter Smith will escape prosecution and continue to go about his underhand business. Schapiro frames the dilemma as being a choice between two different principles inherent in being a good police officer - respecting the right to life of a defenceless man, and eradicating the threat that Smith presents to the overall culture and integrity of policing through his survival (347-351). An important classificatory point here is that this does not preclude consequentialist thinking of a sort - one horn of the dilemma here depends in part on the reasonable belief the Smith will, if left alive, continue to undermine what it is to be a good cop. As Nagel points out in his original account of blind alleys, deontological (or absolutist) constraints, as he terms them, only limit consequentialist judgements and behaviours that are the product of them, without replacing them (1979: 58). Because of the way that democratic procedures and substantive outcomes are connected in a complex way in most accounts of public justification, a sharp separation between deontological and consequentialist requirements is not a sensible way of thinking about these dilemmas. In the case of deliberation, we can think of blind alleys as situations where we must inevitably violate a norm associated with deliberation or act in a way that damages the process. Because (as stated above), deliberative institutions depend on underlying cultures, Schapiro's

example of harming the culture of the police force in the L.A. Confidential case is analogous to questions around political rights, because the process of public justification relies on background norms and cultures as I described in Section 2.

3.3. Summarising the Choice We Face.

At this point I have established strong *pro tanto* reasons both in favour of and against state interference. States have *pro tanto* reasons to limit the political rights of citizens where they invoke political rights to j*ustify non-interference by the state, or the continued support of the state, in activity that undermines the possibility of legitimate policy-making*. This applies to states and citizens acting *qua* citizens; that is to say that citizens may be mandated to interfere in the political rights as others.[11] In addition to a basic version of the harm principle, such instances are the only cases where the state might withdraw political rights. In this way interference may be justified when one of the following conditions are met:

- **C1** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state (in cases where the right is 'positive', such as entitlement to funding), in activity that causes severe harm or injustice to another.

- **C2** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state, in activity that undermines the possibility of legitimate policy-making.

When these conditions are met there is also a *pro tanto* reason to interfere in political rights because to not do so is to permit behaviours that mean that laws cannot be legitimised. This means that some citizens will be subject to laws that are not justified to them, which in turn erodes the authority of the state.

However, it is not sufficient to justify the withdrawal of politics rights in all cases. This is because there are also reasons to avoid state interference that are also grounded in the necessity of liberal states to publicly justify laws, and that underpin a process of legitimisation through public deliberation. There are therefore strong moral reasons

against citizens or the state interfering in the political rights of others. I have also argued that these two sets of competing reasons are not reducible to each other. This means that there dilemma cannot be resolved according to a simple principle of the kind: 'The state ought interfere in the political rights of citizens in cases of type P, where conditions C are met'.

In the rest of this chapter I consider two reasons why it might not be the case that we ought to favour non-interference in all cases: firstly an argument based on greater scepticism about the efficacy of measures to preserve deliberation through the limiting of political rights, and secondly because interference by the state imposes a disproportionate cost on deliberation.

4. The Choice, and the Theory of Second Best.

In the previous section I defined the cases where the state, or citizens acting *qua* citizen, has a *pro tanto* reason to interfere in political rights. This is when people act in a way that undermines the possibility of legitimate policy-making. It is important to note that although the defence of interference in political rights is grounded in the disrespect we show to others in acting in a way to undermine their political voice, citizens can do this indirectly by undermining the institutions that are required if citizens are to utilise their voice effectively in a political context. Thus, we can inflict an epistemic injustice during deliberation, of the kind I introduced in Chapter 3 if we prevent the effective functioning of some institution. In practice it is hard to separate assaults on democratic institutions from attempts to undermine the status of others, as I discussed in Section 2 when I challenged the distinction between 'favourable background conditions' and 'full compliance' in Rawlsian ideal theory. We can see this in the example of efforts by far-right parties to give greater autonomy to institutions such as police and immigration forces, as well as to the executive more generally. Such initiatives simultaneously undermine the process of deliberation, and seek to empower agencies to target some social groups - normally recent immigrants - in a way that either threatens harm or inflicts an epistemic injustice on them. Recall also, that deliberative institutions function

differently in different political and cultural contexts, so threats in different situations may be more or less severe as a result of other complex social factors. In the case of Front National and the police, the gravity of the threat depended in part on the fact that French police were perceived in some cases to act according to racist or illiberal norms.[12] We ought to be aware when discussing public justification that a deep and ongoing relationship between public behaviour and institutions is necessary to facilitate deliberation in practice, and of the relative fragility of these institutions in a given context.

This is important in answering one objection to the use of ideal theory to determine the relative legitimacy of regimes and ought to act as a source of important reasons when determining the authority of the state to enforce a given law. This objection is roughly that the pursuit of an ideal standard of deliberation will ultimately be counter-productive, or at least might risk undermining institutions in a way that ultimately makes things worse-off. This is articulated most clearly by Gaus who argues that those who deploy ideal theory as a source of reasons are faced at some point with 'The Choice'. This is the choice between pursuing an ideal when there is some risk that we might not be successful and in doing so risk sacrificing the benefits we currently possess. He frames it as:

> "*The Choice*: In cases where there is a clear optimum within our neighbourhood that requires movement away from our understanding of the ideal, we often must choose between relatively certain (perhaps large) local improvements in justice and pursuit of a considerably less certain ideal, which would yield optimal justice" (2016: 82).

Gaus then states that "cannot have it both ways", in that if we are to pursue an ideal, we must forego the opportunity for incremental improvements along the way (83). This is presented as part of a general scheme that suggests that we ought to allow for a more open deliberation about justice. For Gaus, this presents that best chance of reaching the local maximum, but that pursuit of the ideal is problematic because of both our ignorance of what it might be, and also the steps needed to teach it (2016).[13]

The Choice is worth discussing with reference to democratic deliberation in particular, especially how I present it. Whilst I would contest the idea of a local maximum applied

to a theory of justice in general, and the way that Gaus conceives of the best course of action to pursue this, it is plausible to think of existing deliberative institutions as a 'local maximum' of sorts. It might plausibly be that the institutions that we have established over time have come to realise the best approximations to an ideal of deliberation that is possible given existing attitudes, institutional capabilities and so on. Even if we do not accept that it is the best possible arrangement at the moment, modern liberal democracies are certainly better placed than many of the 'local' alternatives, where local refers to options immediately available to us. There certainly seems to be a risk that reform meant to create a more liberal system might ultimately undermine one of the more valuable components of existing systems. In the case of democratic institutions it might be that persevering with a partially legitimate regime is better than risking it in pursuit of a 'purer' set of democratic institutions. For example, it seems unlikely that many liberals would accept an ideal with a monarch as the head of state, but there might well be a case to persevere with the British constitution, such as it is, as efforts to reform might lead to an undermining of the institutions that facilitate some kinds of public deliberation. It might also be that we have reasons to persist with partially legitimate institutions because they perform another valuable function that we have reason to preserve.[14] When confronted with The Choice we ought, by this reckoning, to ensure the protection of political rights and opt against interference, because once the state starts interfering with the political rights of others there is a risk that things could get far worse. This is plausible, as interference by the state can rapidly erode trust in institutions, even if one believes it is warranted.

The problem with characterising dilemmas around political rights in this way is in part the same as the problem of how to make these decisions absent any ideal at all; if we make pairwise comparisons   between courses of action without reference to an ideal some information is lacking.[15] There is a more particular problem with applying it in the case of deliberation in that it misstates how deliberative institutions function. Because deliberative institutions depend not just for their legitimacy, but also for their stability, on facilitating deliberation amongst equals, then there is not really an option to preserve part of the process simply by protecting certain rights. To protect particular political

rights as citizens challenge and undermine deliberative institutions and processes is not to secure a 'local maximum', but to preside over a worsening of affairs. Ensuring that the state does not get involved in curtailing the political rights of any actor whilst allowing citizens to freely undermine the political voice of others is to permit the complete dissolution of deliberation.[16]

The mistake here is to see preserving some political rights, by ensuring the state does not get involved in limiting them, as sufficient to the realisation of a state of partial or full legitimacy. It is not. Partial legitimacy - or a best available option, or a 'local maximum' - is attained when citizens are subject to laws that have been established through a process that best approximates to public justification given existing conditions. It is a flawed way of thinking to see legitimacy as a scalar variable, and political rights as constitutive of this. So a state where the state does not get involved in sanctioning political rights cannot be said to be, say 60% legitimate by dint of this fact. Instead, we ought to use ideal theory to evaluate the complex arrangement of institutions involved in the making of laws. In doing so we ought to pay particular attention to whether citizens can participate effectively as deliberators, in the way that a theory of public justification requires that they be able to.

There is a second, mistaken belief that appears to be at play in this argument. This is the idea that citizens or the state ought necessarily always behave as it would in ideal conditions, as far as possible, even when conditions have changed. To illustrate why this is not the case, we can think of the Theory of Second Best (ToSB), an idea in economics that has recently been brought up in connection with the use of ideal theory.[17] ToSB states that if a pareto optimal outcome is achieved through a range of variables being held in equilibrium, then if a constraint is introduced that interferes with one or more of the variables, the best possible outcome may not be achieved through keeping all other (controllable) variables the same (Lipsey and Lancaster 1956). In such situations, there is no *a priori* way of judging between possible attainable states with reference to the initial equilibrium (12). In fact, the best possible outcome might be achieved by changing some variables in a way that deviates further from the 'correct' levels in the

ideal, non-constrained environment (31). Applied to political theory, it means that behaving as we would under ideal conditions may, given widespread constraints placed on political institutions due to systematic noncompliance, make things worse.

In the case of political voice, ToSB is at least a useful analogy. This is because the actual realisation of equal political voice depends on a range of factors functioning in some sort of balance; citizens need to have the set of political rights I described in Chapter 3, and there needs to be an institutional arrangement in place to facilitate deliberation. The analogy is useful in this case, because it is fair to characterise an arrangement that satisfies the demands of public justification as an equilibrium. We can therefore see how actors might destabilise this through their actions. Given that widespread noncompliance exists, we are left to aspire to second best outcomes, as I acknowledged in the account of actual political decisions taking place in moral 'blind alleys'. For example, it is true that an optimum outcome where all have an equal political voice means that the state provides positive support to all political parties that meet certain criteria. In practice to provide this sort of support to all parties, even those that seek to disrupt deliberative institutions further, is to allow a deviation from the best possible outcome because it will enable citizens to suppress the views of others.

ToSB might appear to represent something similar to The Choice. It implies that we might have to sacrifice a readily-attainable second best outcome if we are to pursue an ideal. However, it shows that the Choice is not best resolved by eschewing any notion of the ideal and seeking to resolve things through a particular kind of procedure. In the case of political voice, it does not imply that we ought to be biased towards the preservation of certain (mostly negative) political rights, whilst not assessing the value of a procedure relative to the ultimate goal of deliberation as equals. In economics the unchanging goal in ideal and nonideal conditions is often maximising utility and/or welfare - in the case of public justification it is facilitating deliberation amongst equals. What ToSB demonstrates, then, is that the best approximation to a process of public justification is not reached by acting like everyone within a deliberative constituency is treating others with respect when they are not. It shows that we ought to use ideal theory

to evaluate existing states of affairs, and inform future actions, not as a source of particular rules. When we are faced with a dilemma about how to engage with some anti democratic behaviour, we ought to think of our response as being concerned with addressing this whilst maintaining as close to an ideal of deliberation as possible. Kirshner lays this out neatly, arguing that:

> "[T]he dilemma raised by those who oppose democracy [including hate speakers] will be more tractable if we treat defensive policies as efforts to augment the democratic character of flawed regimes, instead of as attempts to preserve a moral community or any other idealized *status quo*" (2014: 17).

ToSB shows that individual components of political structures that would, under more favourable conditions, allow for an ideal of deliberation, ought not necessarily be preserved where they are counter-productive.

5. Introducing the Price We Pay Argument.

Even if state interference in politics will not tend to produce the most just regime possible, there are other possible reasons we might still tend towards noninterference in most cases. In particular, there is a school of thought that states that we ought resist state interferences in political rights because the damage this causes to the deliberative process is always greater than that wrought by any citizen. According to such a view, the complex moral blind alley that I have described in this chapter is easily resolvable in favour of noninterference in political rights. I refer to this as the 'Price We Pay' argument, as it implies that state interference in some political rights is so costly, that noninterference must prevail regardless of the costs of this in action.[18] I consider this perspective in greater detail in Chapter 7, when I deal with the question of freedom of expression, as the Price We Pay argument is made most plausibly over this issue.[19] Here I simply present it in its general form, and suggest that it does not take into account the way that various rights and institutions are required in order to realise an ideal of deliberation. The analogy with ToSB therefore provides a forceful objection, as it can be argued that Price We Pay theorists understate the extent to which noncompliance with norms of deliberation determines what is the best achievable process of public justification in a given situation.

ToSB gives us reason to doubt Price We Pay Arguments. Such arguments suggest that the real legitimacy of states in actual conditions depend on the presence of certain rights but not others. ToSB has shown that the presence of these rights in some circumstances may actually cause a deviation from the best approximation to a process of public justification. If we recognise the legitimacy of states as partial, and dependent on how closely it mirrors a process of justification where all have a fair opportunity to participate, then for a state to cause a greater deviation from a process of ideal legitimacy is, in effect, to render itself less legitimate. The error of the Price We Pay argument is to anchor real legitimacy to the presence of certain rights, when in reality the legitimacy of laws can only be achieved through a complex process.[20]

The Price We Pay argument in its more nuanced and plausible forms is based on the correct argument that the threshold for real legitimacy lies below an ideal of legitimacy. Real world legitimacy is depicted as a threshold view; when certain criteria are met or met well enough then real world laws may be legitimately enforced (Heinze 2013). The error is to see the threshold being met when a subset of a full set of rights are secured, not when the entire process of public justification functions reasonably well. ToSB is a useful analogy in this case because it shows the error of disaggregating specific parts of dynamic system of actual political institutions designed to fulfil a particular purposes under certain conditions. As Dworkin notes, an assessment that a state has met a threshold depends on the presence of a range of things being present: he lists democratic institutions, political rights, checks and balances on power and a functioning economy (2011: 322). Rawls also argues that interference in the rights of unreasonable is justified, but only to protect the "institutions of liberty" if they are threatened to a certain degree (*ToJ*: 193).

This only presents the argument in its general from, and there are reasons why the Price We Pay position is more plausible when we think of freedom of expression. I address these in Chapter 7, although my critique remains that it ultimately understates both the complexity of the political arrangements required to facilitate somewhat legitimate policy-making and the extent of non-compliance with democratic norms in practice.

6. Conclusion.

The main aim of this chapter has been to present decisions about whether to restrict the political rights of some citizens as moral 'blind alleys'. These are choices taken where either course of action violations a non-consequentialist norm or obligation. In the case of political rights, the occasions around which there is typically disagreement amongst liberals are of this kind, because both to restrict and not to restrict political rights in the face of certain behaviours is to cause or permit a distortion of the deliberative process. To restrict others' political rights necessarily distorts a process of deliberation that ought to be inclusive, whilst allowing them to undermine the status of others in deliberation also has this effect. Under nonideal conditions, where there is widespread noncompliance with political norms, many decisions around political rights are of this form. In such circumstances we cannot assume a simple formulation of some principle to resolve the case, but must draw on an ideal theory of deliberation, as well as practical concerns, to justify a decision either way.

Throughout the chapter I have argued that we ought to continue to use ideal theory in such cases, even where it cannot provide determinate guidance. An ideal theory of public justification can still help us evaluate the relative costs and benefits of any course of action in a moral blind alley. The preservation or realisation of a democratic system that better approximates to the requirements of public justification provides a strong moral reason to act in a given situation. Understanding that part of the problem of the blind alleys around political rights is that we have strong, non-decisive *pro tanto* reasons either way is important when trying to determine an appropriate course of action. In this chapter I have challenged the position that we can or ought to eschew ideal theory in such situations. To do so is to disregard these strong moral reasons and some valid concerns. Later in the chapter I introduced the Theory of Second Best. I used the analogy with this economic theory to further strengthen my position that whilst ideal theory is an important factor in our decision-making, it cannot provide determinate outcomes. This argument shows that when we consider how to apply an ideal that relies

on an unattainable balance of different institutions and individuals acting in certain ways, then the best possible outcome may not be achieved by behaving as if this were full compliance as far as possible. In the case of political rights, it implies that the best approximation to an ideal of deliberation is not reached by preserving certain rights - especially negative ones where this is more feasible - come what may.

The next two (short) chapters build on and defend the way that I have characterised dilemmas around political rights as blind alleys and the role I suggest for ideal theory. Chapter 5 considers why we should not restrict the political rights of a subset of unreasonable people whenever they engage in the kinds of behaviour that generates a *pro tanto* case for interference. In suggesting that we ought not systematically exclude certain more illiberal citizens from deliberation, I also argue that under nonideal conditions we ought to focus on specific indiscretions when considering the limiting of political rights, rather than trying to characterise a group of individuals as unreasonable. Chapter 6 then considers a range of theories that present ideal theories of justification that are more modest in the idealisations they make. The appeal of such theories is that if we adopt a more feasible ideal, and do not demand so much from other citizens, then the divide between ideal and nonideal theory is reduced and we might apply ideal theory more directly. If possible this would make it possible to use ideal theory in a more determinate fashion. I argue, though, that it is not.

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[1] I build on this position in later chapters. In Chapter 5, I argue against demarcating a section of the population as unreasonable. In later chapters I suggest that we ought to use 'soft' sanctions such as the removal of political rights, rather than criminal sanctions, where possible, and that even these ought to be limited in scope such that the target can still participate in politics where they are not undermining the status of others. I also suggest that there ought to be different requirements of those in public office and other public roles, and offer a cautious account of the efficacy of sanctions in Chapters 8 and 9.

[2] By "insoluble" I mean that the trade-off cannot be definitively resolved by framing one side of the debate in terms of the others. I deal with this more fully in Section 5 for the case of political deliberation, when I discuss the Theory of Second Best.

[3] See Chapter 2 Section 4 for a full account of this.

[4] This mirrors to an extent Locke's arguments in his first Letter Concerning Toleration that we cannot

force others to authentically subscribe to religious beliefs (Locke 1991). This is sometimes called the 'rationality' argument', and Waldron argues that it is the dominant thread in the first Letter Concerning Toleration. For a summary and criticisms of this interpretation see Bou-Habib (2003) and Tate (2009).

[5] In the conclusion I note that this fragility, in light of recent events, may be a cause for pessimism amongst liberals.

[6] Rawls points out here that the only two aspects of nonideal theory he raises in *A Theory of Justice* are civil disobedience and conscientious objection.

[7] There is a fair worry that advocating a more realistic or likely set of institutional arrangements will ultimately prove too concessive to unjust behaviour (see North 2016).

[8] I develop this argument more fully in Chapter 5.

[9] By conclusive justification here I use the term in a similar fashion to the way Gaus does. Where one side always took priority under certain conditions this is a "simple conclusive justification", whereby all citizens have reason to accept this position. Alternatively, a course of action may be "procedurally conclusively justified" if there is a universally agreed upon process by which we might agree upon how to resolve the dilemma that all could accept. For full definitions see Gaus (2013: 25).

[10] For those with vague memories of the film, Exley is played by Guy Pearce.

[11] In this project I focus more on state interference, but suggest that there are some norms that citizens or groups ought to adhere to in this area. For example, I consider the question of coalition building for political parties in Chapter 8. I assume that interference in political rights by private citizens is harmful to the possibility of legitimate policy-making for much the same reasons as state interference is.

[12] To help conceptualise this, think about institutions that have been branded 'racist', such as the Met Police in the wake of the response to the murder of Stephen Lawrence. In general, when I state that institutions might have an illiberal, racist, sexist or otherwise culture I am not making a claim too different from this everyday, colloquial judgment on the character of institutions. It is not to say that such institutions are peopled entirely by bigots, are anti-democrats, but just that there are norms that are widely observed that are illiberal. There is a separate question of how a partially legitimate regime might respond to the fact that important public institutions are racist or illiberal. The point I am making here is simply that further empowering them whilst removing accountability undermines the legitimacy of that regime, even where such institutions do not cause direct harm.

[13] Much of the debate about the relationship between justice and legitimacy and procedure and substance is covered in Chapter 2. I criticise his use of idealisations in his own account of public reason in Chapter 6.

[14] During the period when I was editing this section, Donald Trump had, during the presidential election campaign, challenged the assumption that the American election would be conducted fairly. Many liberals noted the danger of this challenge to the peaceful transfer of power; few I think, believe that the American

state is either fully just in its actions or fully legitimate. Trump, unfortunately, never had need to retract that remark.

[15] This is the same objection that I raised against Sen's idea that we can eschew ideal theory all together in Section 2, and the idea of a local maximum bears comparison to the example of assessing the heights of mountains.

[16] If one accepts Gaus' account of justification without deliberation there may be a way out of this, but then the question arises about how the state ought protect the rights we do need to participate in politics.

[17] Gaus suggests that ideal theorists have been mistaken, and that the theory if anything supports his position (2016: 14-15).

[18] The term 'Price We Pay is used in passing by both Kirshner (2014: 63) and Waldron (2012: 175) to describe arguments of a kind that state that certain rights must b be preserved otherwise a state's real legitimacy is completely undermined. Waldron's target is Dworkin, and I re-engage with this debate, roughly on his side, in Chapter 7.

[19] In particular, I highlight Dworkin (2009) and Heinze (2016).

[20] Waldron suggests Dworkin, in advocating a version of the Price We Pay argument, needs a "reality check". Because real legitimacy dependent on certain rights being present and unrestricted he appears to condemn as unenforceable a range of laws that it seems clear we ought to support. This is because in practice few democracies have no laws on hate speech, or no limits on support for political groups; it is implausible that a great many of the laws in democracies across the world are in fact illegitimate.

Chapter 5: Political Rights and Unreasonable Citizens.

In the previous chapters I have defended a liberal theory of political legitimacy, and sketched the democratic process required in order for laws to be legitimate according to this view. I have argued that the state must ensure that citizens retain a full set of political rights, in order to enable all citizens to participate in political deliberation. The set of rights I envisage goes beyond 'negative' freedoms such as freedom of expression and association, and includes provision by the state of adequate opportunities for citizens to exercise their political 'voice'.[1] These might legitimately be infringed upon in two sets of cases: when people act to cause an injustice sufficient to undermine the legitimacy of the state; or when they undermine the process of deliberation such that the legitimacy of the laws produced is adversely effected. Cases of the second kind are far more common, and are the main focus of this thesis.

Even if one accepts my argument that reasonable people are entitled to certain political rights, there is no obvious reason that these should be extended to unreasonable citizens. Valentini argues persuasively that within a Rawlsian framework, deliberative democracy is intrinsically valuable, but only under conditions of *reasonable* disagreement about the content of justice (2012: 598; 2013). Although not addressed in much detail, the implication of her position is that when the disagreement is unreasonable, the value of democracy can only be instrumental. In this chapter I hope to refute this suggestion, and defend the position that, except in cases where they can be violated for the reasons that I outlined above, there are strong normative and practical reasons to suggest that citizens ought to retain political rights even when they themselves are unreasonable.

Even if one accepts that there are reasons that interference in the political rights of unreasonable citizens might distort deliberation, it is less clear that it is unfair to interfere in cases where citizens exhibit deeply anti-democratic or illiberal behaviour. After all, someone who advocates discriminatory social policies, whilst not inflicting a direct harm is advocating a severe injustice, and undermining other deliberators. This is in many ways contemptible behaviour. In such cases, even where to interfere in such

parties causes the greater damage to deliberation as a whole, ought we not as a matter of fairness restrict the political rights of the would-be discriminator on grounds of fairness? Whilst I have stressed the link between fairness to individuals and the functioning of the deliberative process, there is nothing in my argument to suggest that they might not become decoupled in places, and that concerns of fairness ought not take priority. However, I suggest we ought to be very cautious about demarcating a certain set of the population as unreasonable, and therefore subject to systematic restrictions on political rights. Resolving the moral blind alley with reference to the reasonableness of the participants' other behaviour or world views, rather than the effects their action will have on deliberation, is a flawed approach.

My argument proceeds as follows. Firstly, I challenge Quong's argument that unreasonable citizens might maintain the rights of citizenship, but at the same time be excluded from the justificatory constituency. This depends on a separation between the set of citizens who are subject to laws and the justificatory constituency to whom citizens must appeal to in political deliberation. Whilst under ideal conditions, this justificatory constituency is a set of hypothetically reasonable citizens, this cannot be mapped onto actual members of the public. Under nonideal conditions, I argue that because of the tie to legitimisation, political rights cannot be separated so neatly from efforts to contain unreasonable behaviour. Sometimes we must infringe what Quong calls the rights of citizenship to preserve the process that allows all citizens to participate in discussing, and thereby legitimising, policies. It is worth noting that this is a methodological disagreement - in many ways I agree with Quong's analysis. The problem is that in actual politics the vast majority of the population are unreasonable some of the time. As I stated at the outset, even 'bleeding heart liberals' sometimes violate norms associated with deliberation. Quong's discussion of the rights of unreasonable citizens, and much of the debate in the literature in this area, starts with the tacit assumption of a (sufficiently) reasonable majority who are entitled to keep a full set of political rights, and an unreasonable minority.[2] My objection is to this stark demarcation between the reasonable and the unreasonable under nonideal conditions. Instead of trying to contain unreasonable beliefs, we ought to restrict and sanction

particular sets of behaviour that impede deliberation or inflict injustices on others.

In the second half of the chapter I present two positive arguments that suggest that unreasonable people ought to maintain their political rights unless they violate one of the constraints that I set out in the previous chapter. I argue that if the democratic process has an epistemic function, in the sense that a more legitimate process will tend to produce just outcomes, then the participation of unreasonable people in the political process can aid this. The epistemic aspect of deliberation depends on wider inclusivity, a pluralist dialogue and the opportunity for as many people as possible to participate in the process of debating and scrutinising policies. Secondly I suggest that even people who engage in frequent unreasonable behaviour are entitled, on normative grounds, to the opportunity to make their arguments in a political setting, even if they are eventually disregarded.

1.ii. Why this Discussion is Important.

Before proceeding with this, it is worth outlining what is at stake. Alongside her defence of the intrinsic value of democracy under conditions of thick reasonable disagreement about justice, Valentini makes the empirical claim that such reasonable disagreement is pervasive, and is what we actually encounter in the real world (2013: 173; 197).[3] I assume that this is not the case. Most if not all citizens behave unreasonably at some time, many citizens behave very unreasonably a lot of the time, and states do not fulfil many of the requirements of justice and legitimacy.[4] In such circumstances, if one were to adopt the position that unreasonable disagreement undermined the claims citizens have to political rights, and the centrality of deliberation to the formation of legitimate laws, then we must accept that not many citizens would be entitled to political rights. It seems unfair and disproportionate, for example, to strip the far-right of political rights in a systematic way whilst defending a full set of rights on behalf of everyone else, including members of illiberal centre-right parties like the Christian Democrats of Austria or the UNF in France. At the very least there is a greater burden of proof required by real, partially legitimate regimes to silence dissenting views compared to

legitimate ones.[5] A practical response might seek to insulate the *status quo* from insurgent anti-democratic groups, but the question then becomes: what is it that is being defended?

As a first step, my suggestion that the focus when we debate ought to be on protecting the status of individuals in deliberation is both normatively appealing and more feasible given existing levels of non-compliance. An approach that focuses on the containment of unreasonable doctrines, and that depends on a sharp distinction between reasonable and unreasonable citizens will, if applied under nonideal conditions, lead to a decoupling of the explanatory and action-guiding roles for ideal theory that I described in Chapter 4. Ideal theory that insists on preserving a stark divide between a reasonable justificatory constituency and an unreasonable minority would adequately explain that the world was deeply unreasonable but not really offer much information about how to respond to likely political dilemmas. I have argued in Chapter 4 that there is no reason to moderate ideal theories because they describe states of affairs that are unlikely, and I shall re-visit this point in Chapter 6 where I discuss the problems with less demanding ideal theories of deliberation. I do not suggest that we sacrifice a 'thick' definition of reasonableness, or the norms associated with deliberative democracy, just because many do not live up to them. What I do suggest, is that through greater attention to the question of political voice, rather than the divide between unreasonable and reasonable citizens, we can arrive at a more nuanced position that can help us respond to existing regimes in a way that is neither uncritical acceptance nor exasperated defeatism.

2. Quong on Unreasonable Citizens.

In this section I critique the way that Quong formulates the problem of how to respond to unreasonable citizens, and suggest that it not be applied *under nonideal conditions*. Quong's suggestion is that unreasonable people maintain the "rights of citizenship" (297), but that they are excluded from the "community of justification", and that the state might be mandated in containing unreasonable doctrines in certain ways (298).[6] I do not disagree with the argument that we can still enjoy the benefits of

citizenship even outside the justificatory constituency. I also do not disagree with how he demarcates reasonable and unreasonable doctrines, building on Rawls. My issue is that attempting to define the justificatory constituency in absolute terms - whereby citizens are either in or out - is not sustainable or right under nonideal conditions. In particular, I disagree that the focus in these cases ought to be on keeping unreasonable views out of the process of justification, or unreasonable citizens from participating. Instead it ought to be on policing behaviour that undermines a deliberation amongst equals. Attempts to define the constituency do not really capture the main problem of unreasonable behaviour, which is that it is often not motivated by the desire to promote comprehensive doctrines as such, but by the pursuit of self-interested policies in a way that is unreasonable towards other people.

In the case of the far-right there are a variety of reasons that citizens support such parties beyond commitment to an unreasonable moral code including, but not limited to, mistrust of institutions; response to economic conditions or injustices; false political beliefs; and responses to identity politics.[7] Moreover, many 'mainstream' politicians do subscribe to racist or illiberal ideologies, but modify their policy positions. For this reason, a social ontology that treats the far -right as a detached, *sui generis* phenomenon does not explain its popularity and persistence. Instead, we must see far-right parties embody radical variants of mainstream values, something Mudde calls "pathological normalcy" (2010). Attitudes compatible with far-right politics are widespread in Western societies, but few subscribe to them exclusively (1178).[8] Gaus agrees, arguing that those who oppose liberal values still tend to share many of the same basic moral convictions as their more 'reasonable' counterparts.[9] Drawing on empirical research from social psychology that supports Mudde's hypothesis, but also the position that the way that underlying moral values and beliefs interact to shape political action is complicated, he notes that "this is bolstered by empirical research that indicates that the main source of our disagreements is not *what* is valuable, but what is *more* valuable" (2011: 280, his italics). Furthermore there are reasons that individuals vote for political groups that are based on issues of identity rather than agreement on moral values or ideological perspective.[10]

Attempts to map an account of the justificatory community based on shared values onto real citizens therefore do not correspond with reality[11]. There are strong dis-benefits to the exclusion of even the deeply unreasonable. Nonetheless, much of what Quong describes as unreasonable behaviour corresponds to behaviour that distorts deliberation, and that I argued in Chapter 3 might justifiably warrant interference in political rights.

Quong describes unreasonable people as those who reject one of three liberal beliefs, or fail to accord them "deliberative priority" in their practical reasoning, and are not moved to act in accordance with them (2011: 291; 2007: 323) These are:

- That society should be arranged around fair terms of cooperation.

- Citizens are free and equal.

- The "fact of reasonable pluralism".

He argues that citizens who reject these to varying degrees will, over time, be excluded more or less such that "the more unreasonable views they have" - in the sense of rejecting these premises - the "more total their exclusion will be". In practice this presumably means that their political rights will be ever more restricted (2011: 292). Most of his subsequent discussion is not of how to respond to citizens who behave unreasonably, but what to do about unreasonable citizens as a category. He acknowledges this, but makes the move anyway, stating that "strictly speaking, therefore, it is not the unreasonable *citizen* who is excluded by public reason, but rather unreasonable *views* or *claims*. For simplicity and ease of exposition, however, I will refer to unreasonable citizens, but we should always bear in mind that this term refers to certain aspects of a person's beliefs or behaviour, rather than referring to a clearly identifiable class of people" (291, his italics). This perspective misses the practical problem of when to exclude citizens from political deliberation, because it implies a situation where there is a reasonable majority or state seeking to regulate an unreasonable minority. This minority's ambition is to impose a fairly coherent, unreasonable, comprehensive moral doctrine, essentially a religion. This is only one kind of unreasonable behaviour, and the containment of such doctrines is separate from the issue of what kinds of unreasonable behaviour might be sanctioned through the

withdrawal of political rights.

In reality, few if any citizens are reasonable in all their political interactions and modern Western democracies fail to meet the standards of legitimacy. At the same time few completely disavow all liberal values. The situations where a liberal theory of exclusion will actually be applied are the mediation of disputes amongst (to various degrees) unreasonable people, and the debates around the authority of partially legitimate states to impose laws on citizens through threat of coercion. The threat to public justification does not come from the content of beliefs, but from behaviour that undermines that status of fellow deliberators. There is, at best, an imperfect correlation between commitment to an unreasonable doctrine and behaviour in the political sphere that imposes a harm or epistemic injustice on others. In such cases, it is not clear why any limits on political rights ought to be directed at the former and not the latter.

To illustrate this, consider someone who holds unreasonable religious views and generally evangelises about them, but does not look to use deliberative political fora to do so. When they do deliberate in public, then they are *de facto* excluded from deliberation where they cannot support their perspectives using non-religious, public reasons, because the laws they advocate cannot be enforced (*CP*: 491-3). Even if they can convince a majority - or even the entire population - to support their position, if laws cannot be justified with reference to public reasons they still cannot be imposed. This is, of course, theoretical exclusion from deliberation. It means that in debates over certain laws, this citizens' views are effectively disregarded. They can still adopt these positions and live according to an unreasonable moral code. As critics have noted, political liberalism leverages a divide between public and private actions, and Quong's view on unreasonable citizens is no exception, in that it accords them rights in private, but not in public. Political liberalism requires citizens to be able to think of themselves as some sort of "divided self" whereby they can appreciate the different demands of political and comprehensive morality; it is often criticised because of this demand (Galston 1989: 722).

There is significant debate about the scope to which unreasonable behaviour in the 'private' sphere ought to be tolerated. The point I raise here is just that it is possible to advance completely unreasonable positions, and that the liberal state accords you the right to do so where you do not seek to impose those views on others. When political liberals describe someone as reasonable (or unreasonable), they do so with reference to their behaviour rather than their beliefs (Nussbaum 2011: 33). If someone holds deeply unreasonable views, but prioritises concerns of liberal justice over them in all political and other-regarding moral decisions, we have no reason to call them unreasonable. A citizen who suffers from a severe "moral schizophrenia" between their comprehensive moral values and liberal political ones cannot be condemned if they prioritise the latter.[12] Rawls also argues against using the content of speech, or beliefs as the basis for regulation. He states that freedom of speech is one of the basic liberties, and these "can be restricted in their content (as opposed to being regulated in ways consistent with maintaining a fully adequate scheme) only if this is necessary to prevent a greater and more significant loss, either directly or indirectly, to these liberties" (*PL*: 356). Not only do we not have good reason to limit the political rights of individuals solely as a result of the content of their views, rather than their effects, but to police doctrines requires either an incredibly intrusive state or an unduly burdensome degree of self-policing by citizens (Nussbaum 2011: 31). We ought not, therefore, think about when sanctions that limit political rights might be applied by trying to determine whether an individual belongs as part of the justificatory constituency at a given moment, given their worldview and past conduct. Instead we ought to approach these decisions on a case-by-case basis that considers primarily the effect of an action on deliberation.

To make this case more concrete, recall the question of whether a neo-Nazi group might hold a rally in an area. In this case, even if they are prevented from rallying, their political rights are only impeded in a partial or limited sense. Members of far-right parties who are prevented from rallying do not lose the right of association *per se*; they are free to join their union meeting or business association lunch on a Monday after their rally was shut down on the Saturday. Actual complete exclusion from the real justificatory constituency - effectively from political life - is implausible in most cases,

at least where people are not imprisoned. It is also wrong for reasons I outline below. More fundamentally liberals object to Nazis rallying not because because they are Nazis, but because they are Nazis *rallying*. If my neighbour of twenty years casually mentioned in conversation that she were a white supremacist but had never acted upon this, I might have cause to condemn her, but it seems obvious that I do not have grounds to petition the state to start restricting her political rights at that juncture. Closeted bigots do not violate enforceable duties in this area.

Even when Nazis do rally, the pressing concern is not containing far-right doctrines. When white nationalists rally they are seeking to encourage harm towards others, to effectively silence the political voice of minorities through intimidation or to secure the passage of unreasonable laws, not just to spread Nazism as a doctrine in the long term. Indeed, the spread of a comprehensive Nazi ideology appears to be amongst the least salient of the threats they present. In less extreme examples, when Pegida rally in Germany, the issue is not the emergence of some conservative Christian ideology that is unreasonable, but the fact that they seek to exclude Muslims and non-Christians from the political process in the here-and-now. There is therefore a case for containment beyond the spread of doctrines.

A further reason not to use a distinction between reasonable and unreasonable citizens is that exclusion from the justificatory constituency tends to bring with it other harmful effects. To be excluded from the justificatory constituency at any level is to be stigmatised, and to be excluded completely and branded unreasonable is to suffer a significant loss of status. The separation of the rights of citizenship and the right to participate politically is not cleanly separable in practice in the way that Quong argues that it is in theory. Exclusion in practice attaches a stigma to individual that is not the case under ideal conditions. Quong fails to fully capture the cost of alienation that accrues from exclusion from the political process. Of course sometimes this cost is warranted - those who require a well-founded racism to not feel alienated cannot be accommodated - but the nature of alienation means that it is a greater harm than mere exclusion from justification, and the absence of an opportunity to pursue one's own

agenda. There is also a risk that this stigma might be attached to an already-maligned group, and that they might suffer greater injustice. The power to exclude others can also be abused by state actors or those who hold political power. Even where this is not the case, the stigmatising effects of exclusion do not tend to fall uniformly across all those who are excluded. This uncertainty makes it harder to justify the claim that the stigmatising costs of exclusion in practice are always justified in the face of unreasonable behaviour. The way that Quong formulates the dichotomy between exclusion from justification and the rights of citizenship, and the focus on containment, means that this problem cannot be fully addressed within his conceptual framework.

In a recent essay on the aims of political liberalism, Larmore states that liberals need to be open about the fact that some are excluded from the constituency of justification in all plausible accounts of public reason (2015: 85). However, he goes on to say that this exclusion is "qualified" and that one of the benefits of a liberal system of government is that those opposed to it retain many basic rights (86). Whilst this may be true, and certainly dissenters in liberal states live under less threat than those under other political system, this disaggregates political participation from the rights of citizenship in general in a way that does not ring true. This split does not pay enough attention to the fact that both the rights of citizenship more generally and the right to participate in politics depends on equal status and respect for others, so one cannot be eroded with out a collateral effect on the other. Exclusion from the political sphere is a form of denigration and exclusion, and for the excluded the "rights of citizenship" will often ring hollow. That said, the way that exclusion shapes moral relations is complicated. It is possible to argue too far in the other direction. Gaus argues that those excluded from the justificatory constituency have their moral autonomy denied, and are treated in a ways akin to "psychopaths" (2011: 282). To argue that political exclusion will completely undermine social relations in this way is as implausible as denying that they will have any effect. Any basic knowledge of the real social world will suggest that there is some sort of relationship between political excision and status in the moral community, but this is complex, and they are not equivalent.

Before moving on it is worth stating that this blindspot towards the costs of containment is not unique to Quong amongst political liberals; the reason that I engage with Quong here is because I agree with much of his account of what constitutes unreasonable behaviour that in theory might be worthy of sanction. Much of what he describes as unreasonable behaviour mirrors the types of behaviour that I think can warrant the limiting of political rights.[13]

3. The Epistemic Function.

I have argued that a particular form of deliberative democracy is uniquely able to meet the two requirements of public justification: The **Epistemic Function** and the **Justifying Function**. In this chapter I argue that both of these are better realised through a process that includes even those who look to advance unreasonable positions, at least insofar as they do not act in such a way as to undermine deliberation.

The **Epistemic Function** broadly conceived is is the function of democracy by which it brings about more just outcomes over time (Daniels 2003: 252). In this chapter I defend the claim that there is an all-things considered epistemic value in including as many people as possible in deliberation, even those who are ignorant or unreasonable (Estlund 2008: 219).[14] There are two levels to the epistemic function. The first, deeper level is that the content and realisation of justice is enhanced by democratic procedures. The second is a thinner conception of the function as fact-finding. From this perspective, the democratic process allows a better understanding of the preferences of individuals, and of relevant empirical facts.

On the first of these, reasonable theories of justice depend on concepts such as the social basis of self-respect, and an account of things like goods, utility, capabilities or welfare. When dealing with such concepts, we ought to take seriously the views of individual citizens when making decisions. Theories of distributive justice are determined by their acceptability to all citizens at various levels, and the democratic system can provide a way of continually re-testing this.[15] Implementing principles of

justice in practice is a complex matter, and democracy provides a mechanism by which we gather information about this implementation and look to refine it. Say the state hopes to determine whether a particular policy improves the situation of the worst-off. A system whereby citizens who might be among the 'worst-off' group can articulate their own political interests, and can convey to others aspects of their lived experience, will provide important information when it comes to re-considering and revising that policy.

On the issue of legitimacy, as well as justice, there are strong epistemic reasons to support an ideal of inclusive democracy. The set of public reasons in a given context is never definitively established. There will always be situations where there is disagreement over whether a reason provided is an authentically public one or whether it actually represents a comprehensive moral stance. The set of what count as acceptable public reasons must therefore always be open to debate in actual deliberation. An important function of democracy is therefore to enable this process of determining what count as public reasons. Given that public reasons are mutually acceptable ones, this process is enhanced if a greater number of people are able to participate. If there is to be such an ongoing dialogue about what mutually acceptable reasons are, then including the greatest range of opinions that we plausibly can will strengthen this discussion (Swaine 2009: 200).

There are 'thinly' empirical epistemic benefits to greater inclusion. This benefit is to the breadth and accuracy of the factual claims underpinning the implementation of whatever practices exist. If, as a matter of justice, it is important that all have the capability to do something - there will then be some debate over how this can (best) be realised. It is implausible to argue that unreasonable people cannot contribute to democratic debates on these empirical grounds. Many 'experts' who contribute to democratic deliberation hold unreasonable views on some issues, but it would be foolish to exclude them from the process of justifying laws. An unreasonable but accomplished surgeon could be completely resistant to the ideals of liberal democracy and hold utterly offensive views, but have something important to contribute to a discussion over healthcare polices. At least allowing such an individual to participate in political

discussion could lead to information being thrown up, or problems in a prospective policy being identified, that would be of great benefit in the long-run. Reidy uses the example of the many philosophers and political theorists who are not reasonable in the Rawlsian sense; he asks whether we would we really want to exclude Hayek or Marx from deliberation. From his point of view this is the type of unreasonable interlocutor we want to encourage (2007: 261). The only cases where this would not apply are if said unreasonable expert either refused to share their knowledge (which seems implausible) or tried to mislead others. The latter is clearly a reason for exclusion from political deliberation, as it is an attempt to undermine the process of deliberation, and is consistent with my argument that political rights should be withdrawn if they are used in a way that undermines the legitimacy of potential outcomes.

In my account of legitimisation, I stress the epistemic benefits of deliberation as a practice. What matters is that a discussion takes place under certain circumstances, not that it involves actors of a certain character. An aspect of this that I think is important, and that unreasonable people can participate in, is the process of scrutinising and challenging another citizen's position.[16] Being forced to reconsider and revise our own position is important, as is being able to defend it. Consider again the example of an unreasonable expert; granting this person political rights might be beneficial if their influence in their area of expertise outweighs the harm of their unreasonable behaviour. Even members of the public without any specific expertise possess important local knowledge, and can contribute to an ongoing discussions. Groups with an illiberal agenda can also provide vehicles for raising issues, or to challenge polices. If this sounds a little implausible beyond stylised examples, we ought to remember that populist parties do not arise in a vacuum. They tend to succeed where there is a fall in trust in institutions, and that this is sometimes justified. In situations where mainstream politics fails in some way, a kind of 'pure populism' where people support groups likely to challenge the *status quo* can be a valuable form of scrutiny.[17]

This is perhaps clearest in the case of the Austrian Freedom Party, which became a "flexible voice of popular unrest on a variety of issues and themes" by the late 1990s

(Williams 2006: 175). Indeed, even those critical of the party acknowledge that successive governments in Austria in the 1990s had effectively "disenfranchised" vast swathes of the population through graft and corruption (155). In such a situation, a powerful opposition force of any kind can help in exposing corruption. It may be pessimistic to suggest that what is important in a democratic system is that political challenges are made, but the capacity of all, including the unreasonable, to scrutinise ruling elites and seek to disrupt them when they try to avoid criticism has an important role in ensuring that policies are as legitimate as possible. Often political conflict between unreasonable groups or interlocutors will expose issues to the public eye, or enable more informed debate in future. It will also help guard against any group gaining untrammelled power over some aspect of political life. In this case neither the conduct nor the outlook of the Freedom Party is the salient point behind the justification for their supporters being able to continue to make use make a full range of democratic rights. What is important is their role in helping hold others to account. This role will often be taken by outsiders or fringe parties. Ironically the Freedom Party has been dogged by accusations of corruption about its own stay in power as a junior coalition partner from 2000-2005 (Vienna Review 2011), but what is important here is that they facilitated a challenge to corruption; in this case two unreasonable political blocs squaring off at least had some benefit, in that it exposed deeply permissive norms around corruption that were pervasive in Austrian political culture.

4. The Justifying Function.

The epistemic argument does, however, appear to be fairly weak in that unreasonable people do not have any claims *qua* citizens to political rights. Instead their political rights are justified on instrumental grounds because of the benefits to society as a whole that their participation provides. Unreasonable citizens remain entitled to political rights for normative reasons as well. They ought to remain part of the justificatory constituency if at all possible because they are subject to laws. People are entitled to a say because they are governed rather than earning a say by being reasonable. The fact that citizens are worthy of respect and the need for them to, on some level, consent to

government underpins this claim. All citizens ought at least to be afforded the opportunity to raise reasonable objections, especially if one does not treat unreasonable citizens as a fixed category or group. This means that they retain a full set of political rights where they do not act to undermine deliberation in the ways I have set out. The real set of citizens able to participate is not the same as the idealised justificatory constituency. In practice all citizens should be treated as members of the justificatory constituency, in that they should be entitled to scrutinise and raise objections to laws. *De facto* exclusion from the justificatory constituency, where warranted, will be temporary. It will be a by-product of legitimate violations of political rights in a particular context rather than an attempt to shape the justificatory constituency permanently.

Though it is a generally accepted standard of liberal thought that the consent of the governed matters for the sake of imposing legitimate burdens upon them, there has always been a tension in liberal thought between consent as it envisaged in ideal deliberation and the actual consent of citizens. Simmons argues that most liberals do not really take seriously the idea of consent, and that contemporary Kantians (he names Nagel, Rawls and Dworkin) have "illicitly appropriated the justificatory force of voluntarism while being (like Kant) in no real way motivated by it" (1999: 761). His hypothesis is that they underestimate the "transactional" relationship between citizens and the state, and that Rawlsians rely too much on the idea of reasonableness to defend a Lockean system of hypothetical consent (764-6). The worry is that liberal states are able to exercise arbitrary power over the unreasonable if they exclude them from the justificatory constituency. The fact of unreasonableness ought not cause people to be subject to arbitrary rule in this way. It is worth noting that the importance that Simmons attaches to voluntarism and actual consent is such that he sees no existing state as legitimate, but some as more legitimate than others, arguing instead that state authority is currently justified for prudential reasons (770-1). This emphasis on actual consent appears at odds with Quong's account of political liberalism as "internal justification". For him, we ought not even bother to address justifications to unreasonable people because they are "*beyond the reach*" (his italics) of public reason (2011: 314).This

disconnect is the product of a failure of unreasonable people to recognise certain values.[18] The logic that some reasons are justified 'internally' to a reasonable constituency using reasons they 'can accept', amounts to a set of reasons that citizens *ought* to accept based on foundational values that are assumed as correct.

The issue here is that there are two different kinds of consent at work in a liberal democratic framework. There is consent amongst idealised, hypothetical citizens at various points. This is a conjectural exercise used to determine rules. There is also the "transactional consent" gained from actual citizens of the kind Simmons is concerned with. This kind of consent can be attained in part through deliberation in which citizens might raise reasonable objections to laws. As I noted in Chapter 2, an ideal of legitimate policy-making will be maximally inclusive. Part of the reason for this is a concern that citizens ought to be able to grant consent to government, and raise objections to laws. They have a right to some say over the laws by which they are governed, even when – in cases where they propose illegitimate laws – their suggestions ought not be implemented. A desideratum of this is that we ought to allow as full a discussion of laws as possible. Citizens ought to be able to raise reasonable objections to laws and look to advance reasonable interests. Those committed to unreasonable views might still have valid and reasonable objections to policies, or pursue reasonable interests in ways that might be effected by laws. They ought to be able to advance these positions unless they act in ways that undermine deliberation when they do so.

To illustrate what this entails, consider how we ought to justify ourselves to unreasonable people who are told that their desired policy outcomes could not be legitimately enforced. When public reasons are supplied to justify a policy, and an unreasonable person chooses to argue against these on unreasonable grounds, the statement by the reasonable policy advocate is: 'I have given you reasons x, y, and z, and they are all public reasons. Like it or not this means that the policy is, if I can secure support through deliberation, enforceable. Your alternative policy is not'. This process can be reconciled with consent by unreasonable people so long as unreasonable people are addressed in this fashion, and are given the opportunity to offer an alternative that

also satisfies the liberal constraint on legitimacy. They must also have the opportunity to challenge the implicit claim that the reasons supplied are in fact public reasons. Otherwise, in a similar scenario, the case that is made to unreasonable people amounts to an assertion of truth.

In a paper that is highly critical of public reason theorising, Enoch imagines a scenario where someone makes unreasonable arguments against redistributive taxation. He argues that public reason theorists might as well be addressing other citizens like so: "I understand that you are not convinced, but I have stated my reasons why it is *true* that this taxation is justified" (2015: 129-30). Public reason theorists can avoid moving from my first form of addressing unreasonable citizens to an assertion of truth of this kind, but this depends upon providing unreasonable people with a chance to raise reasonable objections to laws. Once again, the idea of a firm constituency of justification, and a category of unreasonable citizens is not helpful – what matters is that all policies are subject to on-going deliberation, and that all citizens have the chance to participate in this insofar as they do not seek to prevent others doing so. The direction of justification is important here. By Enoch's account public reason theories effectively permit people to participate in justification if they are reasonable. An adequate public reason theory will instead be one that requires that the state provides reasons justifiable to all that it might coerce, and that it at least provides an opportunity for them to participate in this process of justification.

In practice, this justification through public reasoning relies upon actual avenues of deliberation and fora. To exclude individuals from these because they are perceived as unreasonable also removes the chance that they might have to raise reasonable objections. This is important even for the deeply unreasonable because the stigma and cost of having the capacity to make reasonable objections withdrawn is greater than the cost of simply not being able to articulate your own view. It might well be that public reason liberalism does not speak the language of conservative Catholicism or Islam, but adherents to these doctrines maintain the right to participate in deliberation and to ignore public reasons, so long as they do not use such rights to undermine the

deliberative process as a whole.

5. Conclusion and Implications.

In this chapter I have defended the position that unreasonable people, in so far as it is sensible to define a group of actual people in this way, ought not be excluded from political deliberation unless they seek to use political rights in ways that either provokes direct harm, or undermines the process of deliberation in the ways I described in Chapters 3 and 4. Their inclusion both assists the tendency towards just outcomes of a deliberative democratic system, and is something they are entitled to on principle so that they might raise any reasonable objections they might have. Moreover, the notion that there is an unreasonable minority of citizens does not work in practice, where all citizens sometimes act in unreasonable ways, but where most respect the basic rules of the democratic process most of the time. For this reason we ought to adjust liberal approaches to unreasonable behaviour in politics such that we deal with unreasonable behaviour on a case-by-base basis, rather than trying to map out the appropriate justificatory constituency who are entitled to be involved in politics.

The implications of this when actually confronted by decisions about whether to restrict political rights that are moral blind alleys are threefold:

First, as I have re-iterated throughout the chapter, sanctions that limit political rights ought to be used to protect deliberation by restricting behaviour that would undermine it rather than to penalise unreasonableness *per se*.

Second, my position carries with it the (in some ways) unpalatable conclusion that in dilemmas around whether to restrict political rights we ought not always favour the individual who appears to be the wronged party. Whilst the intent to undermine others in deliberation ought to weigh on our decisions when we contemplate how to respond to abusive behaviour in political contexts it is not a 'trumping' factor, and we should not treat it as sufficient reason for interference. At least where there is not risk to direct

harm, then there will likely be a viable liberal argument that we ought to side with the bigoted.

Third, the combination of the problems of determining who is part of a constituency that is deeply unreasonable, and the stigmatising effects of exclusion from deliberation suggest that we ought to use 'softer' sanctions where possible. In practice this means not using the criminal law to prosecute political acts that look to stigmatise others except in extreme cases. We ought instead to use measures like the removal of institutional support, no-platforming and if censorship is to be applied (say in the case of racist campaign material, which I consider in Chapter 7), then it should apply to specific material and not to individuals or groups. In the final three chapters of this thesis I discuss how this might work in practice with reference to examples in recent European politics. Before that, I consider one final challenge to the application of the liberal ideal in these cases.

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[1] This includes support for parties and NGOs, regulation of deliberative fora and the media, consultation in policy making, judicial review etc.

[2] Much of the literature is focused on how to contain religious sects or cults who challenge democratic norms and, though it is a separate debate, I think that much of the orthodox Rawlsian literature deals with the core concerns of such cases well. For example, in his discussion of unreasonable citizens Quong brings up religious groups who seek exemptions from public education (2011: Ch10).

[3] See Chapter 2 Section 2 for a fuller discussion of this.

[4] Though I disagree with them that this is inherently problematic, I agree with both Enoch and Gaus who argue that "many" people are unreasonable by Rawlsian standards (Enoch 2015:121; Gaus 2011: 368).

[5] I revisit this point in Chapter 9.

[6] This builds on an footnote in Political Liberalism in which Rawls makes reference to the containment of unreasonable doctrines in a fairly nonspecific way. The language used in the footnote is somewhat ominous, and not in keeping with Rawls' general style: he argues that such doctrines be contained like "war and disease" (64 *fn* 19).

[7] In Chapter 9 I deal with how this informs the excusibility or otherwise of supporting far-right parties.

[8] Mudde's empirical claim here is based on survey data that is to some degree unclear. It is, naturally, hard to survey populations to try to discern any latent nationalist, racist or anti-democratic sentiment. However, attitudes to migrants, criminals and welfare claimants have tended to harden over the past

twenty years, and political beliefs have become more authoritarian, whilst trust in institutions and mainstream parties has eroded. This is evident in the results of the Eurobarmoter, one of the largest and best-regarded social surveys in Europe (Mudde 2010: 1176-7).

[9] Gaus would reject the use of the term 'reasonable' here, but to the idea that there are idealised counterparts of citizens.

[10] I consider this in more detail in Chapter 6.

[11] Quong acknowledges the difficulties of identifying a real-world group who all hold certain views, but I feel that he greatly understates the problems in doing this, and the complex nature of political groups (2011: 291).

[12] The phrase "moral schizophrenia" is used by Strike to describe someone whose religious and/or comprehensive moral convictions are at odds with liberal norms, and who sees both as providing action-guiding reasons (2007: 699).

[13] See Chapter 3 Section 6 where I draw on Quong as I begin to build the case for interference in political rights.

[14] Estlund discusses this in the context of a repudiation of the view that the epistemic credentials of democracy are enhanced by an 'epistocratic' system, that is one where the most intelligent are afforded electoral priority   by having their vote weighted disproportionately, or even where the justificatory constituency is limited to those who show a certain level of intelligence (For a prominent recent work arguing this see Brennan 2016). Though I do not engage with this point here, I feel that many of the issues of local knowledge that I raise in this chapter and Chapter 2 might, in future, form the basis of a challenge to an epistocratic position based on public reason.

[15] See Chapter 2, Sections 5 and 6.

[16] This process is enhanced by a process that is inclusive of the greatest possible number of perspectives, rather than just the presence of a greater quantity of information. For a defence of the epistemic benefits of inclusion of this kind see Bohman (2006).

[17] I consider the case of pure populism in more detail in Chapter 9.

[18] As I noted earlier in this chapter, empirical evidence suggests many actual citizens are unreasonable, but still have some sense of respect for others, reciprocity and fair play.

Chapter 6: A Less Demanding Ideal?

In the last two chapters I have argued for a division of labour between ideal and nonideal theory. Ideal theory ought to be used to assess a situation and provide reasons to act in a certain way. One limit on ideal theory, as I describe it, is that it cannot provide determinate guidance for some decisions. Decisions around whether we might restrict political rights for those pursuing anti-democratic behaviour, for example, are often decisions where the state or citizens finds themselves in a moral blind alley. This is where any course of action or inaction has significant moral costs that said actor has a duty to avoid. There are *pro tanto* reasons in favour of any course of action. In the last chapter I argued that we cannot resolve this dilemma by making a judgment about the behaviour and relative culpability of those on either side of this dilemma. The state ought not restrict the political rights of those who look to undermine the status of others in deliberation if to do so is to inflict a much greater cost on deliberation as a by-product. Instead the state must look to assess the impact of deliberation on either side.

A final view I must consider is this. Rather than present a stark divide between an unrealistic ideal and a tragic reality. why not advocate a more realistic and achievable ideal that can be more closely replicated?[1] A less demanding account of what we are required to do in an ideal polity would make the task of bringing it about more realistic. In this chapter I consider the deliberative democracy described by Gutmann and Thompson,[2] and the 'convergence' version of public reason offered by Gaus.[3] I focus on these authors specifically as they offer some of the most complex and convincing defences of their respective theories, but their positions are indicative of a wider set of positions that advocate public justification, but through a system that places less exacting demands on citizens than Rawlsians do. That is, in the ideal they describe where all conform to the demands of public justification, such conformity requires an adherence to a 'thinner' set of liberal values. There is scope to behave in ways that Rawlsians might consider unreasonable whilst still conforming to such standards.

The objection that both deliberative democrats in the Gutmann and Thompson school

and convergence public reason theorists raise is that by restricting the reasons that can be used to justify laws, Rawlsians, or 'consensus' public reasons theorists more broadly, place unfair demands on citizens in deliberation. This makes their schemes less feasible.[4] It might be that the consensus account as Rawlsians conceive of it is too restrictive of the use of religious reasons in public discussion, for example, although I do not believe this to be the case. What I set out in this chapter is that any appeal that these alternative theories have based on their greater feasibility is illusory. This is because whilst both theories eschew a requirement that we limit the reasons we deploy in deliberation, they still require adherence to deliberative norms. These are fairly demanding, and most citizens do not in practice keep to them. They demand a civility absent from actual politics. In addition, Gaus' theory requires a kind of rational thinking - a process of reflection in forming preferences - that does not resemble the way citizens actually think about politics. Both theories rely on idealisations that, whether or not they are less demanding than those required by Rawlsians, seem no more likely to be fulfilled.

Advocates of these positions might argue that I am being unfair in this diagnosis. That there is a way of interpreting these theories that presents their demands as 'thinner'. By this account the virtue of these theories is that they treat as their main purpose solving the problem of actual disagreement and not reasonable disagreement. This may be a viable interpretation of these theories - that there is a 'mid-level' theory of public justification that can be constructed that resembles a slightly-modified version of the *status quo*. The problem with re-constructing a theory of public justification in this way is that it strips out too much of the normative content of the theories. It ignores the many occasions where the process of legitimising laws are not met, even by the standards of a convergence theory or a mid-level theory of deliberative democracy. Both types of theory still depend on a mutual respect amongst citizens that is frequently absent in real life. Adjusting theories so that they are more readily achievable is problematic if it introduces a blindness to this disrespect.

What I present here is not a comprehensive rebuttal of such theories, but is instead an

argument that they must be treated as either ideal or nonideal theories. If we treat them as the former then they are no more feasible than Rawlsian theories of public justification. Maybe they are better ideal theories, but they must be defended as such. If they are valuable ideals for independent normative reasons so be it, but they cannot claim greater realism as a virtue. Moreover, such an ideal theory will face all the difficulties of moral blind alleys and 'lesser of two evil' choices that I describe. On the other hand, if they are nonideal theories, they must acknowledge that they may ignore morally relevant instances of disrespect. This chapter proceeds by setting out this dilemma in detail, then offers a brief discussion of Gutmann and Thompson and Gaus' work to illustrate this.

2. The Dilemma.

There is an inevitable disconnect between a fair system of public justification and the best achievable process of political decision-making. The question of how to create fair terms of social cooperation given full compliance with deliberative norms of any kind, and the question of how best to mitigate for breaches of such norms in practice are dissonant. Too often, however, public reason theorists conflate these two, and this leads to a worst of both worlds scenario where the resultant theory is neither feasible as a piece of nonideal theory, nor a complete piece of ideal theory. The mistaken belief is that answering the question of what a just constitutional settlement will look like will yield both a workable political ideal in contemporary settings and fair terms of social cooperation. In this section I present this as a dilemma with two horns; theories of public justification or deliberative democracy must choose one of these two paths.

2.i. The First Horn: Idealisations.

Theories of public justification tend to put stock in certain norms such as respect and tolerance for the views of others (Enslin *et al* 2001); respect for others as autonomous deliberators (Killmister 2013: 360-2); integrity and magnanimity in deliberation (Galston 2005: 35); sincerity in deliberation (Estlund 1997: 190); and various

intellectual competencies (191). Political deliberation that offers a justification for laws that all can accept must retain at the very least a basis of respect for all citizens. Broad compliance is required for democratic systems to function. The theories are therefore constructed as ideal theories in a Rawlsian fashion, whereby some form of normative standard is stipulated at the outset, and theories are constructed based around an assumption of compliance with these.

The actual institutions that facilitate deliberation in accordance with such values are dynamic systems that require various citizens to behave according to norms defined by these requirements. Even regular citizens with no formal public role must adequately inform themselves on relevant issues, and be prepared to hear others out. Crucially, when some don't comply with the norms associated with deliberation it impacts the opportunity of others to do so. Those who do not comply will come to gain benefits over those who do over time. They would be *de facto* free riders, avoiding the burdens that deliberation places on them whilst still accruing some of the benefits. They are able to use the opportunity to advance their political interests whilst preventing those with competing interests from being able to do so. It is therefore implausible to construct a theory of legitimacy that relies on *widespread* compliance with normative constraints to be coherent and not to rely on *full* compliance. Theorising about partial compliance is to theorise about a completely different state of affairs where mitigating for a failure to comply with the norms associated with deliberation is one of the most pressing issues of politics. Many deliberative democrats infer that the kind of ideal theory I have defended is spurious because there is disagreement about what ideal justice looks like, and that these idealisations are never close to being realised. However, the dependence of these theories on compliance with certain controversial norms makes them susceptible to the same critique. Theories of public justification that depend on norms that encapsulate any of the values listed above must acknowledge that given the dependence of actual deliberation on complex institutions, they are actually 'full compliance' theories.

2.2. The Second Horn: A More Feasible, Nonideal Theory.

For those who opt to take on this horn of the dilemma, and offer a more realistic account of public justification, the hope is that laws can be produced that are acceptable to all actual citizens - or plausible hypothetical proxies - rather than merely rational and reasonable "demigods" (Gaus 1997: 210). A key component of this is the idea that at some level, deliberation should act to coordinate the self-interest of members of society, rather than enforce objective norms. Deliberative democrats who adopt this stance develop Rawls' account of the individual as a "self-authenticating source of valid claims" (*PL* 32), to reach the conclusion that "self-interests are intrinsically self-justifying", and that the common good is a "composite" of individual accounts of the good (Mansbridge *et al*. 2010: 75). If one is to adopt this horn of the dilemma, the value of democratic decisions accrues not because of their content but because they were reached democratically. Individuals' autonomy as it is, not filtered through the restraint of the requirements of reasonableness, the burdens of judgment or similar, is the source of the value of laws that are the outputs of a democratic process.

The central weakness of such theories is that once norms are hollowed out to the point that they bear some resemblance to positions the majority of citizens actually hold, it is unclear what, substantively, remains. It appears that there will always be a tension between "liberals" and pure nonideal "democrats", where democrats do not grant that there are any constraints on either the inputs into public deliberation or the content of the laws produced. (Okin 2005).[5] Okin uses the example of subsidies to the Catholic church to illustrate this. She argues that given the sexism within the Catholic church there are strong reasons not to give the organisation government subsidies. The fact that the majority of people are Catholic, or support said subsidies would not, in her view, change the fact that the organisation is inimical to liberal values; in making this step she sides with the liberals rather than the democrats (87). Whatever one thinks of this argument, public justification as nonideal theory is unable to make it, instead ending on the side of the democrats. There might be reason to step in to protect certain egregious harms, but ultimately the theory is subject to far greater capture by large majorities.

Theorists who take this horn of the dilemma must therefore justify themselves in terms

that acknowledge the seeming unfairness they permit, especially the failure to ensure respect for all citizens. The most coherent way to do so is to argue for the priority of actual politics and resolving questions around real competition for resources or interests. There is a strand of realism that presents the arguments in the way that takes up this challenge. These acknowledge the normative force of certain moral arguments but present the political domain as distinct and more important. In particular, the Basic Legitimisation Demand set out by Bernard Williams falls into this category (2005: 4-7). This is the demand that states justify themselves to all in a thin sense, beyond 'might is right', but not through as demanding a framework as public reason. The normative work here lies purely in the process of justification. Sleat takes this further and argues, after considering the dual concerns of justice and legitimacy much in the way that I did in Chapter 2, that rather than try to incorporate the two, realistic liberals ought to prioritise legitimacy (2015). In Okin's terms liberal realists are very much on the side of the democrats rather than the liberals.

Whatever the merits of these two approaches, I highlight merely the danger of conflating them. I also do not offer any counter to alternative justifications for democracy under nonideal conditions. For example, nothing I have said contradicts an argument like Christiano's that existing democracies have a better track record in securing other rights, economic success and other benefits (2011). I argue merely that by defending democracy in such terms there is a risk of understating or ignoring many injustices that persist in existing democracies due to shortcomings in the way laws are legitimised.

3. Two Examples.

3.i. Gutmann and Thompson.

Gutmann and Thompson defend a conception of democratic politics in which decisions and policies are justified in a process of discussion among free and equal citizens or their "accountable representatives" (2000: 161). They outline a process of deliberation

where the content of political discussion is not regulated, but citizens are subject to norms around deliberation based on principles of "reciprocity, accountability and publicity" (168). Their work has been credited with beginning "to make deliberative democracy look like a complete theory", because it makes certain conflicts in nonideal theory "tractable" (Dryzek 2000: 17). They echo Rawls in arguing for a theory that "contains a set of principles that prescribe fair terms of social cooperation" based on "the fundamental principle" that citizens "owe one another justifications" for coercive laws (Gutmann and Thompson 2000: 161). They also identify both procedural and substantive elements of democracy (Ibid.). The alleged strength of the theory relative to Rawls' is that the "range of acceptable reasons is wider than in most [Rawlsian] theories", and that it can "more readily accommodate moral conflict" (161-2). The argumentative step that enables this is the distinction between first and second order moral perspectives, where first order moral theories "aim to be the single view that resolves moral conflict", whilst second order views seek to justify positions to all to whom these laws would apply (162). They therefore prioritise the resolution of actual political conflicts over the (Rawlsian) approach of speculating what fair terms of social cooperation would be amongst a constituency of idealised, reasonable individuals.

Their theory is susceptible to the dilemma that I have outlined, because of how they attempt to position it as a second order theory whilst retaining a substantive element. The difference between these substantive claims and those of first-order moral theories is their "status" - they are morally and politically "provisional" (167). They fail to make the distinction between a provisional moral statement, and a provisional political settlement, where the former relates to an ideal of morality, whilst the latter refers to a solution to differences in nonideal circumstances. In failing to do so, they leave open the possibility of both an 'ideal' or a 'nonideal' reading of their work, but not one that resolves the tension between the two or combines them.

The ideal reading of this is easier to make - namely this is an ideal theory that acknowledges the uncertainty and pluralism of perspectives on justice, so moral statements remain provisional. Rather than commit to a single perspective on justice, a

first order view, one can plausibly claim to be able to promote more just outcomes, or outcomes that tend towards a set of reasonable conceptions of justice, through the practical reason of citizens cooperating in deliberation. This deliberation depends on their observing certain norms that are justified according to substantive moral standards, like mutual respect. These standards are valuable apart from and prior to deliberation. By this reading the norms associated with deliberation are justified prior to the account of justification, so their theory provides terms of deliberation they are justified apart from any output of the subsequent deliberation. However this suffers from similar problems to other ideal theories in application. The justification for these norms, even qualified as provisional, will still be treated by some groups in actual society as simply wrong, and these groups will at some point cease to be accommodated. Indeed Gutmann and Thompson even acknowledge that these provisional epistemic judgments about justice might be challenged from within the deliberative framework by libertarians or utilitarians (174).

The hope is that this can be done in a way that ensures that people can accept coercive measures they disagree with as legitimate; Gutmann and Thompson argue that the main benefit of their account is in providing a more compelling conception of legitimacy to those who lose out in the political process (1995: 107). There are two claims made here that are open to challenge, at least whilst deliberative democracy so conceived retains a substantive element in nonideal conditions: the assumption that people behave anything like they are described, and therefore the plausibility of the theory as one of accommodation; and whether it does adequately justify coercive measures to citizens. On the latter, Gutmann and Thompson acknowledge that deliberative democracy is biased towards certain first-order moral theories, presumably liberal ones, but that this does not exclude any views (2000: 171). Assuming that citizens have political views about how society ought to be run, by which I mean a position about how society ought to be organised, (Chowcat 2000: 746-7) and that these are connected to first-order moral theories, it is unclear why a citizen whose political view is not favoured will accept outcomes that differ from their view.

A possible response to losers in deliberation is to point to the procedure itself. The problem here is that Gutmann and Thompson's procedure depends on citizens adhering to norms that many simply do not. Their system relies on citizens treating each other with respect, and deliberating in an open way according to standards of "Reciprocity, accountability and publicity" (2000: 168). More generally, deliberative democratic norms that we ought to debate sincerely and with an open mind are the "chief standards that regulate the conditions of deliberation" (168-72). Applying these standards there is little to suggest, given noncompliance with norms associated with deliberation, that actual political practice "merits the label 'deliberative'" (Parkinson 2003: 181). Unreasonable groups do not actually deliberate like this. Rather they seek to maximise their influence by any means that they feel they might get away with. Faced with conditions like this, it is not clear how states can maintain the normative standards required to legitimise deliberation to those who lose out and not regress to an ideal theory that relies upon full, but unlikely, compliance. It seems that the best that can be offered to the losers in real deliberation is to appeal to an ideal where people deliberated better as part of a justification for state authority. In such cases, their theory is an ideal one, and it ought to be applied in the ways I suggested in Chapters 4 and 5.

Alternatively, a nonideal reading would suggest that if unreasonable groups adhere to a certain framework, then they ought to be accommodated in deliberation, and that this inclusion forms part of the legitimisation of democratic outputs. The problem with this interpretation is that it is not clear how intractable differences between liberals and, for want of a better term, racist citizens can be resolved through greater communication. Such an interpretation would probably stress the benefits of a more pluralist dialogue. By this account, giving deeply unreasonable citizens equivalent status in deliberation will make it possible to find solutions to the practical question of resolving political conflict that are not available when there are tighter limits on the justificatory constituency. In debating and taking seriously those who advocate extremely prejudiced views it is doubtful that either side will come to revise their positions particularly, nor that they will come to respect or tolerate the other more. The likely outputs will be normatively 'thin', unless there is justified exclusion in some cases. This thinness is the

product of a system designed around a norm of offering justifications for positions, whilst permitting confrontational diversity of both opinions and reasons (Gutmann and Thompson 2000: 167).

A problem such a view will have to confront is that even the norms of deliberation would be subject to discussion and revision (174). At some point this will presumably become unsustainable, so some less demanding norms of deliberation will have to be enforced, possibly a norm of civility. It might well be true that many who support illiberal or populist parties make distinctions in their mind between "regime legitimacy" and "government legitimacy" (Easton 1975). That is to say that they reject the legitimacy of mainstream parties but broadly support the system. This is, I suspect, true of many members, supporters and low-level operatives of populist, far-right parties. However, it is certainly not the attitude of many elites, insofar as they have a coherent position. A minority who act to undermine confidence in regimes might gain traction - there is no reason why respect for regime legitimacy will persist indefinitely in such a situation.[6] A 'thin' mid-level theory of deliberative democracy will still face the choice of having to regulate the behaviour of some, or limit some behaviours, in order to preserve democratic norms. It will just be more permissive than the 'thicker' reading in what behaviours are permissible before that point is reached.

A normative worry with the 'nonideal' reading of deliberative democracy is that it is too permissive in permitting the terms of deliberation to be reconstituted so readily to adapt to actual events. It might lead to a point where laws are mandated that ought not be justifiable if we take seriously the underlying values of respect and reciprocity. The concern with any nonideal and mid-level theory of justification is that, in declaring some real-world process to be the definitive source of legitimate laws, it masks failures in the justificatory process that are apparent if we refer to an ideal. If deliberation is shaped in such a way that the explanations citizens give are insincere, they do not provide others with the information needed to scrutinise them, and they are never prepared to revise their views, then it is unclear why we ought to declare the result of such a process legitimate. A nonideal account of deliberative democracy must respond

to the fact that it seems to mandate the enforcement of laws that are not adequately justified. Conversely, a division of labour between ideal and nonideal theory allows some flexibility. We can recognise the general or *prima facie* legitimacy of a near-just, or partially legitimate regime without being committed to the conclusion that all laws produced by said regime are necessarily legitimate. Nonideal mid-level theories of democracy that stress the way the democratic procedure responds to existing circumstances are committed to a position where they cannot say much about the relative or partial authority of existing regimes.. Though it sounds counter-intuitive, the use of a demanding ideal theory in such cases provides a basis for a nuanced discussion of the legitimacy of specific laws and actions.

The two readings of Gutmann and Thompson's work are incompatible because the nonideal account describes a process that accommodates citizens who fail to comply with norms that the ideal reading assumes are justified prior to and independent of political justification. In this section I have argued that an ideal of deliberative democracy can shed lights on problems in the justificatory process that the nonideal account cannot. Even if I am incorrect on this point, the essential incompatibility of the views means that a mid-level theory of deliberative democracy cannot resolve the dilemma I set out in section 2.

3.2. Gaus.

So far, I have defended a version of public reason often referred to as the 'consensus' view. This is the position that public justification requires that citizens draw on public reasons that all, to some extent, can accept. Gaus offers an important challenge to this, suggesting that we might be justified in arguing for rules that we agree upon for different reasons, including 'comprehensive' (and therefore religious) ones. An atheist might, by this scheme, justify a healthcare policy to a Christian by appealing to a distinctly Christian sense of charity (1997: 208) and if they converge upon a common, desired, outcome this would be legitimate. Of course, mere convergence is not enough to justify a rule. Actors must be sincere, and have some faith in their interlocutors as

reasoners (207-8). Although we must not provide reasons that are *accessible* to all, in that a Christian may justify herself in terms an atheist cannot readily accept, our justifications must be *intelligible*, in that interlocutors must be able to understand how we reached our preference about the rule under deliberation given our existing belief system (Gaus: 2011: 280). The key difference between the consensus and the convergence views, is that the latter permits that there can be legitimate rules without citizens appealing to any common underlying reasons, and allows citizens to appeal to each other using reasons that are, if not contradictory, disjoint. (Weithman 2011: 333-4).

The alleged strength of Gaus' system is that citizens, or as he refers to them Members of the Public, must present reasons that are accessible to others who rank prospective laws differently to them (Wall 2013b: 162). This is seen as a welcome deviation from the consensus view, which relies on all reasoning "identically" (Gaus and Vallier 2009: 58), because it acknowledges pluralism about moral reasoning in a way that is both realistic and normatively appealing. Legitimate laws are those that all Members of the Public prefer to the absence of any law at all, and that are not pareto dominated by all other laws (Gaus 2016: 211).

One potential issue with constructing legitimacy in this way is that every citizen has a *de facto* right of veto over all laws. This means that in practice there could be very few, if any, legitimate laws; after all, there are people who will sincerely argue for anarchy over even the most basic liberal laws. Consensus theorists do not have this issue, as laws only need to be defended with reference to a certain set of reasons to be 'on the table'.

Gaus' way around this is threefold. First, he just assumes that people will be averse to anarchy in the end, and will tend towards a kind of classical liberalism in the long term (2016: 221). This is a weak claim that is based in part on historically contingent claims; he thinks that it applies in many modern societies, but it need not in all cases. He therefore applies certain substantive restrictions on acceptable reasoning to support his view. Second, he acknowledges that there are some views that will ultimately be

excluded from deliberation as their behaviour is simply inimical to an Open Society, or the process of exchange to which he refers (222). This is a brief and underdeveloped passage of his work, but it is important. In making this step, he acknowledges that his theory of political decision-making is idealised, because in order to function some behaviours are ruled out *a priori*. A second idealisation that Gaus applies - the third aspect of his defence - is to specify that Members of the Public do engage in deliberation in a way that adheres to certain norms. Specifically, he offers a "specific but realistic level of idealization" that Members of the Public "do not bluff, bargain, or engage in strategic behaviour" (276). They are also sufficiently well-informed that they can come to some sort of evaluative ranking of potential laws, and can then present these to others in an "intelligible, reasonable and competent manner" (283). This permits a range of levels of cognitive ability, but does rely on basic competence in reasoning, and a commitment to finding shared resolutions to social problems that at least extends beyond pure egoism (277-281).

Gaus presents a complex philosophical case to show that reasoners come to reach a coherent set of preferences on laws, complete with transitive preferences, that I do not engage with directly here. It may be that people *can* reason in such a way. The reality is , though, that they do not. To interact in the way that Gaus describes, that is sharing intelligible sets of reasons with other citizens to justify preference rankings around laws, is to comply with norms surrounding deliberation that most citizens do not comply with. In particular, the requirement not to bluff and to present one's views sincerely are rarely kept in practice, and for good reason, as to do so might leave one open to exploitation through the strategic behaviour of other citizens.

To make this point, contrast Gaus' account of political deliberation with the findings in *Democracy for Realists*, a recent volume by two political scientists, Achen and Bartels, that sets to explore reasons for voting behaviour (2016). Take, for example, Gaus' assumption that citizens might present information in a competent way. Presumably this means being reasonably well informed, but citizens are often fairly ignorant on policy issues (277-80). Being politically informed is a time consuming behaviour, and the

imperative to be well enough informed to reason as Gaus requires will conflict with other demands. Real citizens face the problem that "[w]ithout shirking more immediate and more important obligations, people cannot engage in much well-informed, thoughtful political deliberation, nor should they try" (Achen and Bartels 2016: 9). Therefore, Gaus demands that citizens commit to public reasoning in a way that in practice they may not, and that requires a moral decision to invest time in their reasoning capacities over other, potentially worthwhile causes.

This is not in and of itself terminal for the position that the convergence view reflects our political reality, and therefore might be presented as a nonideal theory. What may be is the fact that voters are frequently mistaken over the extent to which their views align with political parties and others (270-2). Not only that, but their views are often incoherent (12), and rather than being based on robust belief systems are reflexive of existing social cleavages (218-2). Citizens tend to prefer laws because members of social groups that they identify with advocate them. Whether or not political parties present intelligible reasons, this is not the reason that most citizens come to support or oppose them. As such, Gaus' account is more highly idealised than he lets on, as it abstracts away from issues of group identity. The convergence view relies on people being able to rank their own preferences on a matter (at least sub-consciously) and to be able to discern both the views of others, and intelligible reasons that they support those views. This is, as Achen and Bartels show, not how people come to acquire and defend their views on actual policy issues. The atomised citizens that Gaus describes, and that are required for the convergence view to work, are not like citizens as they are. In this sense, it is a highly idealised, constructivist theory like the consensus view; the theory assumes people not as they are, but as they ought (according to the theory's adherents) to be.

Ultimately, the difference between Rawls' and Gaus' views lie in the way they conceive of justice itself, not the way that they think democratic procedures interact with them. Both justify democratic procedures by pointing to their justice-promoting effects. Both of these are also, despite Gaus' protestations, ideal theories, in that they imagine these

procedures by making assumptions about people that do not hold true in real life. The difference between consensus and convergence views is, as Weithman notes, "overdrawn", given the similarity of the structure of the arguments, and the fact that they are underpinned by many of the same normative assumptions about ethical individualism and citizens warranting respect as reasoners (2011: 335). The idealised Members of the Public that Gaus portrays still argue in good faith, so are still committed to core moral values of respect during deliberation (336-8). The main difference between the way the views are portrayed is that those on the convergence side of the debate, typified by Gaus, have looked to re-cast these value judgments as factual statements about practical reasoning and the formation of preferences. They are wrong, as the convergence view still depends upon complying with the norms of deliberation and reasoning in a way that people do not in the real world. Even if it is less demanding that the consensus view in an abstract sense, it remains dependent on citizens complying with a set of norms that they usually do not. For this reason, it remains a piece of ideal theorising, in the sense that I have described it. Any application of the theory in actual politics will need to consider how to mitigate for this noncompliance without sacrificing the normative heart of the theory, particularly its respect for the individual.

4. Conclusion.

In this chapter I have defended an understanding of normative democratic theorising that preserves a strong distinction between ideal and nonideal theory. I have argued that both types of theorising are important, and that attempts to bridge the two through 'moderate' idealisations are flawed. Theories that set out to do this may still offer coherent alternative ideal theories, but cannot be constructed so that they are more readily applicable without sacrificing important normative content.

I now turn to applying the framework that I have defended to three specific issues: freedom of expression; institutional support for parties; and the question of whether there are mitigating factors that individuals might use to challenge sanctions that

interfere with their political rights.

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[1] 'Tragic' is the term used by Jubb and others to describe conditions under nonideal conditions (2012). The point is that we ought to acknowledge just how far away we are from realising an ideal, and the extent of existing injustices.

[2] Gutmann and Thompson advocate something like the liberal constraint on legitimacy I describe in Chapter 2 Section 2.

[3] I explain the difference between consensus and convergence views in Chapter 2.

[4] There has been a wealth of literature on what feasibility and achievability actually means, see Lawford-Smith (2013).

[5] See also Heinze's disaggregation of liberal and democratic rights in his discussion of hate speech (2016: 5).

[6] I allude to the fact that there is emerging evidence that attitudes to regime legitimacy are hardening in the epilogue. For liberals and deliberative democrats this should be a cause for concern, because ultimately all democratic systems rely on some level of adherence to unenforced norms.

Chapter 7: Freedom of Expression.

In the previous chapters I made the case that political deliberation in which all can participate as free and equal citizens is a necessary condition of legitimate law-making if one accepts the central tenets of political liberalism. This deliberation requires that citizens possess a range of political rights, including 'negative' rights like freedom of expression and association, and a 'positive' right to state support in ensuring that they have sufficient access to political platforms, for example through funding for political parties and support for interest groups. I then suggested two conditions for when these political rights might legitimately be restricted on a case-by-case basis:

- **C1** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state (in cases where the right is 'positive', such as entitlement to funding), in activity that causes severe harm or injustice to another.

- **C2** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state, in activity that undermines the possibility of legitimate policy-making.

One of these conditions being met is a necessary but not sufficient condition for political rights being compromised. Furthermore, one of the conditions being met provides a *pro tanto* reason to restrict political rights, because failure to do so would mean that some other citizens are not treated with respect and dignity. However, there will also be a *pro tanto* cost to interference, even in the political rights of unreasonable citizens.[1] This is because deliberation ought, where possible, to adhere to an ideal of deliberative inclusion, which restriction of political rights necessarily compromises (Cohen 1997b: 416; 423).[2] This case is stronger in the case of 'negative' rights such as freedom of expression, because the measures that are practically required to limit speech will require a greater interference in individual liberty.

This situation is a feature of nonideal theorising that I identified earlier in the thesis.

Ideal conditions in Rawlsian literature are defined, in part, as those where all will comply with the demands of justice. Under such conditions no citizen's actions will meet **C1** or **C2**. However, when people behave unreasonably under nonideal conditions and their actions meet **C1** or **C2**, the political rights of free and equal citizens come into conflict. Public justification requires that all have an equal political voice, but the political rights that citizens are entitled to cannot be realised simultaneously by all citizens when some act undermines the equal political status of others. This remains the case even when the state can limit such behaviour, because it undermines the political voice of citizens through such an intervention. It is important to note that this conflict is between claims based on rights that are non-consequentialist, and derived from the same principle of equal respect for persons. Where these claims are in conflict the choice is therefore a trade-off between two sub-optimal options that cannot be resolved by appeal to any values that uniquely justify one course of action over the other(s).

To apply this to Freedom of Expression (FoE), consider the following dilemma: a citizen is making propaganda that depicts a group within society as untrustworthy. Over time this prompts others in the society to treat members of this group as inferiors during deliberation. The members of the group under attack feel the state should intervene and prevent the citizens circulating this propaganda to protect their status in public deliberation; the citizen in turn claims protection from censorship based on FoE. Both citizens are therefore invoking rights that are based on their entitlement to be treated with equal respect in deliberation in a way that is not easily resolvable one way or the other. Using real-world examples of far-right politics that mirror this scenario, I provide a fuller account of what the typical features are of cases where the decision ought to be to restrict the FoE of the propagandist.

The contribution is therefore threefold. Firstly, I show that **C1** and **C2** apply in the case of speech acts. In Section 2, I outline what kinds of speech act meet **C1.** After a brief discussion of the 'harm principle' and the nature of harm through speech, I suggest that there are instances where hate speech can be harmful. In the first section of this chapter I briefly expand upon Waldron's work, and defend this claim. I illustrate this using the

example of the rhetoric used by Front National in France where they have made an issue of trying to suspend the provision of non-pork and halal meals in schools, to show how speech acts can perpetuate a distributive injustice.

C2 is met when acts of expression are used to persistently de-humanise or otherwise undermine groups within society to the point that other citizens come to treat them without due respect during political deliberation. Sometimes **C2** is met because the persistent use of certain expressions over time inculcates behaviour that causes citizens to disregard the political rights of some others. Alternatively, such speech can undermine the process of deliberation as a whole, by inculcating a norm where some groups are not taken seriously as interlocutors. Both of these satisfy **C2** because they undermine a process that produces legitimate laws. However, the dilemma remains as to whether the cost of interference to prevent **C2** being met may still be the greater cost to deliberation. Section 3 sets out an account of how acts of expression come to meet **C2** that ties this to the idea that citizens can come to suffer an epistemic injustice in the deliberative process.[3] I argue that there is a harmful subset of what has been defined in the literature as 'propaganda' that saves to re-shape background norms and knowledge systems in a way that undermines deliberation.

Far-right parties often use language in such a way both by accident and design, and that in some cases this warrants restrictions on their activity, especially the withdrawal of 'positive' political rights like funding, and access to certain platforms. I argue that there are two harmful effects of propaganda - that it serves to exclude some reasonable positions from political discourse whilst serving to legitimise unreasonable positions in the eyes of the public, and that it creates an environment in which some non-privileged groups are not treated fairly in deliberation. I then discuss two types of expression to which this might apply - racial epithets in campaign imagery and the use of dehumanising language by public officials. Violations of **C2** by public officials or recognised campaigns are much more damaging to the process of deliberation. There is therefore good reason to suggest that there are many speech acts that might not warrant a criminal prosecution for hate speech, but might be sufficient to justify excluding an

individual from office, or 'no-platforming' them within some political fora.

The chapter serves as a defence against liberal arguments for completely unrestricted FoE, and addresses concerns that, if accepted, would mean FoE poses a severe problem for the way I construct **C1** and **C2**. Section 4 challenges a body of literature that discusses political rights in similar terms to those that I use, but affords FoE particular status above other political rights. This is a variation on the 'price we pay' arguments that I outlined in Chapter 4 Section 5, applied specifically to FoE. These arguments acknowledge either the harm in hate speech as a *pro tanto* harm, or that democratic deliberation can be subject to distortions, but argue that the cost of restricting expression is especially high and outweighs these, the upshot being that FoE ought to be upheld almost without exception. I address three such arguments. First, I consider Dworkin's argument that restrictions on freedom of speech undermine legitimacy because they undermine the process of consent by the governed. His argument, crudely, is that permitting citizens to use racist and exclusionary expressions in political discussions is the price we pay in order for the state to be able to justifiably impose laws preventing racial violence or discrimination; if racist citizens are prevented from expressing themselves in this way, laws restricting their actions are not justified. Second, I reject the argument that restrictions on freedom of expression necessarily undermine the epistemic benefits of deliberation under nonideal conditions. In doing so, I relate my position to a Millian defence of FoE on the basis that it creates a beneficial pluralism in discourse. Third, I address the concern of creeping authoritarianism. This,is pertinent to the question of restricting propaganda, as this tends to take place over a period of time, and is less easily demonstrable than the use of threats, or offensive language.

Throughout, I use the conditions I set out to develop principled responses to some of the real-life dilemmas that arise around whether to restrict FoE, especially in response to the kinds of expression used by political groups and parties like the far-right.

2. Acts of Expression That Meet C1: Speech that Promotes Harm or Severe

Injustice.

2.1. Harm.

I assume that a basic version of the harm principle is publicly justifiable, and that the state is under an obligation to restrict any behaviour, including acts of expression, that lead directly to harm (Gaus 2011: 369). Few would deny that speech acts that can be demonstrated to directly provoke actual harm ought to be restricted, and therefore few argue for completely unrestricted FoE. For example Dorsen argues that the offering of a bounty on another citizen's life is illegitimate in an essay that otherwise argues for unrestricted FoE (1988: 133). The debate around the harm principle, however, tends to be over how far we can establish a causal link between acts of expression and harm, and how to define harm, for example whether psychological duress counts as harm.[4] In the case of the far-right, there is some evidence to suggest that increased support for parties in an area, or parties gaining power at a local level, has been accompanied by an increase in racially motivated violence. This trend is apparent in France where Front National have established strongholds in certain cities and municipalities, though it is impossible to show conclusively that Front National's success was the causal factor (Emmons 1997: 363). Implementing sanctions in such cases will depend on proving such a causal relationship, and showing that there was intention, or at least wilful negligence, on the part of the actor being charged. This will be almost impossible to prove in cases where no direct threat is made. The far-right parties that I am studying are specifically those that do not actively incite violence, so cannot be charged on such grounds.

For my purposes I use a fairly narrow definition of harm. I see some of the deeper harms that Waldron and others use to argue to restrict freedom of speech not as individual harms but as restrictions of FoE and so meeting **C2**. This is partly a semantic point, in that there are cases where I reach the same conclusion as Waldron with regards to grounds for restriction (or not), but defend this with reference to **C2**, whilst he cites a harm inflicted by the action. For example, racial epithets can, for Waldron, become a

"disfiguring part of a social environment" under certain conditions, and if re-produced frequently (2012: 117). I agree, however, I argue that their adverse effect occurs within the deliberative environment, and the reason that this kind of degradation is illegitimate is that it prevents people from participating in politics as equals, thus meeting **C2** rather than **C1**.[5] The idea that hate speech promotes a "group libel" or "group defamation", that is that it inculcates harmful beliefs that are untrue about a group is central to Waldron's argument for restrictions on hate speech (39-40). I offer a similar argument, but argue that many of the acts he has in mind actually meet **C2**. In Section 3.2. I use the language of epistemic injustice to offer an account of the impact of such speech acts on citizens' capacity to deliberate as equals.

There are still cases where I feel that politicians or those in public office ought to be sanctioned for trying to promote harm against others. This is in part because less specific threats by those in public office are more credible. For example, I think it was correct that Catherine Mégret, briefly the Front National mayor of Vitrolles, ought to have been sanctioned for stating it was "her job to scare people who did not belong" (Emmons 1997: 362). Although she did not directly threaten any individuals, such a remark from a person in public office could lead to the targets of her remarks, rightly, feeling less secure. It implies an abdication of her responsibility, as a part of the state apparatus, to protect all citizens, and might encourage others to inflict harm because of an apparent tacit endorsement by the state. This is a case where the demands of public office are very different from those placed on citizens in general and should be subject to a more stringent set of enforceable duties.

2.2. Injustice.

I argued previously that in cases where the outcomes of laws deviated too far from any justifiable conception of justice, then this undermines the legitimacy of that law. There are certain speech acts that provoke actions or cause behaviours that perpetuate injustices beyond this point. Admittedly, these are few and far between. This is partly because the level of injustice a person's behaviour would have to cause to warrant for a

liberal state to interfere with it is much higher than the level of injustice that a state's laws must reach before they cannot be justifiably enforced on citizens (Gaus 2011: 341-5; Scanlon 2003a: 19). It is also unlikely that a non-state actor will be able to perpetuate such an injustice, especially through acts of expression alone, without having first behaved in a way that meets **C2**. It is highly probable that there will be a stronger case for a sanction to be placed on them because of the distortionary effect their behaviour is having on deliberation. Nonetheless, there are cases where certain acts of expression might warrant limited sanction because they condition people to behave in a way that causes such a severe injustice that the state's failure to act would undermine its legitimacy.

Two examples illustrate when this might be the case. Scanlon suggests such an injustice is present in the way that broadcast rights are auctioned off in the United States. His point is that this commodification of political rights amounts to a "distributive injustice", because it allows for a disproportionate influence for the most well-off and enables rent seeking behaviour (22). This is a case where faulty, unjust institutions mean that FoE can be abused in order to undermine the reasonable claims of others. The case for interference based on **C1** is stronger than that based on **C2** here, because the effect on deliberation is smaller than the distributive injustice that is caused. Whilst American citizens retain many of the political rights they are entitled to, political rights are used as a way of protecting behaviours that cause injustices of the kind that count against the legitimacy of the state. The problematic behaviour is the use of political acts to promote injustice, not undermine deliberation - when considering this case, **C1** ought to feature at least as prominently as **C2**.

An example of behaviour by the European far-right that I feel warrants sanction because it meets **C1** is the slightly bizarre fixation that Front National has with school dinner policy. In Marignane, where they held office in local government, canteens were prevented from serving alternative options at lunchtime, a move that obviously had a greater effect on Jewish and Muslim children when the only option at lunch time was either pork-based, or non-halal. Despite attempts to rationalise and justify the policy on

economic grounds, FN literature at the time included statements like "In Gaule you eat like the people of Gaule" (FN cartoon cited in Davies 1999: 189). This controversy over school meals has raged whenever FN has controlled a local municipality, with one (ultimately successful) candidate for election in the Hayange vowing to turn the schools under his jurisdiction into a "pork fest" (Kleinfeld and Kleinfeld 2014), and the leader of FN, Marine Le Pen, emphasising the issue in speeches. The reason I focus on the rhetoric here is twofold. Firstly, the policy was initially limited in scope to towns controlled by Front National, and was used as a way to introduce the more assertive, secular discourse into debates around education. Secondly, it is an example of rhetoric eventually shaping norms – the policy has been picked up by the centre-right in recent years.

The policy has not been successfully implemented for any significant amount of time, but expression of this kind can still undermine the children's capacity to fully participate in the education they are entitled to. This is therefore a promotion of an injustice through a speech act Statements like the two I cite above, if repeated by people holding political power, stigmatise Jewish and Muslim children and cultivate an environment where they cannot participate in the classroom on an equal footing with their peers. The injustice occurs because for children to obtain the education they are entitled to, the classroom environment must be one of respect amongst pupils and educators. The debate around school meals establishes a lesser, but still existent, distinction between children, so perpetuates such an injustice. This depends on the empirical claim that children who are treated as part of an 'out' group struggle in education. There is certainly unease about any segregation within schools, as can be seen by the legal challenges to the segregation of Roma children in Italy (at the behest of other children's parents) as discrimination (see Farkas 2014). Whilst I do not have the space or expertise to evaluate the evidence regarding stigma and education, I assume that it is at least possible to conceive of harmful effects of such a kind accruing. Therefore, there may be cases where **C1** is met due to the kinds of injustice brought about through speech acts. Although these cases might be rare, it is for this reason that I include the clause about injustice in **C1**. I now turn to the main focus of the project, which is speech acts that

meet **C2.**

3. Speech Acts that Meet C2: Undermining Deliberation through Acts of Expression.

Speech acts that meet **C2** are those that can be shown beyond reasonable doubt to cause citizens to disrespect others during deliberation. This relies on the empirical claim that speech acts can affect our treatment of others over time. Whilst this is intuitive, and there is an observable correlation between types of language used and certain behaviour - an extreme example is the increased presence of such language in countries where genocidal regimes come to power – it is much harder to demonstrate that this as a causal relationship (Tirrell 2012).[6]

Implicit in the argument that a speech acts meets **C2** is the empirical claim that acts of expression can influence people to behave in a way that "transgress the basic ground rules of deliberation" (Heyman 2009: 176). These acts of expression serve to undermine either the political rights of others, and with it the ideal of inclusion, or the process of deliberation (177). In both cases this undermines the equal political voice of citizens.[7] Political rights in the scheme I have defended are treated as "relational rights", that is they focus on a shared activity of producing legitimate laws through deliberation that requires that they adhere to a certain code of conduct. When one behaves in a way that undermines deliberative procedure, this right is no longer subject to the same protection (162). The status of FoE as a protected right is therefore best understood as part of a system of rights that are held in equilibrium with others (Waldron 1993). These structures ought to embody the normative value of respect for others, and the ideal of treating all citizens with respect (Feinberg 1980: 151). Citizens can therefore invoke rights like FoE as a strong *prima facie* claim against interference, but these may be overruled with reference to such values in an all things considered judgment (153). This position, that FoE is a right that has value only as an articulation of deeper values such as respect for persons, and as part of a functioning democratic system is a theme in the ECHR ruling charter on expression.[8]

There are two main ways that a speech act can undermine this process that I shall consider in turn. First, they might inculcate and legitimise behaviour that serves to undermine the institutions where deliberation occurs so that in future more unreasonable policies might be imposed. Second, it might serve to inculcate behaviours that prevent other citizens from exercising their political rights or participating in deliberation effectively. I expand on these below, then set out some of the characteristics of speech acts that might serve to meet **C2** by falling into one or both of these categories of speech. Before doing so, recall that speech acts that meet **C2** may therefore be restricted, but this is not a sufficient reason to do so because of the costs of exclusion from deliberation. When speech acts meet **C2**, certain actors may find themselves in the dilemma I described in the introduction. The nonideal choice in this situation when confronted with an act that meets **C2** is that either the state must restrict their expression, thus undermining deliberative inclusion allow deliberation to be undermined as a result of the conduct of some participants. The nonideal choice is the course of action that, bearing in mind the empirical implications, causes the least deviation from a liberal ideal of deliberation under public reason, and by extension the production of legitimate laws.

3.1.a. Normalising Unreasonable Behaviour.

In his wide-ranging work on propaganda, Stanley identifies pernicious patterns of speech that mask unreasonable policy positions by presenting them in superficially reasonable terms. He uses the term "reasonableness" to express the norms we associate with participation in deliberative democracy, grouping most public reason theorists and deliberative democrats and arguing that this is, broadly speaking, their position. He places both Rawls and Gutmann and Thompson in this group (2015: Ch3, *fn 29*).[9] People can act in a way that appears to comply with these norms, and perhaps does in a limited sense, whilst actually seeking to undermine the ideal of public reasoning, something he calls "undermining propaganda" (57). This kind of propaganda meets **C2** but not **C1**, in that each individual act of propaganda will not perpetuate an injustice or

inflict harm, but over time it can serve to undermine the capability of citizens to challenge unreasonable policies that impose unfair burdens upon them. The process of producing (somewhat) legitimate policies is eventually undermined.

Far-right parties often use this kind of speech, as well as succumbing to demagoguery, which he defines as "a contribution that presents itself as exemplifying the norms of public reason but makes a contribution a rational person would recognize to be inconsistent with these norms" (120). By adopting norms of civility, actors can effectively project reasonableness regardless of the positions they advocate or their wider conduct. This is important because 'reasonableness' in the eyes of the public is really a proxy for legitimacy. The appearance of adhering to the basic norms of deliberation projects justifiable authority in the public sphere. Parties that can appear reasonable in the everyday, non-Rawlsian sense will be seen as parties that are acceptable to vote for, and that ought to be able to enforce policies relatively unimpeded wherever they gain a mandate. Far-right groups are able to exploit the disjunct between public perceptions of reasonableness (and therefore legitimacy) and the standards in liberal, ideal theory. In the eyes of the public, reasonableness is something that is established within a certain context at a certain time, and as such bears little relevance to an a-historic, normative standard (169).

Whilst politicians clearly strive to appear reasonable and respectable in Western democracies, the charge of projecting liberal values that they do not actually adhere to might appear more applicable to the 'centre-right' than the far-right. After all, the far-right tends to encourage and thrive on their outsider status - they market themselves as saying the things that the mainstream or elites won't but that people are really thinking. There are, however, ways in which they encourage this kind of distortionary propaganda. By presenting themselves as the outliers of reasonable, respectable discourse they re-define what it is that more mainstream parties can, in the eyes of the public, reasonably argue. Hence electoral success for the far-right has often been accompanied by the emboldening of centre-right parties who then deviate from liberal norms to a greater extent, whilst still appearing moderate in comparison. Of course, this

is not to say that these parties are in collusion - there is not a grand conspiracy of illiberals seeking to appropriate the norms around discourse and gradually shift perceptions of what is permissible. The actual motives of centre-right parties, though, is of secondary importance given that success of the far-right tends to bring about both exclusionary policies and a more exclusionary discourse. In this way, the European far-right have managed to subvert democratic norms from within a democratic system. They have typically used de-humanising language to gradually cultivate an environment in which unreasonable, discriminatory policies are perceived as legitimate that would not have been acceptable previously. Crucial to this process is closing off the avenues available for dissenting voices, and discrediting them. This has been a successful tactic, in part because it is hard to prove, so building a case for sanctioning this behaviour is important.[10]

The use of dehumanising language over a prolonged period serves both of the purposes of propaganda that I have laid out - it normalises unreasonable policies so that they appear reasonable, and it serves to disenfranchise members of the population so that they cannot deliberate as free and equal citizens. The latter has been characterised as an attempt to construct a "diagnostic framework" in which a variety of social problems are attributed to minority groups through inference, a strategy initially pursued by the French far-right, in the late 1970s, but taken up across Europe in the 1990s (Rydgren 2004: 478). The desired consequence is often that centre-right parties came to embrace more hardline policies, whether out of a concern for their electoral prospects or because these were their preferred policies anyway. For example in Austria, Haider's rhetoric would border on outright bigotry and anti-semitism at times (Connolly: 2001), as well as repeatedly seeking to reinforce a divide between natives and outsiders (Carroll: 2000). Both of these strategies appear to have had some effect. The Austrian government of the early-2000s in which the Freedom Party was the junior (and as time went on increasingly marginalised) partner implemented a series of small-scale measures designed to undermine the status of immigrants. These included the withdrawal of language lessons for recent immigrants and tighter restrictions on people migrating to re-join their families (O'Brien 2003: 13). Perhaps the most marked

example remains in France where terms like "invasion" of migrants and "look and smell" of foreigners became, if not totally normalised, much more apparent after a concerted effort by Front National to control discourse (Fysh and Wolfreys 2003: 141).

Finally, far-right parties have at times presented themselves as deepening some liberal norms - a kind of warped liberal nationalism or xenophobia. To bolster the positive case they make when contrasting themselves with minority groups, they often invoke this adherence to liberal norms. The clearest example of a far-right party managing to secure greater support through appearing reasonable, and by publicly endorsing some liberal norms was in Holland at the turn of the century. Pim Fortuyn secured a rapid rise to prominence and his party, Lijst Pim Fortuyn, became a junior partner in a coalition government in the immediate aftermath of his assassination. There were no obvious changes in the message of his party compared to radicals who had gone before, but he was able to exploit his academic persona and increased concerns about security to ensure much greater exposure. Fortuyn crafted a media persona through which he was able to benefit from the effects of "consonance" - that is repeated exposure in major outlets (Koopmans and Muis 2009: 659-60).[11] Through this process, he was able to legitimise his party in the eyes of the public, as well as being able to re-shape certain discourses.[12] In particular, he was able to fuse his anti-Islamic agenda with a discourse of protecting liberal values. The ruling Christian Democratic Party responded to his success by implementing compulsory - but not free - citizenship lessons for immigrants and cutting funding for the centres that processed asylum seekers (Roxburgh 2002: 160). **C2** was met in this case because the process of democratic deliberation had been subverted, to the point that substantive injustices that ought not be tolerable in a legitimate regime were enforced. Not only this, but the status of Muslims in deliberation in Holland has suffered as a result, because disrespect towards them has been normalised within democratic deliberation.

3.1.b. Undermining Other Citizens' Political Rights, Especially Minorities.

Speech meets **C2** if it serves to disparage or discredit minorities within deliberation.

They suffer an epistemic injustice, of the kind that Fricker describes, and that I introduced in Chapter 3, Section 5. Recall the two component aspects of epistemic injustice, or being doubted as a knower:

> "Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word; hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive resources putting someone at an unfair disadvantage when it comes to making sense of their social experience" (Fricker 2007: 1).

I apply these concepts to deliberation in particular. So individuals or groups suffer a testimonial injustice when they are treated in political deliberation as if their testimony is less reliable than others for no good reason. To normalise ignoring another individual in the political process is to inflict such an epistemic injustice, which in turn prevents them from participating in discussions, or scrutinising policy. One of the things that separates speech that meets **C2** from regular speech is that it enables citizens to present information in such a way that it is not verifiable or falsifiable in a conventional sense (Walton 1997: 405). Illegitimate speech is used to undermine the process of deliberation and discussion. The goal in deploying hateful language over time is to mould background knowledge or assumptions so that certain attitudes eventually go unchallenged. The process of shaping knowledge through discourse is a constant feature of everyday conversations - Maitra gives the example that we might debate the prospects of the England football team at the next world cup even though they are yet to qualify, and that in the conversation we just assume that this will be the case (2012: 111-2). Such speech becomes illegitimate when it is constructed in a way to prevent the problematic background assumptions that it introduces from being challenged. Speaking in this way commits the kind of 'group libel' that Waldron is concerned about in his account of hate speech, and closes off the avenues through which these might be challenged.

To illustrate this, consider climate change denial. There is a categorical difference between people who seize on certain scientific reports out of context to pursue an agenda against climate change legislation, and those who discover these studies, misinterpret them and come to believe that the effects of climate change are overstated. What matters here is not that those who espouse this position are saying something that

is untrue, and arguing for policies based on this; everyone does this in some policy area at some time. **C2** is met when they attempt to distort deliberation so that either some actors are de facto excluded, or some reasonable positions are side-lined. Typically in the case of climate change denial there are two ways in which this can happen. The first is that those involved are simply being insincere and arguing for a position they know to be false for individual gain. Secondly, the issue is that they are attempting to exclude legitimate voices, and prevent citizens having access to information on the subject. Climate change deniers often attempt to cultivate the image of the scientific community as a homogenous whole, and then seek to marginalise scientific voices. An example in recent times is the repeated use of subpoena powers by the Science Committee in the American House of Representatives to target scientists who have argued for greater measures to combat climate change. Such measures are designed to intimidate and inconvenience these scientists, and contribute to their being silenced in the public domain.[13]

I propose an alternative definition of hermeneutic injustice specific to discussion about public reasoning that refers to any speech that amounts to a *concerted attempt to undermine the deliberative capabilities of any group of citizens*. If individuals are to make use of the political rights that they are entitled to they must have the opportunity not just to participate in political organisations, but to do so in a way that means that they are taken seriously by others. Speech acts can undermine this if a language system is established within political discourse that systematically undermines some groups by failing to provide adequate means for them to express their concerns, and permitting others within discourse to disregard their status as reasoners. This relies on a broader assumption that language and speech acts can either shape institutions or conduct in a way that stops some citizens using their political rights.[14] If stigma becomes entrenched within a language system that unjustifiably discredits an individual or group, then that individual or group will come to be treated with less respect than is required by political liberalism. An important process in the production of this stigma is what some writers on this topic have referred to as "licensing", whereby these ideas only become entrenched because those who spread them are granted some level of authority to do so

(Maitra 2012: 111-116). This authority can be achieved at all aspects of the political spectrum (96), and occurs anywhere where such assertions go unchallenged.[15]

A problem that unreasonable propaganda poses for "non-privileged" groups is that it establishes negative racial or cultural stereotypes as 'true' in the eyes of the public. Members of these groups are then forced to deliberate as if they were true (Stanley 2015: 163). This point can be articulated in Kantian terms as well - by treating members of the justificatory constituency as part of a group that is erroneously stigmatised we end up disregarding the capacity for reason of all members of that group (Korsgaard: 1996: 296; Stanley 2015: 266). Policies produced in an environment in which people are not treated as autonomous cannot satisfy the liberal requirement of legitimacy that policies be justifiable to all reasonable citizens. Citizens who are forced to deliberate under such conditions have a justifiable case that they need not treat the laws produced at the end of the process as legitimate, thus **C2** is met.

3.2. Defining Propaganda That Meets C2.

Speech that meets **C2** in these ways will tend to be of a kind that has been described by Stanley, amongst others, as propaganda. In this section, I briefly draw up some characteristics of such propaganda. I deal only with the subset of what could be called 'propaganda' in both the everyday and academic sense that meets **C2**. It is not as an exhaustive account of what might count as propaganda by most definitions, including Stanley's own. I do not claim that all propaganda is worthy of sanction by the state, or that it meets **C2**.[16] However, the literature in this area is worth drawing upon as it identifies certain characteristics of speech acts that meet **C2** in nonideal conditions, in particular the fact that such speech acts shape background norms and assumptions, and the process by which they do so.

Below I list some of the common characteristics of propaganda that meets **C2**, which I refer to as simply propaganda from this point on. These are not necessary or sufficient conditions for acts of expression meeting **C2**, but rather common features of such acts

of expression in the real world. However, there are very few plausible cases of speech acts that meet **C2** and not **C1**, and at the same time do not possess any of these characteristics.

3.2.a. Propaganda as Goal-orientated.

Walton suggests that propaganda be seen as "instrumental" dialogue that seeks to force people to perform a particular action, as opposed to a concerted attempt to shape beliefs (1997: 394-5). For my purposes, I suggest that the ambition of propaganda is to advance a policy position, or to better ensure the passage of such laws and their enforcement; in this sense it is goal-orientated. This use of acts of expression to attempt to promote a certain action is different from looking to persuade others or debate with them, as the ambition is to ensure certain kinds of behaviour, rather than to shape beliefs. Sincere attempts to critique positions cannot meet **C2**, because to attempt to persuade someone, so long as you are also willing to be persuaded yourself, is a sign of respect. If someone is acting in a way that they believe respects all others as equals, removing political rights by invoking **C2** is wrong. It is also counter-productive, as anyone seeking to persuade others is likely to be somewhat sympathetic to the goals of political liberalism.

In practice, there is no clear divide between attempts to inculcate action and attempts to critique a position in political debate. Propaganda that meets **C2** is set apart because it is designed to induce an action rather than persuading other citizens *qua* autonomous agents of the merits of that action. It attempts to bypass reasoned debate entirely, and therefore transcends mere rhetoric or sleight of hand. It further violates deliberative norms because no attempt is made to deliberate with others with the intention that the propagandist's own view might be change. It is an asymmetric attempt to disrupt discourse rather than a sincere attempt to participate it. There will therefore often be a degree of insincerity involved in the use of propaganda. In practice acts of expression that are propagandist will often be positioned in absolutist terms, and will not be constructed to inform, persuade, or promote discussion.

3.2.b. Context is as Important as Content.

The context in which something is stated, and the relative authority of the speaker matters more than the content and (un)truthfulness of the remarks in determining whether it meets **C2**. This is because to meet **C2** an act of expression must inculcate certain behaviours in other citizens. Many of these behaviours are deeply engrained deliberative practices informed by background beliefs. These are fostered through conditioning over time rather than in response to specific arguments. For this reason, the status and authority of the speaker is important. Speakers that hold public office, or possess a formal platform are better placed to contribute to a background public culture.

To illustrate this, recall the example of Catherine Mégret arguing that as mayor of Vitrolles, she ought to seek to unsettle foreigners. Such behaviour meets **C2**, because it encourages others to disregard them in political deliberation. This would not necessarily be the case if a member of the public had stated this in passing, however distasteful this might be. There are unique problems that arise when a political representative makes such a statement. Due to the status of representatives, a declaration that certain groups are unwelcome can help to inculcate or perpetuate an existing epistemic injustice. Those in positions of authority have disproportionate influence in shaping background norms, and adopt roles whereby they can, in part, legitimise behaviours. There is also a more fundamental problem that part of a representative's job is to act as an intermediary for the political voice of all their constituents, not just those that voted for her. In Mégret's case, as with all other representatives, these constituents will include those who are not native by her characterisation. The declaration that some citizens ought to be made to feel uncomfortable in politics amounts to an abdication of a representative's duty to represent them as equals in public deliberation.[17]

There are three reasons why it is best to avoid including some constraint based on 'truth' in defining propaganda. First, true and commonly agreed upon facts can be used in a way that nonetheless undermines deliberation, the most obvious example being statistics being systematically quoted out of context. Second, any notion of moral 'truth'

appears to impute all those who are unreasonable as participating in unreasonable propaganda when they articulate a political position. I argue that unreasonable people remain entitled to a full set of political rights in most instances, and for an ideal of inclusion in deliberation. It therefore runs counter to my argument to include some notion of truth directly linked to the epistemic demands of reasonableness as a sufficient condition for meeting **C2**. Finally, much of the public reason project is committed to the idea that there are certain views that we can simultaneously argue are false, whilst at the same time respecting that others are reasonable in holding them. An implication of this position is that it is possible to argue for a position that it is possible to defend in reasonable terms in a fashion that meets **C2** if those advocating this reasonable position are insufficiently respectful of other interlocutors.

3.2.c. Propaganda as Systematic.

Most acts that meet **C2** will be systematic, because hate speech as such, even if it is targeted, will not be able to bring about the subversion of political rights that I envisage. By systematic I mean part of a process wherein the structural disadvantages of some groups within deliberation ossify; speech that meets **C2** will typically be part of some wider pattern or effort. Propaganda that meets **C2** may be systematic in one of two ways. It might form part of a campaign by a particular group. Thus the speech act can serve to entrench norms, or legitimise otherwise problematic behaviour. An example here might be Front National's 'charcuterie parties' – mirroring the concern about school meals, they would hold rallies serving pork-based and non-halal products near mosques and in areas with a high Muslim population. This was clearly an intentional attempt to inculcate exclusionary behaviours towards Muslims, but it does not cause an immediate harm or block any other citizens' capacity to access goods that they are entitled to, so does not meet **C1**. It is systematic in that it cannot be understood outside of the context of their wider campaign. A sincere, one-off meat market run by local butchers does not meet **C2** and therefore would not attract the same sanction. Alternatively propaganda might meet **C2** by utilising existing unfair language structures. Using particular terms of racist abuse might meet **C2** because to use certain

words in a particular context might serve to reinforce exclusionary norms associated with them. This means that the position of the actor concerned becomes important.

The claim that I have relied upon is that propaganda can meet **C2** because it affects citizens' behaviour during deliberation. This relies upon changing the underlying assumptions about groups within society amongst other deliberators, to the extent that they behave differently towards them. This is unlikely to occur in a single act unless it already exists as part of a linguistic structure anyway, or a concerted campaign. In the terms of my argument, speech acts that are not part of a concerted effort are unlikely to meet **C2** but not **C1**.

A secondary concern is that even if **C2** were likely to be met by a single act of expression, this would be very hard to prove. Connecting a specific speech act with a potentially observable behaviour in deliberation will be nigh-on impossible to demonstrate. It is difficult to show the use of any political right meets the condition for **C2**. The general liberal bias towards non-interference carries weight here. The preference for the application of these principles ought to be to prioritise the avoidance of 'false positives', due to the costs of exclusion. Therefore – remembering that this debate occurs in the realm of nonideal theory – a successful prosecution on the grounds of **C2** based on a single case is unlikely to succeed without reference to other linguistic structures.

There is also an empirical basis to addressing persistence when considering possible restrictions on FoE, because language systems tend to become entrenched the more frequently they are repeated. This is because if views can be disseminated in a systematic fashion they do tend to impact beliefs regardless of what they are and how they are received. Ideas, even dehumanising ones, can gain traction if they are stated with repeatedly in public debates (Koopmans and Muis 2009: 658).[18] If fringe parties can gain enough exposure, even if they are roundly criticised in all public appearances, their message will eventually come to be normalised. An implication of this is that there are more grounds to restrict FoE that is being used to repeatedly disseminate de-

humanising messages. Furthermore, if one accepts these arguments 'no-platforming', especially in prominent media outlets, becomes an important measure to consider when formulating responses to speech that meets **C2**.

3.3. An Example: Danish Cartoons vs Far-right posters.

Heyman argues, based on a similar broad perspective on the nature of political rights to mine, that restrictions on FoE should not apply in cases like the controversial Danish cartoons depicting the Prophet Muhammad; this is a position I agree with. However, I do believe that racial epithets used in far-right campaign imagery across Europe may be subject to restrictions, despite superficial similarities. Heyman defends the cartoons in two stages. Firstly, he resists the charge that the cartoons ought attract censure because they satirised some aspect of Muslim culture in a way that offended adherents to the religion, claiming that religious reasons carry no weight in a liberal society (2009: 179-80). He then goes on to argue that interpersonal values such as dignity and humanity are not threatened by the cartoons, concluding that "those drawings did not attack the humanity of Muslims or call for any violence or discrimination against them", and notes that the cartoonists' intention was to make a political point about various aspects of Islam such as the relationship between organised Islam and terror, and the way that they felt Islam subjugates women (180). I agree with this conclusion for roughly similar reasons - the cartoons do not diminish the status of Muslims in deliberation or cause others to act in a harmful or unjust manner towards them, so they do not meet **C1** or **C2**.

There ought, however, to have been restrictions in place on some of the posters used by the SVP in Switzerland in the run-up to the referendum on the building of minarets, despite some superficial similarities. The imagery in question is fundamentally similar, being summed up by some commentators as:

> "[The imagery was] was similarly provocative, with minarets shaped like missiles obscuring a map of Switzerland, alongside a silhouette of a woman in a burka suggesting the intrusion of restrictive foreign norms" (Halkiopoulou *et al* 2013: 117).

There are various factors that set this case apart. Firstly, the context of the speakers is different. Whilst cartoonists are expected to satirise, political parties posses a greater authority. Political parties play a role in mediating deliberation and have a greater capacity to shape deliberative norms than other comparative civic groups, as I argued in Section 3.2. Representatives also have a range of duties to their constituents that they must remain mindful of. It is therefore coherent to argue that certain imagery, such as that depicting Muslims as terrorists by implication, might be acceptable in a cartoon but not in party political material because whilst the former can be interpreted as making a point about Islam, the latter is more closely connected to the way other citizens treat Muslims. The posters are more likely to cause Muslims to be treated as lesser individuals in political discourse than the cartoons. Even if this were not the case here, political parties take on responsibilities that ought to preclude using this kind of imagery that, again, satirists do not.

Secondly, the imagery in the SVP cartoon was part of a more focused and widespread campaign to re-enforce negative portrayals and stereotypes about Muslims. The party had frequently used images of Muslims and non-whites in general as a threat to Switzerland, and of the party subsequently driving them out. Another image they circulated around this time was of a white sheep kicking out a black sheep from a field the base of which is a Swiss flag with the caption "Establish Security" (Halkiopoulou *et al* 2013:114-7).[19]).

The particular issue with the images is that through their systematic deployment they seek to portray Muslims as lesser citizens such that in political deliberation other citizens will, inevitably, not treat their ideas with respect. The imagery in the posters is worthy of censure because it actively encourages other citizens to treat Muslims unfairly. Whilst the Danish cartoons were vicious in their judgment of Islam as a faith, they did not attempt to inculcate an environment where people treat Muslims differently. The SVP's material did suggest that other citizens use the referendum as the first step in undermining the status of Muslim citizens as equals. For an act of expression to meet **C2** it must do more than cast aspersions. It must seek to promote an

environment where a group is systematically disadvantaged, which these posters, in the context that they were presented, did.

4. The Price We Pay Argument.

In this section I challenge three variations of what I described as 'price we pay' positions. These are defences of largely untrammelled FoE that either acknowledge many of the arguments I have made so far or at least are drawn from within a liberal architectonic that means that they are compatible with them. However, they attach a particular weight to FoE over other political rights, and a significant cost to censorship, to the point that the trade-off I described in the introduction - whereby FoE is restricted in order to preserve the possibility of us reaching more legitimate policies through deliberation – is illegitimate. Someone taking one of these positions might agree with most of my hypothesis that political rights as such can be withdrawn when **C1** or **C2** are met. They would nonetheless maintain that there is some particular aspect of speech or expression that means that it ought not be compromised.

Dworkin defends unrestricted FoE on the grounds that it is a necessary component of legitimate policy making. He argues that FoE is "constitutive of" not "instrumental to" democracy, and that any restrictions on it therefore undermine democracy itself (2009: v; Heinze 2016: 11-12). This means that any laws decided upon under political conditions or a state that restricts freedom of speech cannot be considered legitimate because "[T]he majority has no right to impose its will on someone who is forbidden to raise a voice in protest" (Dworkin 2009: vii), and "who has not been allowed to contribute to the moral environment" (viii). He also argues that it is impossible for a state that treats all citizens equally whilst restricting their FoE selectively (vii). He uses the term "upstream" to refer to democratic deliberation (vi). Upstream here refers to deliberation itself, whereas 'downstream' would be the implementation of rules. This leads him to argue that laws preventing, say, racial prejudice in the employment market cannot be made into law and enforced 'downstream' unless people are permitted to say whatever they want 'upstream' during the deliberation.[20]

It is worth re-iterating that discussions on restrictions on freedom of speech necessarily occur as part of nonideal theory. Under ideal conditions, I would agree that there would be unrestricted FoE, because under such conditions no one would act in a way that meets **C1** or **C2**. The claim to restrict FoE is based on the claim that it is possible to use expression in a way that perpetuates this, and that people do. There is therefore a balance to be struck between trying to honour the 'ideal' principle of unrestricted FoE and protecting the political rights of others. Dworkin attempts to defend the principle of FoE unrestricted regardless of consequence (vii), under these nonideal conditions. However, having committed to this framework he goes on to contrast rights like FoE with "immediate goals", and states that it is not worth sacrificing the former for the latter (ix).

A 'blind-spot' here is that under nonideal conditions there are often conflicts not just between consequentialist and non-consequentialists ethical concerns, as Dworkin states, but between non-consequentialist ethical demands. Dworkin makes a convincing case for choosing a non-consequentialist right over the pursuit of utility, or some other goal, but does not adequately consider the fact that FoE may, in some situations, only be protected when the political rights of others to participate, and perhaps even their own FoE rights, are compromised. He does not adequately address the fact that FoE does, in reality, often conflict with non-consequentialist rights derived from the same underlying values of respect for all people that it is.

A further problem with Dworkin's argument is that it conflates expression and speech with democratic "voice". He uses the concept of democratic voice to mean, as I would, the capacity to participate in democratic deliberation and shape policies. Furthermore he considers a certain level of equality of voice a necessary component of legitimate policy making and bemoans that no existing states realise this yet (vii-viii). However, the voice we have is relational, and depends on others treating us with respect, as well as being treated as having a degree of authority in our own right. Having an equivalent voice in a democratic context means more than just being allowed to say what you want the same

as everyone else; it matters that other participants in deliberation treat you with respect, and not just the state (Heyman 2009: 172).[21] If one defines 'voice' in this way, Dworkin's point about individuals needing to be able to "raise a voice" in protest makes more sense. Legitimacy depends on people having been able to shape policies, but an environment where this is best achieved might not mean unrestricted FoE for all. This point is compounded if one takes seriously Dworkin's position that citizens ought to be able to "contribute to the moral environment". This, surely, means the way that we conduct ourselves and treat each other. If this is to be an environment of treating others with respect or dignity, then it is not necessarily true under nonideal conditions that an environment where all can best contribute to this environment is one where unrestricted freedom of speech is permitted.

If, instead, one reads 'voice' in the "raise a voice" sentence as merely 'say whatever you want' the right appears inert. Public reason theorists argue that laws based on bigoted principles could not be legitimately enforced. A right to express bigoted views in democratic fora does not change this, so participants who espouse these views would never be able to enforce their desired policies, even where they convinced a majority of their rightness. The right to unrestricted FoE in political settings therefore amounts to little more than a right to 'sound off', and to articulate some views about a law whilst having no bearing on whether it would be put in to practice.

My challenge to Dworkin so far is that political voice is not the same as free expression, and that the former is a necessary condition for a legitimate liberal democracy and the latter is not, Dworkin offers a final argument against restrictions on expression that must be considered. This is that unrestricted FoE realises the foundational value of liberal democracy - to treat all people with respect and dignity - independent of its relationship it has with democratic deliberation. He states that his argument need not rely on the claim that democracy is a human right, and that FoE is a necessary condition, or constitutive of, democracy. Instead he argues that

> "[W]e can distinguish democracy, as a form of political organization, from the more basic obligation of government to treat all those subject to its dominion with equal concern, as all people whose lives matter. That plainly is a basic

human right; and many of the more detailed human rights we all recognize flow from it. And so does a right of free speech" (2009: ix).

He then goes on to state that this right exists even in countries that are "ruled by prophets or generals" (Ibid.).

This argument disaggregating democracy and respect fails. Ultimately the reason that democracy is treated as a source of legitimate government by public reason theorists is that it is an institutional framework that best realises the demand that we only be susceptible to rules that we all accept (Cohen 1997: 71), and this principle is itself a desideratum of a desire to treat all citizens with equal respect. If it is true that citizens who can say anything but have no meaningful political voice have no reason to treat the resultant laws as legitimate, then the same must be true of those who may say anything but are systematically disrespected by others. Even more puzzling is the fact that Dworkin appeals to the role of freedom of speech in legitimising laws in his earlier attack on restrictions of FoE. He argues that discrimination laws are not legitimate if they have not passed through a process where all were allowed to participate with unrestricted FoE. If we can appeal directly to the value of dignity when establishing the status of rights, and not merely appeal to a legitimate procedure, then there is no reason that the right not to be discriminated against cannot also be defended in this way, without any need for such laws to be justified through deliberation.

In summary, Dworkin does not present a compelling reason to favour preserving FoE over other political rights that we are entitled to under political liberalism when there are conflicts between these rights. The tie to legitimacy that he presents is not present under nonideal conditions. Unreasonable speech may undermine the production of legitimate laws, and the potential harms that come from restricting it may still be less than the harms caused by allowing it to go on unimpeded.

4.2. The Price We Pay for the Epistemic Value of Democracy.

Another objection is a variation on the defence of FoE delivered by Mill that there are epistemic gains that arise from an unrestricted competition between ideas (1991: Ch2).

In the previous chapter I argued that the epistemic benefit of accepting the views of unreasonable people was twofold. Firstly, it embellishes the tendency of the democratic procedure to produce just outcomes described in Rawls' work (*RTH*), because such outcomes rely on all reasonable positions being aired. Secondly, allowing the unreasonable to participate enables better practical solutions to policies to be formed, because part of the process of forming actual policy is deliberation using factual knowledge. The example I used was of unreasonable doctors who could nonetheless play a valuable role in debates about health policy because of their expertise. These benefits are best accrued in an environment with unrestricted FoE, and more generally few limits on participation.

In response there are three approaches one might take. The first, which I think is plausible, but not entirely satisfactory, is simply to point out that the kinds of speech that might be restricted under the principles that I have set out cannot be defended as 'political' or epistemically useful. Whilst this might be true, it only really complicates matters because a definition would then be needed about what constitutes 'political' expression worthy of protection, and the question would then arise about how this would be decided.

A better response is to point out that the epistemic benefits of democracy, of any kind, will only accrue when people treat each other with respect. In the previous chapter I suggested that the epistemic benefits of democracy arise only when we treat each other as "epistemic peers". Speech acts that meet **C2** undermine this. A classic articulation of the importance of knowledge transfer between citizens is offered by Hayek, who stresses the importance of 'local' knowledge to resolving political and economic problems (1945), an account that Gaus draws upon in his defence of public reason (Gaus and Vallier 2009: 68).[22] Even if, like Gaus, you do not accept the account of political rights and deliberation that I have defended, such an account relies upon some mechanism to transfer this local knowledge to other citizens. Unrestricted FoE does not necessarily cultivate the best environment for this transfer to occur, so cannot be defended with reference to an epistemic benefit. When **C1** and **C2** are met, the process

by which information is transferred within a democracy is undermined. In such instances, a judgment is required as to when this reaches a point that warrants interference.

Finally, those who invoke Mill's arguments to defend unrestricted FoE may be guilty of misusing the analogy typically attached to his work of the 'marketplace of ideas'. Gordon challenges the notion that the ideal Mill envisages is a "dog eat dog" confrontation between opinions, arguing instead that competition between ideas must be regulated in order for any public benefit to be realised (1997: 235). Lee then applies this critique to the case of hate speech, pointing out that if one rejects this metaphor, then one cannot treat hate speech as merely a distortion within the market that will be corrected for over time (Lee 2010: 17). Instead, any deliberation must be regulated such that it best realises the values of tolerance that underpin society, in order for any outcomes that benefit the common good to be realised (25).

4.3. The Price We Pay Because the State Can't Be Trusted.

A final, liberal worry about restrictions on FoE is that the powers the state would require in order to implement these restrictions would be too great to be legitimately countenanced in a liberal society. This has both a practical and a theoretical version. The practical one is a worry that even if the measures I suggest have correct normative underpinnings, no government can be trusted to enforce them in a way that isn't simply side-lining opponents, silencing dissent, or otherwise looking to secure some political advantage (Cram 2008: 69). Dorsen expresses this neatly when he states that "government will often confuse the enemies of its policies with the enemies of freedom" (1988: 127). In the debates surrounding free speech, he simply does not trust any government to adjudicate fairly (132). This type of behaviour is hard to prove; as an illustrative example, Scanlon points out local governments shutting down protest marches citing insufficient funds to police the events safely when it is not apparent that this is the case (2003: 22).

Certainly restrictions on FoE could only be enforced by technocratic institutions, and not by governments, as governments have stronger vested interests in this area and no discernible greater competence in adjudicating such cases (Lewis and Cumper 2009: 100-3). In addition, such decisions rely on the authority of the state in question. Given that existing states only satisfy some of the liberal demands for legitimacy - or only realise liberal legitimacy to some degree - cases where these restrictions ought to be applied, and where this can be proved beyond reasonable doubt, will be few and far between. Finally, the restrictions on FoE that I envisage would be temporary and limited. Citizens would not be prevented from participating in public discourse over the long-term, and I would not advocate prison sentences or similar sanctions for the use of propaganda.

The theoretical objection is a concern with creeping paternalism. Scanlon argues that no one who considered themselves to be autonomous would allow the state to interfere in their expression in a way that treated her beliefs as false (2003: 15-18). A worry of implementing restrictions on FoE is therefore that it gives priority to certain doctrines, which runs contrary to the intentions and values underpinning political liberalism. As such, although Scanlon argues that FoE ought to be weighed against political rights, he envisages far fewer cases where it might be violated than I do, focusing on exceptional circumstances and instability, and does not group FoE with other political rights (24-5). He comes to treat FoE as bound up with a conception of minimal autonomy in a way other political rights are not (25). If this argument is correct, restrictions on what I deem to be propaganda might serve to restrict the autonomy of citizens in a way that citizens ought not to tolerate (15).

This concern is valid, and my response once again hinges on the fact that debates around FoE are trade-offs in which, whether or not there is censorship, the political rights of some citizens will be compromised. There comes a point where the threat to autonomy of not restricting certain kinds of speech is greater than those presented by the restrictions themselves. The restrictions I have in mind are limited, so the extent to which those whose FoE is restricted would lose the capacity to judge truth, or that the

state would be able to inculcate some doctrine, will also be limited. For example, in the case of the election posters I referred to earlier, restrictions on such material will not significantly violate the autonomy of the party members and campaign staff who released the posters. However the ban will allow the targets of it to live in the minimally autonomous way Scanlon envisages without fear of reprisal.

5. Conclusion.

In this chapter I have suggested that there are times when acts of expression may be restricted. I defend the two principles I set out in the previous section concerning when political rights may be restricted: when the use of those rights is causing severe harm or injustice; or when it impinges on the political rights of others such that it undermines the production of legitimate laws. I have sought to demonstrate how acts of expression can meet both of these criteria, and that there might therefore be a case for restrictions one FoE in some cases. I then defended this position against the charge that expression serves a special function in a liberal democracy that is similar but distinct from political rights in general, and rejected the view that it ought to be treated as an exceptional right that is uniquely required for the legitimisation of laws. Some, limited restrictions of freedom of expression might therefore be consistent with the best possible process for legitimising laws. In the next chapter I argue, in a similar fashion, that whist there is a right to freedom of association in liberal democracies and a requirement that the state provide institutional support for some political groups and parties, such support may, in some cases, be withdrawn.

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[1] See Chapter 5.

[2] See Chapter 4 Section 3.

[3] I introduce the idea of epistemic injustice, based on Fricker's account in Chapter 3 Section 5. I suggest that it is a good way of conceptualising the harm suffered by individuals who are not taken seriously in political deliberation.

[4] For example, Waldron and Dworkinagree on some version of the 'harm principle', but disagree about the nature of the harms that can be inflicted through acts of expression. Compare Dworkin (2009: vi) where he expresses doubt about the harm caused by most acts of expression to Waldron's view that acts

of expression may provoke degradation and indignity (2012: 111).

[5] I address in Section 3.2.a.

[6] Heinze in particular criticises the application of arguments that might be applicable in times of extreme instability – such as pre-genocide Rwanda, or post-war Germany – to liberal democracies (2013: 597).

[7] These will include taking others seriously in deliberation; respect for others; a willingness to present our own views for scrutiny; etc. See Chapter 2, Sections 2-5 for a full account of this.

[8] This is the stance that the ECHR has adopted with regards to FoE: "Since, according to the courts at any rate, political democracy is the main virtue whose presentation bestows upon freedom of expression its great value, it follows that the preservation of democracy itself must be of equal, if not greater, importance" (Lewis and Cumper 2009: 90).

[9] I disagree with this assertion, in that Rawls' account of reasonableness has many components distinct from the notion of respect favoured by deliberative democrats. However, I accept there is agreement on the need for respect during deliberation, which means it is viable to group public reason theorists like this for the purposes of this discussion.

[10] The way that the EU pursued sanctions against Austria when the Freedom Party was in coalition is a good example of an international actor responding to what it saw as a general and non-specific threat presented by a party. Ultimately the measures emboldened parts of the groups support, though may in some ways have been successful. I revisit this in Chapter 8.

[11] It is worth noting that Koopmans and Muis use the argument to refute the suggestion that it was Fortuyn's charisma that caused the uptick in popularity for his party so much as the fact that he was able to persuade media outlets to cover him on a regular basis.

[12] For a fuller discussion of this see 3.2.c.

[13] See McKinnon (2016) for a recent discussion of climate change denial.

[14] See Langton (1993) for a fuller discussion of this claim.

[15] An interesting but separate discussion being the extent to which we are therefore obliged to challenge others who spread harmful myths, engage in racist language, etc. (Maitra 2012: 116).

[16] This is in both Stanley's sense, and the everyday sense. Wartime propaganda designed to raise the morale of the population is, perhaps, the first thing that most think of when they hear the word, but I do not discuss it here.

[17] A similar case was made against the BNP when hey first took regional office. They were obliged to change their constitution to recognise that non-white people could be British citizens. The argument here was that if they denied the existence of some citizens, the party could not adequately represent them (Kirshner 2014: 80-81). I agree with the ECHR ruling that forced them to change their constitution.

[18] I introduce this idea of "consonance" in Section 3.1.a.

[19] Bizarrely this image was adopted by a more violent, explicitly fascist far-right group in Germany, much

to the chagrin of the SVP who sought to challenge this in court. This makes their defence that the images can be defended in reasonable terms ring somewhat hollow.

[20] I address this in Chapter 4 to some extent, and essentially side with Waldron's critique (2012: Ch7).

[21] It is notable that Dworkin sees equality of concern for citizens as a necessary condition of legitimate government (2000: 2), but understates the necessity of equal concern for others in deliberation.

[22] For a full discussion of this, see Chapter 2 Section 6.

Chapter 8: Restrictions on Political Parties.

In this chapter I apply the two necessary conditions (**C1** and **C2**) for when political rights might legitimately be violated to cases where the issue at stake has been, in effect, whether to curtail the activities of a political party. Before starting, I shall quickly re-state how **C1** and **C2** may be applied to the rights surrounding political parties. Recall the conditions are:

- **C1** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state (in cases where the right is 'positive', such as entitlement to funding), in activity that causes severe harm or injustice to another.

- **C2** When citizens invoke political rights to justify non-interference by the state, or the continued support of the state, in activity that undermines the possibility of legitimate policy-making.

Recall that these cannot be met under ideal conditions, and that they stipulate necessary but not sufficient conditions for violating political rights. They provide a strong *pro tanto* reason to interfere, because where they are met some citizens will be subject to injustice at the hands of others. However, there is also a *pro tanto* cost to interference in political rights. The choice is then between action and inaction on the part of the state, both of which retain costs; taking into account empirical factors, we must consider which is the least bad option.

When a political party acts in a way that meets these conditions, the choice becomes between allowing it to behave unjustly towards another group of citizens, and performing the costly action of sanctioning the party. It is costly because it means temporarily suspending the political rights of party members, activists or leaders. An additional consideration in cases where parties are sanctioned is that, compared to restricting individual speech acts, restricting a party can severely undermine some citizens' democratic voice for a longer period. It is within this framework that I consider

three examples of measures that impede the far-right: the various sanctions levelled against the Freedom Party in Austria after the 1999 election; the financial measures levelled against Vlaams Blok in Belgium that caused it to temporarily disband and re-form as Vlaam Belang; and the threshold for representation in the German Bundestag that has limited far-right parties in the past.[1]

The rights that individuals exercise when they participate in deliberation as members or supporters of parties have both a negative and a positive component. The negative component is freedom of association. The positive aspects are an entitlement to funding and institutional support; basically the means for a party to exercise an effective political voice. In the three cases that I address in this chapter, parties have seen these rights restricted. The first two are direct examples of parties being sanctioned through other political institutions – the EU sanctions levelled against the Austrian Freedom Party, and the court sanctions levelled against Vlaams Blok in Belgium. The final example is the German system as a whole, which includes a threshold for national representation in the Bundestag of 5%, in place in part to prevent minor parties especially the far-right, gaining a foothold.

The chapter describes each case in turn, and sketches a response from within the framework I have laid out in earlier chapters. In doing so I show that the necessary conditions I set out for permissible interference in political rights can be coherently applied to the full set of political rights that I argued for in Chapter 3, and not just freedom of expression. The cases I have chosen illustrate the intersection between positive rights to a platform and funding and negative rights to association that enables political parties to function. The Vlaams Blok example in particular shows a political party being *de facto* banned by the removal of positive rights or support. The use of these examples suggests that defining political rights in the sense that I have, as a combination of entitlements that enable citizens to exercise a political voice, is a plausible approach in nonideal conditions, as well as being theoretically coherent.

A detailed examination of these case studies also demonstrates that this theoretical

framework can provide some guidance in real-life examples, even once empirical concerns are factored in. For this reason I also consider the efficacy of sanctions. My conclusion so far is that there are various cases where the necessary conditions for interference by the state are met. However, in the first two examples I use, the restrictions – even if one accepts that they were justified – were largely ineffective. Indeed such sanctions emboldened supporters of these parties and encouraged sympathy for them, because of the perceived illegitimacy or unfairness of the sanctions. Without further elaboration this might lead to the unsatisfactory conclusion that there might be justifiable cases to limit political rights, but that these are rarely effective so ought not be used in practice. In response, I argue that **C1** and **C2** can and ought to bear on the institutional arrangements that govern us. The empirical question about how best to facilitate political deliberation cannot be disaggregated from the normative concern of attempting to realise outcomes that are as close to legitimate as possible.

With this in mind, I consider as a potential framework for determining how to apply sanctions that factors in empirical concerns: the "concentric" approach suggested by Rummens and Abts (2010). This is that we differentiate between the threats offered by far-right parties to democratic institutions, and increase the level of sanctions as this threat increases. Their suggestion is that restricting political activity that is not perceived as undermining core institutions is often counter-productive as it allows far-right parties to cultivate an appearance of victimhood. They argue that restrictions used in a limited way, against parties perceived by the public as illegitimate and a threat to democratic order, have proven effective. The advantage of this approach is that it seeks to preserve the 'preference tracking' aspect of deliberative democracy; it therefore overlaps with the epistemic defence of democracy that I have drawn upon. I argue that a variation of this approach might provide some hope for being able to apply my theoretical framework. However, I suggest that we ought to focus on the voice of democratic citizens, as suggested in **C2**, rather than on the decision-making process.

2. The Concentric Approach.

In this chapter I draw on and refine the 'Concentric Containment' approach (from here Concentric Approach) to far-right parties suggested by Rummens and Abts (2010). This states that parties ought only be sanctioned when they threaten fundamental democratic institutions, but that those that do can be subject to either measures to isolate them or *de facto* bans (655). They argue that such measures can be effective because parties that are subject to them are left in the worst position possible when it comes to negotiating the tension between appearing respectable enough to govern, and retaining their 'outsider' appeal. Sanctions directed against parties that are not seen as a threat by the electorate can allow such parties to portray themselves as victims. However, if the public perceive the sanctions as a response to a clear and present danger that the party poses the subsequent loss of respectability in the eyes of the public more than outweigh any benefit derived from enhanced credentials as political outsiders (658-9). What is important is how the threat to democratic institutions is determined; what makes the Concentric Approach appealing is that it treats the democratic process as deliberative, rather than focusing on particular institutions. the authors cite the need to track and filter preferences in political deliberation, and then to apply a range of different measures in response to disruption of this (652-3). In this way the authors' conception of democracy retains many of the hallmarks of political liberalism, not least one that incorporates both a procedural and a substantive element (650-1).[2] This is in many ways compatible with my position that political rights may be challenged when they prevent others from participating in deliberation - certainly the kind of threat they are talking about fulfils the necessary conditions that I set out for interference in political rights.

The major benefit of the Concentric Approach is that it attempts to unite some concern with the normative and practical benefits of democracy with a discussion of the efficacy of measures to preserve these benefits. However the normative justification for all this is underdeveloped. The de-lineation of the far-right or the extremist is assumed, and is stark. Throughout this project I have suggested that rather than draw a sharp distinction between unreasonable and reasonable citizens - or those who ought to retain a full set of rights and those who are fair game for substantial restrictions - we ought to focus on actions. The Concentric Approach reproduces the idea that there is an unreasonable

minority. Nonetheless it is useful because it engages with the key elements of liberal theories of legitimacy.

Liberal theories of legitimacy tend to address three types of concern: that citizens have the opportunity to shape and to consent to political decisions; some epistemic element and more generally a concern with the outcomes produced by the political process; and differing conceptions of stability. The idea that the political process be constructed so that all can participate in policy-making is understated in the Concentric Approach, but the core assumptions that we ought to be inclusive as possible, and that there is always a cost to interference in political rights, remain. Secondly, there is the epistemic aspect. This has two parts in deliberative democracy - tracking the preferences of citizens and enabling a process that produces more satisfactory outputs. The concentric approach emphasises the first of these. Much liberal theory understates the fact that under nonideal conditions the process of producing epistemically better outcomes, however defined, and the capacity of a system of institutions to track the preferences of individuals come apart. There might be a case where to provide the fullest range of political rights possible to the most citizens does not produce the optimum outcome, or even outcomes that satisfy some threshold of reasonableness. The types of dilemma that occur where **C2** is met are really cases where these two factors are in tension. Indirectly, the concentric approach addresses this by providing a framework for trading-off violation of political rights in some cases with preservation of the process of deliberation. Finally, liberal theories are concerned with stability - at an ideal level for the 'right reasons', and in nonideal cases in a way that enables the continued realisation of the normative and epistemic components. The discussion of efficacy in the concentric approach addresses this directly.

Perhaps the greatest strength of the theory is that it considers the efficacy of sanctions without granting wholesale concessions to illiberal parties who have attained a level of popularity such that they are insulated from many of the effects of such sanctions. This is in part because the approach recognises the importance of both preserving a process of democracy and ensuring certain substantive outcomes (650-1). An inevitable worry

about any approach that compromises on sanctions when they are not going to be effective is that groups can force concessions by causing disruption when their demands are not met. The concentric approach explicitly disregards this by prioritising the threat to the deliberative process over potential costs. It also suggests that based on the empirical evidence such a course of action will ultimately prevail. Groups will not be able to hold the deliberative process hostage to their demands because they are unlikely to be able to secure sufficient popular support.[3] It allows a limited space to accommodate far-right groups that are non-violent and which gain support. Given the disparate reasons that far-right parties gather support, neither full exclusion nor widespread concession is appropriate or feasible. Approaches that factor in a need for compromise and flexibility are best suited to addressing this problem.

The Concentric Approach does have its weaknesses. Despite noting that the reasonable concerns of all people ought to be tracked where possible (656), it understates the rights of unreasonable people. The set of actors to whom this might apply are identified as extremists, and are defined prior to discussions of efficacy. The approach is essentially a two-stage one. Once a group falls within the set of extremist groups whose activities might justifiably be curtailed, the efficacy of their attempts to influence policies is the determining factor in establishing whether or not we ought to restrict their political rights. There is something normatively troubling about using the threshold of when a group becomes threatening as the sole metric for whether they are worthy of sanction. It implies that normative considerations do not matter at all in discussions of restrictions of these groups. This is presumably not what Rummens and Abts mean to propose.

The demarcating of the justificatory constituency like this is problematic. As I argued in Chapter 5, the process of adopting that initial distinction between the unreasonable and the reasonable or the extremist and the non-extremist is itself problematic and arbitrary. Under nonideal conditions it is antithetical to a non-consequentialist political morality and a functioning deliberative democracy. Even if one accepts the distinction, this approach appears not to permit any variation in responses to anti-democratic behaviour based on concerns other than efficacy. Even amongst a group like the non-violent far-

right there is a wide variety in the policy proposals they advocate, the types of political actions they engage in and the reasons people support them. The concentric approach needs to take greater account of this variety if it is to be successful. That the authors succumb to these weaknesses may in part be because they place a lot of faith in the fact that measures might be targeted mainly at party leaders (655). This is normatively sound, as I have argued, and may be true to a point. However, there is still a cost to any restrictions on leaders of parties that people vote for and are active in, so the concentric approach overstates the extent to which sanctions might be precisely targeted. They also argue that other parties must take up the slack of tracking the reasonable preferences of far-right parties when they are subject to restriction, which is an optimistic claim in some cases (662).

The account of deliberation used in the concentric approach is deficient in the way it emphasises the tracking of individual preferences. It understates the fact that actors must participate in deliberation as equals for this to be functional. Status in deliberation is important, both in enabling citizens to articulate their interests and as a component of citizenship or membership of the political community; the Concentric Approach as it stands understates the status costs of restrictions on rights. In the previous chapter I suggested that unrestricted freedom of expression for citizens who advocated unreasonable policies is in some sense inert, in that whatever they say other citizens are obliged not to take them seriously in deliberation, or at least not to permit their views to be realised in law. It amounts to a right to sound off, which as the authors of the paper note is not necessarily a bad thing from a pragmatic standpoint. It cannot plausibly be argued that citizens are granted full status as deliberators if their rights are withdrawn at the point that they begging to establish any sort of influence.

In summary, the concentric approach has a lot to offer as a framework for addressing these issues. However, I propose to consider the three concerns - of rights, of realising epistemic benefits through a process of deliberation and of stability - in conjunction with each other, not proposing thresholds concerning the first two, and then focusing solely on the third. The concentric approach provides a good example of the type of

general framework that could be applied in order to factor the question of efficacy into any discussion of restrictions of political rights. This is something that any account of public justification that is intended to be prescriptive in real world circumstances, and that considers deliberation as constitutive of justification, must confront. It also takes into account the gap between provision of rights and the securing of epistemic benefits for these theories. The refinements I suggest are to factor in a greater appreciation for the costs of interference in political rights, and to be open to the fact that the line between extremists and non-extremists in existing democracies is less clearly defined than the theory currently takes account of.

3. The Freedom Party in Austria.

The ascent of the Freedom Party (FP) in Austria to junior partners in a coalition government after the 1999 legislative election was the culmination of around thirteen years of gradually increasing support and influence for the party. It initially lurched to the right in 1986 when their volatile but charismatic leader, Jörg Haider, seized power and effectively forced more liberal members out of the party. From this point they steadily increased their support, despite (or perhaps because of) their taking hardline views on immigration, retaining the rhetoric of ethnic nationalism and even occasionally talking of the Nazi regime favourably.[4] In 1999 they secured a 26.9% share of the vote, which put them in second place. They entered negotiations with the Christian Democrats (OVP), and eventually entered government subject to certain conditions. In order to enter coalition, the FP agreed: to give up their designs on a plebiscitary government; to support the neo-corporatist decision making process they had previously opposed; to support European integration; and to distance itself from nazism (Fallend and Heinisch 2015: 4). They also allowed Schüssel to act as chancellor despite the OVP gaining slightly fewer votes in the election (the Socialists formed the largest party), and the divisive Haider remained a regional governor rather than forming any part of the new executive (5).

The coalition government ruled effectively for two and a half years, despite the

European Union enacting diplomatic sanctions against the regime over a number of months, before eventually withdrawing these when they proved ineffective. Then the support for the Freedom Party began to unravel. This arose because of a perceived divide between the grassroots of the movement and those in power, and specifically over economic reforms that would remove certain benefits (Fallend 2004: 115). That this was the issue that divided the party is important to note when evaluating various theories about its collapse in support. In the 2002 elections the support for the party dropped to 10%, but they continued to act as a much smaller partner in a coalition government until 2005. At this point Haider lead a breakaway movement amongst activists, forming a new party. Since then the far-right has continued to enjoy overall support of over 15% in national elections. In 2016, the Freedom Party came sufficiently close to gaining the presidency of Austria that the second round of the presidential run-off had to be repeated.

There are two main points to consider when applying the theory I have laid out to this situation. The response I advocate is to a particular threat - that the FP has succeeded in introducing policies that could undermine the capacity of many recent immigrants and some Austrian citizens to participate in politics in the future. **C1** and **C2** are met, and the party represents a significant threat to proper deliberation in Austria. From this general position that some action might be justified, albeit with costs, the next question that arises is how different actors can and ought to respond. There are three main sets of actors that I consider in this analysis. The first is other Austrian political actors, particularly the two largest (at the time) 'centrist' parties, and the constitutional court. I argue that these parties ought to have taken a harder line, that some (more) of the policies enacted by the OVP-FP coalition ought to have been subject to judicial review, and that the OVP ought not to have established the coalition in the first place. However, in line with the concentric approach, I argue that the Freedom Party ought not to have been subject to more invasive restrictions, like measures to curtail their activity or censorship, during the period around the 1999 election. Secondly, there is the EU. The sanctions are seen as a failure by many, but I argue that they were justified, partly on normative gourds for their signalling effects, and partly because they were less

ineffective than some have argued. Finally I consider the role of the media and wider society. This is limited, although a comparison with Germany shows that if far-right parties are subject to sustained attack by, for example, right-wing tabloids, then they may lose support (Art 2007: 339). The theme that I want to highlight throughout is that restrictions by other influential political actors to prevent the FP realising their policy agenda and holding real power are justified. Despite this, discontent with Austrian politics means that demand for populist parties will remain constant, so such measures are no 'cure' for far-right politics, and will not bring about a more liberal state.

Before embarking on an evaluation of how actors ought to have responded, it is worth dismissing a superficially plausible alternative that has been called the 'de-fanging' hypothesis. In its simplest form this is the idea that far-right parties ought to be allowed into government because they inevitably fail or (less frequently) moderate once they get there. In the Austrian case this seems a plausible case to make - the FP succumbed to in-fighting within three years and lost most of its support. As Rummens and Abts acknowledge, there are contradictions in the doctrine of far-right parties, and the focus of government causes these to rise to the surface (2010: 658-9); some might argue that it is actually preferable to allow this to happen, rather than incur the costs of government interference. Although the de-fanging hypothesis in its starkest form is an oversimplification, Fallend and Heinisch offer a refined version in their account of events in Austria. Here the de-fanging effect was brought about due to contingent factors such as the incompetence of the party leadership, the erratic behaviour of Haider in particular, international pressure having some effect and the capacity of the OVP to outmanoeuvre the FP in coalition (2015). It is notable the extent to which the OVP were able to undermine their coalition partners, distance themselves from them, and criticise them using fora like the European parliament (Taggart and Kaltwasser 2015: 9). Part of the motivation for this was undoubtedly self-preservation. The OVP set out a carefully worded statement at the start of the parliament and agreed reparations with the surviving members of Nazi labour camps, and throughout the early months of the coalition their strategy was to limit the damage to their reputation caused by the coalition. The de-fanging hypothesis would not, in this case, rely on supererogatory actions by other

political actors.

There are a number of problems with this view. Firstly, whilst the 'de-fanging' happened in the sense that the FP were not able to implement many of their policies, they have remained a political force, and the far-right in Austria continues to enjoy support. To further extend the metaphor, the de-fanging was temporary, but the beast continued to grow. Secondly the de-fanging depended on the actions of other political actors, the response of the public, and the actions of the party, but really had nothing to do with the policies they pursued. The marginalisation of the party in coalition could be compared to that of the Liberal Democrats in the 2010-15 UK government, as both parties ultimately suffered from a breakdown in trust between the grassroots members and voters who had helped propel them into government and those at the top of the party now holding ministerial posts. It might just be that in some countries at some time there is a political cost to being a junior coalition partner, or at least an inevitable vulnerability that other parties can exploit, rather than something particular to populist parties that causes them to implode.

Perhaps more importantly, the ultimate divide in the party occurred over economic policy and the withdrawal of some benefits. This has the troubling implication that it was not the 'far-right' elements of the party's position that caused their support to collapse. From a liberal perspective, the grass roots revolted over what would typically be seen as a move towards a less just economic policy. The biggest loss in support was amongst 'blue collar' workers and voters of working age. The party had picked up support in the 1999 election amongst men of working age, with polling suggesting that their new supporters thought the party best represented their interests, or were best faced to deal with corruption (Fallend 2004: 117-9). The largest increase in surveyed reasons to support the party between 1995 and 1999, increasing from 34% to 48% was that the FP "represented my interests" (119). It is unclear why the party no longer appealing to voters in this way is something to be celebrated. It merely suggests that there remain dissatisfied voters convinced that they suffer economic injustice at the hands of a distant elite who are prepared to vote for illiberal parties who purport to have

solutions to their predicament.

The de-fanging hypothesis fails to acknowledge the underlying support for nationalist policies and populist parties in Austria The trend over the period since 1986 has been a gradual aggregate increase in support for the FP and its offshoots. It also fails to acknowledge that a key ambition of far-right parties is to shift political discourse, rather than to achieve specific policy goals. In this case the FP were more successful than advocates of the de-fanging hypothesis gives them credit for. The OVP moved to the right on the issue of immigration, and indeed a legacy of the FP might have been to embolden the 'mainstream' parties in Austria to pursue overtly nationalist policies, mirroring the situation in France and Italy. In this case, the coalition government tightened laws on grant workers, placing more demanding financial requirements on individuals to stay in the country, as well as making "integration" courses compulsory. At the same time laws on seasonal workers were loosened, greatly increasing the number of people in Austria who worked full time, but did not have full citizenship, or rights to housing (Migration Policy Institute 2003). Approaches like the concentric approach that address the threat to core democratic institutions posed by far-right (and other radical) parties can be reconciled with the underlying structural support for these groups. This sets it apart from other scholarship on the far-right that has overstated the effect of demagogic leaders and elite actors on far-right support in cases like the Austrian one.[5]

I now consider the conduct of three sets of actors in the Austrian case.

3.1. The OVP as Coalition Partners.

The coalition with the FP presented a dilemma for any OVP supporter - most would not want to legitimise the FP, but at the same time, it represented an opportunity to lead a government in a political system where 'grand coalitions' of left and right are frequent. Certainly, the move seems to have been a success in terms of securing power and managing to implement a policy agenda. The formation of a coalition with the FP was

rational for them to pursue, at least in the short- to medium-term, in that it allowed them to secure the greatest amount of power and influence possible considering that they placed third in the election with a vote share of 26.9%, behind both the socialists and the FP. Part of this was because the marginalisation of the FP was never as complete in Austria as it was in other countries such as Belgium, which I consider next. In the Belgian case in particular the norm of ostracising the far-right served to buttress the position of the larger parties that observed it, which was not the case in Austria (Downs 2012: 86; 97). In nations where all other parties observe a code of conduct that mean that they would not join the radical right in coalition, the political costs of being seen to break this commitment and join such parties outweighs the potential benefits of having a willing and disorganised junior coalition partner. In Belgium other parties often eschewed the opportunity to form coalition or minority leadership when it might have suited them to do so in the short term. In Austria the norm of exclusion was never formalised in the same way, and so the move the OVP made of forming a coalition with the FP but seeking *ad hoc* assurances at the outset remained open to them. In the context of public dissatisfaction with grand coalitions and corporatist decision-making, the potential benefits of a government where they held greater influence was significant.

Galston approaches the question of when it might be acceptable to pursue legitimate political goals using somewhat underhand means by using a sporting metaphor. He suggests that political parties are permitted, and perhaps obligated to play 'hardball', but not 'dirtyball' (2005: 87). The analogy comes from baseball, where to play hardball is to occasionally throw in a pitch aimed closer to the batter's body to put them off, without simply hurling it at them with an attempt to harm; in political terms it means that sometimes actors ought to campaign negatively and oversimplify their message to the point of distortion (89). Most strikingly, he condemns parties that play 'softball', and are too weak in their political dealings. The real life example he uses here is the unsuccessful Dukakis campaign for the United States presidency in 1988 (85-6). Galston's argument reads as one in which the ends justify some underhand means, a position no doubt motivated by the low regard in which he clearly saw the Republican Party at the time (and presumably still). The requirement to pursue an effective

campaign even when that means playing hardball arises in part because of the obligation that a political party has to its constituents to act "effectively" (83). Therefore, part of the justification for political parties playing 'hardball' is the general, procedural obligation to best pursue their supporters' and voters' interests. This applies irrespective of the ideological position of the parties involved. This view respects some important truths of democratic politics under nonideal conditions: that parties need to respect the views and preferences of their members, and that they cannot always act in an ethically pure way if they are to get things done.

Within this scheme, parties have a strong *pro tanto* reason to form coalitions with opponents they vehemently disagree with if they believe that they can dominate said coalition (given the favourable terms they negotiated, we can assume the OVP were relatively sure of this). The question is whether this slips from being hardball to dirtyball. In the scheme I suggest, playing dirtyball ought really to be treated as acting in a way that meets **C2**, that is using political tactics that serve to disenfranchise parts of the population. Whether this is met in the FP case is not immediately clear. On the one hand, allowing the FP into government appears to marginalise the citizens that the FP seeks to demonise and disenfranchise. Conversely, OVP supporters might point to the assurances they sought when entering coalition, and the lack of actual human rights violations identified by higher and European courts. On balance, they ought not to have joined the FP, but this hinges on the claim that lending credence to the party was sufficient to meet **C2**. This in turn relies on the empirical claim that public perceptions around what counts as legitimate are important and can influence public behaviour and voting patterns (Van der Vleuten and Hoffman 2010). By allying with the FP, the OVP enabled it to grow and consolidate its support in the long term, and continue to behave in a way that meets **C1** and **C2**. By legitimising their rhetoric and actions to an extent they acted in a way that met **C2** themselves. Given the fact that far-right parties can best be responded to by a mutually accepted exclusion by others, forming a coalition is further unjustified because it undermines the possibility of building up a norm of exclusion over time. The threat to democratic deliberation represented by such a move outweighs the obligation parties have to their own supporters to secure their desired

outcomes. A coalition with a party like the FP ought therefore count as 'dirtyball'.

This example highlights two unsavoury truths about responses to far-right politics. The first is that the policy area where the OVP acquiesced was on immigration. Harsher policies towards recent immigrants were introduced and the status of recent migrants as citizens (in the abstract political sense of participants in political deliberation) was undermined. This exposes once again the fact that there is often, in practice, little to choose between mainstream and radical parties in their policies, especially if one accepts explanations structural explanations for the increase in support of the far-right. I deal with this more fully in the next chapter. Secondly, Galston's position shows how far actual deliberation deviates from the ideal that most public justification theorists would suggest. In his discussion, as in the real world, supporters of some parties seek to actively shape the preferences of undecided voters through misinformation and sleight of hand. These voters may themselves have had their preferences shaped by other actors working in a similar fashion. Rather than the ideal of informed citizens looking to persuade each other, the reality is one where misinformed citizens trust elites to deceive each other. If this sounds overly pessimistic, then a positive conclusion that can be drawn is that it highlights the need to emphasise 'positive' political rights. So parties, as they operate in this way cannot be the only organisations that represent voters. Instead there must be sufficient competition between parties and other civic groups to mitigate for their worst excesses. Similarly, there is a vital need for a pluralist media and adequate provision of political education. De-centralisation may also be an important part of a politics that does not succumb to this entirely negative contest. Although it is a separate debate to the one that I engage with here, many deliberative democrats have found that consultation works best at a local level (see Fung 2004). Finally, this shows the need for technocratic institutions to place limits on parties, both in terms of what policies they can implement and in access to support and funding.

3.2. Austrian Constitutional Courts.

Although their actions met **C1** and **C2**, an outright or *de facto* ban on the FP was never

a viable option. The support for the FP has become entrenched over time, and the disaffection many felt with the Austrian system cannot be dismissed as illegitimate. If one looks at where the support for the FP came from, the increases in the late 1990s occurred mostly amongst voters of lower incomes, and those who had reason to feel economically insecure, and it was the failure to implement populist, re-distributionary economic policies that caused the eventual split in the party. To ban the party outright, or to take measures that undermined it comprehensively would be to deny a legitimate voice of opposition to an unpopular regime (Downs 2012: 101). Dismissing FP supporters as unreasonable, which is the effect of severely restricting their party through legal means, is unhelpful, not least because the claim that they are much less reasonable than supporters of other parties appears shaky. For this reason a more appropriate course of action by Austria's technocratic institutions would be to use more limited sanctions. Whilst it might be justified to penalise party leaders for some of their comments, it is counterproductive and unfair to act as if Nazi sympathy extends to the party's support when it most likely doesn't (Mouffe 2005: 63-4). To do so distorts the legitimate concerns of some FP voters and allows the party to more easily play the victim. It also disregards the important requirement of the concentric approach that restrictions can only be justified when alternative avenues to participate in deliberation are provided.

It is hard to actually discern policies that the FP managed to implement in government that did not enjoy tacit support by the OVP. The EU-14 were transparent in stating that their restrictions are in part a response to the party's past and in part anticipatory. At the time the sanctions were introduced "[I]t has not been seriously argued that the Austrian government has, under the influence of the Freedom Party, violated human rights in Austria, although plainly there is concern that it might do so in the future" (Happold 2000: 960). Whilst this might be appropriate for largely symbolic measures, it is not clear on what grounds a technocratic institution could penalise one party but not the other in coalition based on its past. A more appropriate course of action would be to focus on policy suggestions. In this area, the Austrian constitutional courts might have done more to block reforms on migration policy that met **C2** by marginalising recent migrants, and attaching a social stigma to them.

3.3. The EU 14.

The action of the EU member states is typically interpreted as having ended in an embarrassing climbdown. The sanctions were largely symbolic, involving ostracising Austria in European-level decision making, and were removed before any serious pressure had been placed on the Austrian regime. They were withdrawn after less than a year, on the recommendation of a report given by three 'wise men' instructed by the commission to advise them. There is some evidence that this is the case, in that there is polling data suggesting that Austrians opposed the dissolution of the government even after the EU's actions. Indeed, after the sanctions were imposed, only 15% of Austrians believed the government should step down (Fallend and Heinisch 2015: 7). An important part of the failure was the fact that the OVP drew closer to the FP in response to the measures (Fallend 2004: 124). However, it can also be argued that, over time, the actions of the EU and other international actors had an effect, because the populace became tired of the perceived lack of standing they held on the international stage (Fallend and Heinisch 2015: 14). In reality, the action is probably of less importance in the fate of the FP coalition than their failure to implement populist policies and their lack of strategy. Despite this the actions of the EU are worth examining.

As noted the case against the FP was based in part on their rhetoric and past record. Any case for legal interference at the European level rested in part on the claim that human rights and non-discrimination transgressions were "serious and persistent" (Freeman 2002: 110). This was not seen to be the case in Austria, so the European courts did not intervene - instead the action was coordinated by the member states under the Portuguese ruling presidency of the EU Council (110-111). The measures were therefore "coordinated" and "moral", in that they were intended as much to signal disapproval as to respond to any specific rights violations (118; 111). They were also as much about what the Freedom Party 'was' than anything they had done (Happold 2000: 960). This raises important questions about the rights of states to interfere in the affairs of others, which is too complex to go into here, but also about whether actions designed to re-

enforce and promote the values of a regime are ever justified. In this case, the other European states appeared to be making an example of the FP. This was in part pragmatic, in order to be seen to be doing the right thing. However, where principle and pragmatism meet is unclear in such cases, because of the "ideational" cost of inaction for the EU of non-intervention (Van der Vleuten and Hoffman 2010: 746). This cost is roughly the cost of not being seen to police values, thus diminishing the credibility of the institution in the future, in that the measures send a signalling effect about the commitment to liberal values they appear justified. In this case, the FP met **C2** in their programme and actions, and the costs of interference through sanctions were fairly small. This might have changed had the sanctions caused significant burdens on Austrian citizens. As a general rule, however, symbolic challenges to parties that seek to undermine liberal institutions are justified.

3.4 Conclusions from the Austrian case study.

The Austrian case shows how the framework of assessing whether a party meets **C2** through its actions can be useful. The condition captures some of the general concerns that the EU and other Austrian parties had about the threat the FP posed to democracy even when it was not inflicting demonstrable harms on citizens. As I have interpreted the case study, it also shows the utility of the concentric approach, because it demonstrates that parties will not necessarily moderate as they enter power, so some response is needed. However, it also shows the limits of the argument. This is partly because the entrenched support for the FP makes any response limited, and partly because the actions of the OVP and attitudes of voters suggest that illiberal values did and will continue to permeate much of Austrian politics. Against such a backdrop there are limits to the extent to which a process of democratic deliberation may be preserved.

4. Vlaams Blok In Belgium.

Two points that arise from the Austrian case are the limits of the formal legal system, and the way that various actors must contribute to an effective response to an insurgent

party. The extent to which the far-right can influence policies depends on the actions of other parties, if only because they are in a strong enough position to bargain with them, but never hold central power (Minkenberg 2001). The fate of Vlaams Blok illustrates both of these. Other parties have successfully maintained a policy of isolation - a *cordon sanitaire,* or quarantine - meaning that Vlaams Blok has had little impact despite persistent support. On the other hand, the *de facto* ban imposed on the party throughout the Belgian court system appears counter-productive. It did not send a signalling effect that did not exist before, and it strengthened the resolve of the party. In this section I briefly summarise the case, suggest that Belgian political actors were right to stigmatise the group in the way that they did, and finally I suggest that whilst the ban on the party may be justified, in that the case was made in terms compatible with **C1** and **C2**, that it was both imprudent and, all things considered, normatively flawed to implement a blanket ban in the way that the Belgian authorities did. Instead, the transgressions ought to have been dealt with through measures like 'no platforming' which would preserve the exclusion of Vlaams Blok from political arenas that are of constitutional importance, without being subject to the justifiable charge that a self-interested establishment had overplayed its hand.

Vlaams Blok began to shift away from a Flemish separatist agenda towards a more ethno-nationalist one in the late 1980s. It seems fairly unproblematic to declare that the party would seek to implement illegitimate policies if they ever gained significant power on a national scale. Its booklet laid out hardline nationalist policies such as compulsory deportation for recent migrants unemployed for five months and segregation in schools, and the party has never moved away from this despite hints at moderation (Downs 2012: 92). They have also made ambiguous statements when addressing collaboration between Belgian elites and the Nazis in World War II. Like the Freedom Party it enjoyed electoral successes in the early 1990s that saw other parties question how they might respond to them, and like the Freedom Party it also enjoyed an aggregate rise in support in the two decades after its shift to the right in 1986. The success of the party in the 1991 election capped a period that saw them secure representation at all levels of government and a national vote share of 6.6% having

previously only enjoyed 1-2%. This prompted a re-evaluation by the rest of the parties in Belgium who had previously ignored them. They formed a *cordon sanitaire* whereby they would not form coalitions with the party and would essentially treat them as if they were political exiles. Importantly both political parties and members of civil society observed this, despite the political costs of doing so; the fragmented political system in Belgium means that many parties would benefit if they allied with Vlaams Blok in terms of leading coalitions or being able to form minority governments through confidence and supply deals. The *cordon sanitaire* amongst parties remains semi-formal, in that whilst it is not a binding agreement the other Belgian parties repeatedly (re-)affirm it through value statements (94). More importantly, the norm of not interacting with far-right parties is much more deeply engrained in civil society than it ever was in Austria. Vlaams Blok's pariah status extended so far that even when they were securing support in national elections there were reports that regional branches of the parties were struggling to book venues for meetings (100).

The *cordon santiataire* held, and despite gradually increasing support the party failed to have much impact. However, in 2005, the situation changed when the Belgian Human Rights League succeeded in having complaints upheld against three organisations that supported Vlaaams Blok. The charge amounted to "belonging to and lending assistance to a group [Vlaams Blok] or association that clearly and repeatedly advocated discrimination" (Brems 2006: 702), and was based on Belgium's anti-racism law which stipulates that groups like the Human Rights League might bring charges against groups that "clearly and repeatedly practices or advocates discrimination" (704). The organisations were all fined, but more importantly the party eventually lost its formal status, including access to state funds and television coverage. This amounted to a *de facto* ban. The party responded by dissolving and re-emerging within months as Vlaams Belang. It is questionable whether this party is actually any more moderate, but it retained the support levels consistent with Vlaams Blok, polling at 12% in the first national elections it fought in 2007, compared to 11.6% in Vlaams Blok's last election. The continued popularity of the party in its new form combined with the desire of other parities to maintain the *cordon sanitaire* has been a significant factor of the intractable

negotiations that led to Belgium being without a government for over two hundred days in 2007 and almost a year in 2012/13.

4.1. The Cordon Sanitaire.

For the *cordon santiaire* to work it requires that all political actors participate. Unlike in Austria this has by-and-large been the case. A theme throughout this work has been that the obligations and requirements of different political actors vary. Thus it is not inconsistent with the approach I advocate to suggest that the other political parties in Belgium have a strong obligation to adhere to the *cordon sanitaire*, even though the party ought not be illegal. This means that other parties used to maintain the *cordon sanitaire* included playing a degree of political 'hardball' that would not ordinarily be justified if directed at other parties (Kirshner 2014: 17). There is, admittedly, a sense in which the other Belgian parties acted out of self-interest; the positive effects of the *cordon sanitaire* were arguably smaller than the long-term benefits to certain established parties (Downs 2012: 86). However, it still served to preserve democratic institutions, and did limit the groups' influence overall.

4.2. The Court Case Against Vlaams Blok.

The action of the courts met the necessary conditions for legitimate interference in political rights because the things that Vlaams Blok were found guilty of were acts that met **C2**. However, from both a practical and normative point of view, measures aimed at restricting their activity in a more narrow sense would have been preferable. Belgian anti-racism law embodies aspects of how I have constructed both **C1** and **C2**. In particular, the claim that actions ought to be evaluated over a period of time is consistent with my approach, as norms of political exclusion comes to manifest itself over a months and years. In the court case against Vlaams Blok, party material from prior to the period of investigation was used (Brems 2006: 706), which was the correct decision under the framework I propose. Attempting to take decisions about campaign material in the short term will not be successful, because to understand whether

nationalist material is exclusionary requires some knowledge of context. In this sense the definition and justification for propaganda that meets **C2** that I provide in Chapter 6 Section 3, which pays attention to existing language, has greater real-world utility over trying to come up with some characteristic of an act itself that makes it illegitimate.[6]

However, the full *de facto* ban was unnecessary, when more limited restrictions might have been applied. The practical and normative costs to banning a party are high. The normative cost is that to do so disenfranchises a group of citizens. Granted, the *cordon sanitaire* excludes them to a degree, but the party still has the right to bring forward legislation and campaign even where it is in the minority. To blanket ban a political party is an objectionable restriction on liberty because it means that many citizens will not have a vehicle through which to articulate their interests. To reach such a judgment is also unfair on those who might vote for populist parties from a position of ignorance and/or frustration at the existing mainstream. If one takes seriously the idea that mainstream parties frequently violate the norms of deliberation according to the requirements of public reason, then action like this serves only to penalise the disenfranchised and the even-less-reasonable.[7]

It is also impractical, in that it may serve to reinforce other parties that are themselves often illiberal, or cause the supporters of the Vlaams Blok (or Vlaams Belang) to 'double down'. A key part of the justification of the concentric approach is that other avenues be available for people to articulate their preferences. It is not obvious this is the case in Belgium, or elsewhere in Europe, and divisive measures like a ban on a party harms the public perception of and trust in political institutions. Banning parties will often drive people away from groups that might reasonably articulate their position. In an ideal world individuals whose chosen party was banned would be able to find some other avenue to articulate any reasonable concerns they have, but in practice this will not be the case. A more suitable response would be one of limiting the party's activities in certain instances, say by no-platforming them in some arenas or censoring some materials. A re-iteration by technocratic institutions that some (most?) of their prominent policy proposals were illegitimate would also have been appropriate. The

Belgian courts might have set out to reinforce the *cordon sanitaire*, but they came to undermine it to an extent.[8]

5. The election system in Germany, and the 'scale problem'.

It is one thing suggesting that courts might have to take a pragmatic approach to dealing with political parties, and act in a way that re-enforces informal patterns of exclusion. This is possible to impose through a legal framework because of ambiguous terms such as the presence of persistent or systematic discrimination by a group. However, can it really be legitimate, as in Germany, for an electoral system to be, in effect, rigged against small parties? The threshold of 5% for entering the German Bundestag, like the British first past the post system, has been suggested as a causal factor in limiting the growth of far-right movements (Roxburgh 2002: 284). Certainly, whilst various groups have enjoyed "sporadic" success at a local level none have broken the threshold (Norris 2005: 63). The trend of one far-right party gaining significant traction and building support like the FPO, Front National or Vlaams Blok, was not replicated in Germany through the 1990s or early 2000s. This is despite the fact that Eurobarometer surveys tend to show a similar prevalence of nationalist and xenophobic attitudes in Germany compared to other European countries (Pedahzur and Weinberg 2001: 58). Indeed, the threshold has been described as the "primary obstacle" facing far-right parties in Germany, when it comes to building support (Harrison 2000: 37), although the complex structure of local politics in Germany has also had an impact, as does Germany's history which creates a stronger cultural animus towards the far-right. For this combination of reasons it is often hard for the parties to exploit opportunities that might present themselves (38). Given the profound effect this quirk in the electoral system has on actual policy making, it is worth asking how such an electoral system might be justified, and how to justify it to members of minority parties.

To better understand whether measures like this are justified, the issue of the 'scale problem' in deliberative democracies needs to be understood. If we understand modern representative democracies as approximations to an ideal arrangement of institutions, as I have done, then all representative democracies are flawed in that they exclude some

views. By empowering certain people as representatives, and by grouping in parties, the legitimate interests of some voters are ignored (Parkinson 2003: 183-6). Parkinson notes that representative governments under a deliberative scheme tend to require representatives to fulfil the role of both trustee for constituents, using their own judgment to advocate what they see as their constituents' best interests, and delegate who articulates the interests of citizens as they themselves perceive them (187). However, as a result of the 'scale problem' it remains a sub-optimal process of deliberation as representatives can never fully replicate a truly inclusive deliberation; instead they must balance these two roles as best they can whilst being cognisant of the fact that they are unlikely to ever deliberate adequately on behalf of all their constituents simultaneously. Despite this, through a combination of 'positive' political rights, institutional arrangements, and limits on particular actors, democracies can provide better or worse approximations of an ideal of deliberation, where all have access. In practice most regimes deviate from this more significantly.

There are two approaches one could take to the German case. The first would be to identify some aspect of the German regime that makes it worthy of defence in spite of these flaws. For example, Kirshner views a modern form of polyarchy as worthy of defence (2014: 4-5). The alternative that I propose to this threshold view is that we ought to best preserve the process of deliberation that enables as many citizens as possible to articulate their legitimate interests. It appears odd to treat threats to polyarchy rendered in a particular way as the 'cut-off' when the system is such an imperfect formulation of public deliberation anyway given the intractable nature of the scale problem. The existing system does restrict the legitimate interests of some voters through the sheer fact that tens or hundreds of representatives cannot deliberate adequately on behalf of thousands or millions of citizens - indeed this frustration is in general a causal factor in driving support to populist and radical parties in general.

The difference between the approaches is apparent in the German case. Kirshner's emphasis on defending particular institutional features of an imperfect system does not give due credence to the culture in which it is formed; the reason that the German

system is designed the way it is is a legacy of political instability over several generations and, in particular the rise of Nazism. The idea is to create a genuinely pluralist system whilst at the same time excluding radical, and in particular far-right, groups. Indeed, the narrow focus on maintaining polyarchical systems that Kirshner offers is limited precisely because it fails to account for the fact that formal institutional systems do not directly map onto actual capacity to participate in deliberation in different nations. The limit is justified *in the German context* because the institutions associated with democracy face particular threats, so the threat to a citizen's capacity to articulate their views is greater; what capacity they have ought to be defended. Such a threshold would not be justified in, say, Britain. What the German case illustrates is that creating the institutional arrangements that best approximate to an ideal of deliberation is to some degree context-dependent, and that therefore a response to 'threats' may be relative to the particular culture. This is consistent with Rawls' approach that his account of political justice ought to be a "module" that can be attached to various regimes, but can be embodied in different ways (*PL* 12).

6. Conclusion.

Through discussion of three case studies, I have shown how the framework I advocate can be of use in real-world cases. There are two major limits to its applicability. First, there is always a degree of epistemic uncertainty, both in terms of the outcomes produced by a democratic procedure and the process by which factual information informs political discussion. In this chapter I have also introduced the question of efficacy, and context-specific factors under nonideal conditions. If one accepts both my claim that the choices states face when dealing with political rights are choices between different sub-optimal outcomes, and these epistemic limits, then attempting to provide definitive limits on when to intervene based on facts about institutions becomes implausible. Instead, the best an ideal theory of legitimacy can do is to provide an account of the main concerns that we face when trying to negotiate such dilemmas. Secondly, these examples show that an overarching limiting factor is that there is a persistent demand for illiberal politics even in functioning liberal democracies. Against

this backdrop, responses must consider the short- and long-term effects of their actions. In the next chapter, I focus on the underlying injustices of existing systems - both the supporters of far-right parties who have legitimate reason to view 'mainstream' politics with suspicion, and the *cui bono* question with regards to measures taken against populist parties. The risk of any of these measures is that it enforces an unjust *status quo*, whilst not addressing any long-term causes of support for far-right far-right. The process of deliberation is a competitive one where many deviate from ideals of behaviour; any response to a particular political group must acknowledge this backdrop.

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[1] Though at time of writing the far-right 'Alternative for Germany' party is doing well in the polls, so this may be set to change.

[2] This section where they outline the substantive element of democracy quotes *Rawls* on how groups might threaten democracy, so I assume that the authors operate in a Rawlsian paradigm (*ToJ* 119).

[3] If they could, it is not entirely clear that liberal theory has an answer. Certainly the political problem as I set it out is not one that applies in cases where deeply unreasonable groups can hold an effective veto on constitutional matters.

[4] Like Le Pen in France, Haider was gaffe prone, and there remains at least some speculation most of these were intentional.

[5] For a more detailed critique of this position see Taggart and Kaltwasser (2015: 15).

[6] See Chapter 3, Section 3.2.c for a discussion of this.

[7] I address this more fully in the Chapter 9.

[8] Polling suggests the verdict made the general public less favourably disposed to the *cordon sanitaire* (Downs 2012: 101).

Chapter 9: Political Rights, Sanctions and Individual Citizens.

The thesis so far has been a theoretical discussion of what political rights citizens are entitled to and when these might be restricted. I have argued that under nonideal conditions the question of when we might restrict political rights is complex and to a degree insoluble. Under such conditions, we cannot achieve a political deliberation that produces definitively legitimate policies, and are left to choose the least costly or harmful action possible. Furthermore, there is no simple formulation of the kind 'actions of type x, in context y might justifiably lead to restrictions, but nothing else'. However, ideal theory can be used to better conceptualise and understand the different sides of the debate in any given situation.

When citizens abuse their political rights it produces dilemmas whereby deliberation is distorted whatever course of (in)action is chosen by the state. The first horn of the dilemma is the fact that left unrestricted, citizens will use their political rights to undermine the political equality that is necessary for a deliberation that produces legitimate outcomes. As a result of this, exclusion based on race, class and gender, amongst other things, can ossify as background social norms. The past two chapters have attempted to flesh this out, and stipulated cases where the state has a *pro tanto* reason to interfere in the political rights of freedom of expression and association, and when support for political parties might be withdrawn in order to curtail increasing political inequality. I have assumed that despite this the second horn of the dilemma, that state interference in political rights or entitlements undermines deliberation, persists. Whilst I believe this to be true, and that it should be a weighty concern in our moral reasoning, in this chapter I elaborate on this, and offer some other reasons that militate against the restriction of political rights in these cases.

The chapter addresses cases where the state has general or *prima facie* authority to restrict a political party, but may still lack the authority to apply such restrictions to individual members. Drawing on empirical research about the far-right, I sketch two archetypes of citizens over whom the state has a weaker claim to authority compared to

the 'average' far-right activist. These are the 'liberal xenophobe', someone who agrees with liberal norms at least so far as they accept a fair democratic procedure but regard increased immigration as the critical impediment to realising justice due to mistaken empirical beliefs; and the 'sufferer of injustice', someone who suffers a sufficient injustice that the state's authority over them is diminished.

The liberal xenophobe is someone who comes to support anti-immigration parties despite an adherence to liberal norms surrounding deliberation, and broad allegiance to liberal values. Their reasons for doing so are the product of a false empirical worldview. They drastically overstate the potential impact of immigration on the economy and civil society. For this reason, they think that liberal institutions can best be preserved through the policies of anti-immigration parties, whatever their other illiberal tendencies. The archetype exposes a cleavage in the literature around political liberalism about what counts as a justified position. Political arguments may be justified in one of two senses. The first sense of the term 'justified' refers to the set of requirements citizens must meet, or process they must adhere to, when they reflect upon and deliberate about political issues. It demands that citizens reach their conclusion under certain conditions: that they do so through sufficient reflection after sufficient effort to inform themselves, and that they participate in some form of practical deliberation. Liberal xenophobes are justified in this sense.

The second way we might use the term 'justification' is to describe a set of reasons to obey or break the law that are defined at least in part by their substantive content. Often these two categories are reinforcing; most plausible accounts of public justification involve an appeal to a constituency who have reasoned in a certain way under certain conditions, and say something about the content of reasons. The liberal xenophobe is a subset of a significant number of actual citizens who can justify their choices in the first sense, but not the second. They have reached their conclusion as a result of a particular empirical worldview that is wrong, but have constructed this worldview whilst adhering to the norms of deliberation.

In Section 3 I set out this tension more fully. I argue that the state generally has less authority to interfere in the political rights of citizens who have reasoned in the right way, regardless of the conclusion they reach, compared to those who eschew deliberative norms. In the case of those who have simply made an empirical error about the impact of immigration on the economy, it is implausible that they ought to lose all political rights. Even if their actions need to be limited because of the effects they are having on deliberation, the fact that they are seeking to deliberate in good faith ought to count in favour of softer sanctions, as they are more likely to respond to appeals to moderate said behaviour. However, the process of reflection is impossible to measure and police, and the arguments that the archetypal liberal xenophobe would make are often appropriated into right-wing discourse. Some of those who contend that their support for far-right parties is justified in the purely procedural sense may be making this claim disingenuously to mask bigoted arguments. Sanctions will therefore only be justifiable after a degree of *ad hoc* or case-by-case reasoning, further supporting my argument that ideal theory cannot play a decisive role in addressing these dilemmas.

To give some focus to this discussion, I use the example of Paul Collier's book *Exodus*. This is a 'popular' economics book written by an academic, arguing for limits on absolute levels of immigration. The coverage of this book neatly highlights how a message can be distorted in actual discourse. A citizen who read and reflected upon this book might well end up, due to the limits of human reasoning capacities, seeing the book as corroborating a worldview that sees immigration as a much more severe threat to a stable or just society than the author really believes. At the same time, far-right parties have tried to use works like this to lend legitimacy or respectability to their views.

The second archetype is the 'sufferer of injustice'. This is a category of citizen over whom the state has less authority because of the injustices that they suffer. I construct this archetype to reflect the Rawlsian thought that even if there is a legitimate procedure in place, policies that produce severely unjust outcomes are not legitimate. In section 4 I explore what 'severe' injustices of this kind might be. Although it is beyond the scope

of this project to offer a specific definition of such injustices, I suggest that supporters of far-right parties in some European cities or regions that have elected far-right leaders fall into the sufferer of injustice category. However, this would tend to be applicable only to voters and low-level activists for such parties, which suggests that sanctions that target political parties ought to be directed at elite actors where possible.[1]

2. Considerations Around the Legitimacy Of Regimes.

Throughout the thesis I have argued that there are cases where a state might legitimately interfere with the political rights of citizens. I have suggested that such interference causes a deviation from an ideal of deliberation, but may be justified because it produces the closest approximation to this. This mandates states to impose sanctions on citizens that serve to limit their political rights. This imposition of sanctions must be justified in a way that acknowledges the fact that real states only ever achieve a limited or contingent authority. Before examining this more closely, it is worth re-stating the arguments that I have made so far that bear upon state legitimacy, and outlining some of the implications of these in practice:

2.i. Summary of relevant claims made in past chapters.

2.i.a. That deliberation is a constitutive part of public reason. That this requires equivalent political voice.

I argued in the chapter 3 that deliberation is both a requirement and a constitutive feature of public justification; this is the view endorsed by most 'Rawlsians'.[2] Deliberation depends on a degree of equality of status between citizens. This is relational, so the state must provide a set of rights and entitlements that allow citizens to participate with an equal political voice. In Chapter 3 I argued that 'positive' entitlements such as consultation, financial support for parties and a cultivation of a pluralist media form a part of this, in addition to negative rights like freedom of expression. If citizens are not able to realise such a political voice, the possibility of

legitimate policy-making, by liberal standards, is undermined. The important aspect of this discussion, for this chapter, is the fact that the legitimacy of states depends upon its capacity to provide avenues for citizens to articulate their views, advance their interests, and scrutinise policies.

2.i.b. 'Unreasonable' citizens retain political rights, and are entitled to participate in deliberation.

In the fifth chapter I argued that even unreasonable people retain a right to participate in deliberation, as well as challenging the idea that real-world populations might easily be demarcated into the reasonable and unreasonable. In this chapter I further challenge this demarcation using empirical case studies. In real life most citizens are sometimes unreasonable, at least in terms of violating the norms required in political deliberation. In particular, why should mainstream politicians be allowed to go about their business unrestricted, but the 'far-right' or 'far-left' be severely limited - the difference between the conduct of these groups, according to political liberalism, is not so marked as to naturally justify such a position.

2.i.c. That legitimacy is bound by justice, but that there is reasonable pluralism about justice.

I have defended the position that legitimacy is somehow bounded by justice. That is, the legitimacy of a procedure is undermined if it permits a certain level of severe injustice. This needs to be reconciled with the belief that there can be reasonable pluralism about justice, which I have assumed throughout the thesis.[3] The limits that justice places on legitimacy must therefore relate to *all* reasonable conceptions of justice, not just one in particular. The level of inequality that can be legitimately permitted is not that which satisfies the difference principle, for example, but one that does not cause a severe injustice by any reasonable standard. Of course, the relevant questions here are what counts as 'severe', and how broad the family of possible reasonable conceptions of justice is. I have not attempted to answer this complex question, but in this section will

consider more fully the injustices suffered by some members of illiberal parties and argue that this does impact the authority of the state over them.

2.ii. Two Implications for Modern Democratic States.

States ought to be treated as having partial and limited authority, because they treat citizens in some of the ways required by the liberal constraint on legitimacy but not all. In this thesis I have taken a Rawlsian account of legitimacy in its broadest sense. This has incorporated two basic parts - a constraint on legitimacy that laws must be justifiable in a way that is compatible with core social institutions all can accept, and that there must be a process of deliberation using public reasons in which citizens can propose, discuss and scrutinise laws if they are to be legitimate. From here, I have defended the idea of a set of political rights and entitlements designed to secure political voice. At best, their authority is merely a *prima facie* authority to impose laws (Christiano 2004). Even then, this is temporary and contingent, and can frequently be superseded by other concerns.

Clearly no existing states manage to attain this ideal. However, part of the reason for this is that such an ideal can only be realised when all citizens observe various deliberative norms. In practice citizens do not do this, so states can only reach approximations to an ideal of deliberation. Even then they often fail to reach the best possible approximation that is realisable in the conditions that they find themselves in.[4] The authority of interventions by liberal states to preserve democracy is self-limiting because of their imperfections (Kirshner 2014: 47). Drawing on the distinction between ideal and nonideal theory, I have argued that modern democratic states attain partial, but incomplete legitimacy. The correct theoretical approach will focus on authority in certain cases or particular situations, rather than declaring states as authoritative or legitimate (or not).

The state ought not to be seen as a monolith that is either legitimate or not. Instead it is made up of a variety of political actors. Because the state cannot attain unimpeachable

legitimate authority, the question of which actors in particular - individuals, parties, social groups - initiate and benefit from decisions must come into play. In this chapter I use the concrete example of the selective support for measures limiting the far-right by centrist politicians. The perennial problem here is that parties may look to 'rig' how deliberation is organised in the name of liberal values. In this chapter I show that this is probably the case, and that this counts in favour of more limited restrictions on political rights.

3. The Question of 'Pure' Populism.

The empirical literature on far-right parties tends to incorporate two aspects in the definition of 'far-' 'radical-' or 'populist-' right-wing parties. One is the sincere belief in right-wing policies, whether it is a latent racism, or a suspicion of the economic or cultural impact of immigration. People who subscribe to these positions are often described as "radical" or "far-" right. The second dimension I shall describe as 'pure populism'. This is when leaders across the political spectrum will present themselves as outsiders challenging a corrupt and unjust elite (Eatwell 2004: 5-14).[5] As noted by Eatwell, this is as much a "style" of politics as an ideological position, referring to a tendency to embrace outsider status, and to pose policy issues as a dichotomies (12-13). Mudde, similarly, defines it as a "thin" ideology, the core belief of which is the division between the 'people' and the (corrupt) elite (2014: 218). In his more recent work Mudde has been keen to stress that this view is anti-liberal in its moral monism - the 'people' however they are conceived are seen as possessing uniquely legitimate views on politics.[6] In recent times in Europe, the nationalist right have been by far the most successful populist parties by this definition.

The empirical evidence suggests that these definitions capture the reasons that people come to support the far-right, and that they are worth disaggregating. The voter attitudes that have the greatest correlation with support for the far-right are: nationalist or racist views; suspicion of political institutions; and a feeling that current politicians do not represent their interests. The problem with many of the definitions used in the empirical

literature is a failure to separate populism from a more radical set of positions that reject democracy outright. Populism implies a failure to perform the duties we ought to in terms of informing ourselves and deliberating and is illiberal in its implied moral monism, but may be justified in response to an unjust elite. Therefore it is not always wrong by liberal standards to support a populist party in the same way that it is a far-right party. The problem with disaggregating populist beliefs from far-right ones is how to test this empirically. It is hard to discern when a voter supports a party because of their populist or radical credentials.

Separating the pure populists from the sincere supporters of far-right parties in practice may best be achieved by ensuring the transparency of these parties, and allowing voters to see that the outsider status that many populist far-right parties cultivate is in most cases illusory. Successive far-right politicians have proved to be as venal, hypocritical and contemptuous of the average voter as their more mainstream colleagues: both the Italian and Austrian far-right have been routinely embroiled in financial scandal, for example, despite basing much of their campaigning on 'cleaning up' politics. This suggests an approach of 'softer' sanctions, or even measures aimed at promoting alternative values, may be more successful than looking to undermine such parties. More heavy-handed sanctions often enable far-right parties to use the 'conspiracy cloak' in their discourse; they can construct a narrative that the corrupt elite that they are seeking to disrupt is coordinating the campaign against them. Instead, exposing the party to scrutiny through measures like ensuring transparency around the sources of funding and expenditure, and ensuring an environment in which a pluralist media can conduct investigations, does not allow them to make this move so easily.[7] This is not to say there is no role for 'no-platforming' – in the minimal sense of not allowing parties to participate in debates on public media outlets this can a powerful statement.[8] However, providing the resources for citizens to scrutinise the parties they support may ultimately be the most successful counter-measure. Not only this, but it most closely mirrors an ideal of deliberation where citizens themselves are responsible for the scrutiny of laws and institutions.

3.ii. The Liberal Xenophobe.

The second set of beliefs worth considering are those of what could be called sincere liberal xenophobes. A liberal xenophobe in the sense I use it is an archetype of a citizen who subscribes to a liberal account of justice, but also believes that immigration needs to be limited severely and migrants need to be encouraged in integrating into the existing culture. They would even go so far as to involve themselves in anti-immigration parties because they feel that current levels of immigration, or likely future increases, present *the* major threat to liberal civil society. The limit to the state's authority here is based on the fact that it is possible to reach such positions whilst still doing all that is required of citizens in terms of being informed about policy issues.[9] The problem presented is that liberals would want to say more than that such citizens are just empirically mistaken, but that they appear to adhere to the norms associated with public reasoning as well as anyone else.

To illustrate this, consider the work of the economist Paul Collier, who has argued for limits to migration. Clearly, there is no plausible way to argue that someone making the case against immigration in this fashion is unreasonable, or worthy of sanction. However, what about those who interpret it incorrectly, or only see figures from his work quoted out of context? His book *Exodus* is a useful work to discuss in this context, because it received some coverage in the non-academic press, so will have been in the consciousness of some citizens as they sought to form their views about which political parties to support.

In the *Exodus*, Collier argues in favour of controls on migration including an absolute limit on numbers entering many countries (2013: 259). The driving idea in the book is that there is a "happy medium" level of migration beyond which diasporas spring up that increase in size to such a point that their members are not adequately integrated within the wider national community, undermining social cohesion and "dissolving" national identity (88-9; 5). This central argument draws heavily on an earlier paper by Putnam about social trust, cohesion and new arrivals to communities (2007).[10] The main

modification he makes to Putnam's work is to move from an argument that high levels of immigration cause adverse effects – decreases in social trust and increases in crime and social problems – in the short term, but benefits in the long-term, to propose a top level of immigration that best realises these benefits. The implication is that Western states may have to use tighter restrictions in the near future. Despite the contestable nature of terms like 'cohesion' the book is positioned as serious work (and given the level of research it is), that Collier claims brings some objectivity to a debate blighted by political correctness and racism.[11]

The key points of the book that overlap with tropes in far-right discourse if modified slightly are: an emphasis on overall or net immigration figures; mobilisation of the concept of 'integration' as a way of justifying both controls on immigration and policies directed towards recent immigrants; belief that political correctness is distorting discourse in a way that is ultimately extremely harmful, rather than merely undesirable; and, as I noted above in outlining the archetype, belief that increased immigration is not something that will cause injustice, or some minor harm, but represents a significant threat to the very fabric of society (although Collier uses far more moderate language, he believes immigration above a certain level makes everyone much worse-off).

Collier's hypothesis relies upon the concept of a "diaspora schedule" (the rate of growth of diasporas) that is inversely related to "integration", and can be mapped as a curve on a graph against absolute numbers of migrants (2013: 89-104). The difference between this analysis and a lot of political science in the area is that it treats social cohesion as an output rather than an input in its account of this process. Much of the political science literature in the area tries to use social cohesion as a way of predicting the success or failure of the far-right in different contexts.[12] This work tests levels of far-right support against the propensity to live alone, or levels of social trust within an area. The Putnam/ Collier thesis sees integration as a (mostly) desirable output of the political process. Putnam uses it as a collective term for various indicators that he treats as independent variables in his research, with immigration levels as the dependent variable. His major empirical survey shows that in areas of "greater diversity" due to an influx of

newcomers, respondents were likely to show: lower confidence in local government and the media; lower "confidence in their own [political] influence"; lower levels of voter registration despite a greater interest in politics; less faith in collective action; less likelihood to work on a community project or to volunteer; fewer friends; lower happiness; and a tendency to watch more television (2007: 149-150). In summary, he argues that greater diversity causes us to withdraw from our collective lives in an undesirable way - it "brings out the turtle in us" (151).

Collier goes further, in praising "assimilation" as "ethically well-placed" as well as practically beneficial (2013: 99). His argument shifts emphasis from specific concerns about the effect of migration levels on other social indicators, Putnam's point, to a worry that the fusion of old and new cultures that follows a period of both assimilation by migrants and accommodation by natives brings about "a risk that the social model will become blended in such a way that damagingly dilutes its functionality: remember that in economic terms not all cultures are equal" (100). The point he makes is that migrants who come from an 'inferior' economic culture – ignoring the clearly controversial and problematic claim that cultures can be ordered economically – ought to assimilate for the good of all. A similar focus on integration appears in theoretical work like Macedo's, that has been dubbed 'muscular liberalism', which grants more limited exemptions to religious and cultural groups. Macedo sums up this perspective in his statement that that: "Uncritical embrace of diversity may obscure the need to promote citizenship and the elements of a healthy civic life" (2000: 6).[13] Although deployed with very different intent, "[i]ntegration" defined in similar terms has become a major theme in Western European far-right rhetoric (de Lange 2007: 421-2), although sincere attempts to promote cohesion are harder to spot in actual policies. Policies that have been tenuously justified in this way include the introduction of compulsory (and costly) language lessons in the Netherlands and Austria during periods where the far-right was at its most influential (O'Brien 2003: 13).

The themes in the academic discussion around immigration are distorted, and become tropes in far-right discourse. Some anxiety about levels of immigration is the common

denominator amongst all far right parties (Ivarsflaten 2008). More generally, the increase in far-right support occurs broadly in line with a perceived increase in the mobility of capital and labour (Swank and Betz 2003). Whilst levels of immigration in a region are a good general indicator of far-right success compared to other economic or social indicators (Lubbers and Scheepers 2002), this is variable, and on a sub-national level there are instances where the far-right does better in areas where there are fewer recent immigrants residing, as has occurred in Austria in the past two decades (Stockemer and Lamontagne 2014: 51). However, this anxiety is somewhat complex, in that people worry about the impact of immigration for different reasons and in conjunction with an anxiety about the impact on globalisation more broadly. For many far-right voters, there is a perception, "real or imagined" that increased immigration is adversely affecting other areas of social life: welfare, crime rates, social cohesion, declining standards of education, and other concerns any citizen may reasonably have (Kessler and Freeman 2005). Evidence of this can be seen in research that separates anxiety about immigration and a desire for more nationalist policies from authoritarianism and other conservative values (Dunn 2015). Dunn argues that the stronger indicator is an "exclusive" conception of nationalism, that is one that defines nationalism along shared cultural grounds rather than as an abstract idea (369), and that most far-right voters feel threatened (376). This is further evidence to suggest many far-right voters are concerned with social cohesion and the possibility of justice, rather than being fully committed to the ideology of far-right parties.[14]

Immigration and the treatment of immigrants is the area in which the far-right, at various levels have been able to influence policy despite being mostly outside of, and never at the head of, government (van Spanje 2010). They have generally not succeeded in influencing policy beyond those around immigration or particular ethnic groups (Mudde 2014). Their success has tended to be in opening up discourses that make more discriminatory policies appear legitimate. In seizing upon general arguments about immigration and fear of the threat of Islamic terrorism, Pim Fortuyn and Geert Wilders in Holland, managed to present an ethno-nationalist and anti-Islamic position in terms of integration and defending liberal values (Akkerman 2005).

In response, it is worth using the formulation I have offered, which asks not whether a speech act contains discriminatory content, but whether, given the context and content, it inflicts severe harm on other citizens or causes them to be *de facto* excluded from deliberation. The context of the act of expression is both the intent behind it and its potential impact - so Collier's book ought obviously not be censored because it is a good faith attempt to argue for controls on immigration. A racist pamphlet by a political party that drew heavily upon it to promote an ethno-nationalist position might justifiably be subject to censorship.[15]

An example of how empirical beliefs about immigration and integration inevitably become bound up with discriminatory rhetoric can be seen in the debate around the 'Burqa ban' in France that was introduced in 2010. The change in the law was brought about due to a shift in opinion amongst liberal or 'centrist' voters (Weil 2009: 2709). The underlying justification given by the Stasi Commission for the ban was that it was necessary to protect the liberal rights of Muslim girls who did not choose to wear the headscarves, and were increasingly subject to abuse from other students (2705-7). Weil separates this from a more assertive secularism, and the idea that the headscarf is a symbol of oppression that ought to be eradicated. This underplays the role played by the rise of Front National, and its success in shaping discourse. A more plausible conclusion is: "the FN had thus achieved much of its objective to exert an enduring radicalizing influence on the issue agenda and on public policy formation" (Shields 2011: 95). Another account of the debate notes that "the left and the right sought to outdo each other" in competing with Front National, and that "[t]he Stasi Commission was forced to work quickly so that a law could be passed before the spring regional elections… [this timetable] was set [in part] by the haunting fear that Le Pen's Far Right could repeat its April 2002 victories" (Bowen 2010: 242)

The difference between a reasonable muscular liberal position and a discriminatory one is difficult enough to pinpoint in philosophical discussion. In everyday discourse, where individual voters lie somewhere along this divide, and elites will use rhetoric or look to

manipulate discourse so are not always sincere, it seems naïve to accept the 'official' reasons for the ban.[16] It also ignores the history of French republicanism, in which citizenship education is indicative of "historical processes, often aggressive ones, but which the state asserted its supremacy over other sources of power and truth" (Swyngedouw and Ivaldi 2001: 12). A particularly stark illustration from this volume is the comment by Blandine Kriegel, a philosopher turned Conservative minister who, at the time of this interview in 2003, had sat on many commissions concerned with integration, that "here in France each individual has to abstract her/ himself from those traditions and accept the transfer of certain rights from the law" (14).

The central conclusion that can be taken from this debate is that it is difficult to pinpoint the point at which genuine opinions informed by liberal values enter the territory of being unreasonable - this supports my analysis in Chapter 5 that rejects the use of the categories of reasonable and unreasonable citizens in nonideal theory. It also suggests that attempts to impose restrictions by a liberal democratic state based solely on the content of views will not be justified. Instead, an empirical case needs to be made based on the effects of their actions, the practicalities of which in a formal legal context will likely be very difficult. In general, it bolsters the case against interference by the state in the political rights of citizens, even those who act in a way that meets the conditions I laid out for interference.

Finally, there is the issue that an academic like Collier ought to realise that there is a risk to using his status to promote views that are likely to be misrepresented. In practice, academics who gain a public profile are liable to be used as sources of authority in discourse, and misrepresented - in the case of Collier's book, the headline point about limiting immigration was widely covered, the argument based on Putnam's field work was not. Part of the Dutch People's Party's breakthrough was based on the perceived legitimacy of Pim Fortuyn, an academic, who cultivated the 'professor Pim' persona - he encouraged the image of him as a flamboyant gentleman scholar, or man-of-letters (Van Holsteyn and Irwin 2003: 58-9). Moreover, drawing on academic ideas is a way of diffusing attempts by opponents to de-legitimise or discredit far-right authors.

(Koopmans and Muis 2009: 648-9; 658). Research into the way far-right parties present themselves suggests they have to strike a "delicate balance" between being taboo breakers and appearing somewhat respectable (Halkiopoulou *et al*. 2013: 111).[17] Seizing upon research like Putnam's and Collier's is a way of doing this, even if it relies upon mis-readings of the academic work.[18]

There is a separate debate about whether academics like Collier have an obligation to moderate what they say in order to avoid distortion, and also over the particular obligations of deliberators who have this limited authority. However, there are three conclusions that my theory leads to in such circumstances, if we are to achieve the best possible approximation to legitimate policy-making. First, if it were not obvious, these are questions for nonideal theory. The problem I am describing arises when it is simultaneously true that there are people willing to appropriate academic arguments and purposefully distort them to further an agenda by undercutting deliberation, and that some retain a disproportionate influence on deliberation in the first place.

Second, there ought to be greater restriction on citizens who hold public office than those who do not. It is worth persevering with a distinction between the wider political arena, and one where citizens engage in the business of politics. More concretely, by my scheme it may be justifiable to limit things like 'short money' going to political parties, but not to limit funding to academic institutions or cultural initiatives on political grounds. At some level, academics - and artists, researchers, charities, and other civic organisations - are engaged with attempting to further a dialogue, whereas political parties seek in part to reflect the interests of citizens.[19]

Finally, following from this, the intention and context of acts matters in justifying restrictions, but it matters relative to a process cooperative deliberation, rather than a particular standpoint on justice. It would be absurd to seek to silence someone like Collier, because he seeks to engage in a dialogue with others and shape policies, and plays by the rules of deliberation.

4. State Authority Over Those Who Suffer Injustice.

Throughout this thesis I have accepted the argument proposed by Rawls, and others, that justice bears upon legitimacy. This is that there is some point at which the substantive injustices suffered by an individual or group as a result of a policy 'trumps' the authority of any procedure to institute it. How the injustices a citizen suffers bears upon the state's authority is a complex matter. To begin with, there is the question of who might fall into this category. Ought it to be applied to anyone who suffers injustice, or perhaps only the 'worst off' as Rawls defines them in setting out the difference principle? And should citizens who are beneficiaries of the state's injustices also not be bound by its dictats? Then there is the question of how to define injustices. The focus might be on distributive injustices according to various measures, such as income, primary goods, 'mid fare', capabilities, or any other metric suggested either by philosophers in the 'equality of what' debates, or by social scientists as good indicators of some more general equality (respect, status, etc.). Finally, there is the issue of what is a just distribution. Another claim made in the early stages of this thesis is the there is at least some reasonable pluralism on all these matters: in terms of the appropriate good to use as an indicator, how principles of justice may be realised, and more fundamentally what constitutes a just distribution.

Without providing an answer to these questions - which may be a life's work - it is still possible to have a meaningful discussion of the types of injustices that will undermine legitimacy in existing liberal democracies. These will tend to be injustices in the distribution of two types of goods: income, and the social bases of self-respect. That is not to adopt the position that either of these is the most valuable. However, both of these are requirements in being treated with equal respect, which I have assumed is the core commitment of liberalism. If a citizen possesses much less money than others, or is consistently the subject of abuse based upon race, class or gender, then it is unlikely that, even if they possess basic political rights, they can participate in the shaping of policies. In practice, there is less of a need for a comprehensive meta-theory of reasonable conceptions of justice, because severe injustices undermine the process of

legitimising policies. Democratic procedures embody principles of respect, reciprocity and toleration, and severe injustices undermine these.[20]

The broad approach that I take draws heavily on Joshua Cohen's work, and his statements on this issue provide a good starting point. He suggests Rawls acknowledges that whilst a society governed by the two principles of justice is the best possible, the conception of the self that he outlined in *A Theory of Justice* is itself controversial (J. Cohen: 1994: 1520). This commits Cohen to the position that there is reasonable pluralism about the correct or optimal conception of political justice, despite all conceptions of political justice being justified to the point that they may be enforced. He proposes, after Rawls, various tests for what might be a political conception of justice. Part of this test is that it be freestanding and based on democratic cultural norms (1522).[21] As noted, there is no reason to suppose Rawls' scheme is unique in satisfying these. The extent of the pluralism around justice that Cohen acknowledges, and that I outlined in Chapter 2, makes defining what might count as a severe injustice that much harder.

The solution that he offers to this is to focus on the status and standing of citizens relative to each other. He offers a substantive commitment that a certain equality of status is a necessary condition of any political conception of justice (1994: 1525). This is the correct position - if theories of political justice need to be justifiable to all and freestanding, then it is impossible for them to privilege some citizens over others in the process of justification. For Cohen, their equal status in deliberation is a requirement, that he calls recognition of the "deliberative capacities" of others (1997: 73). On its own, this does not tell us much about the level of injustice that might undermine legitimacy. However, Cohen suggests that deliberation bridges the gap between the substantive and procedural aspects of democracy, and aids coalescence around a "common good" (76). Throughout he sees deliberative democracy as a framework that can be used to promote a common good - an epistemic account of democracy aimed at more just outcomes (1997). To do so, it must be constructed so as not to succumb to things like "adaptive preferences" (77). The framework is one that all reasonable

conceptions of justice accept, and that in turn produces a tendency towards generally more just outcomes. The link between democratic deliberation and substantive equality is outlined by Cohen in terms of self-respect, and the regulation of the social bases thereof. He splits self-respect into two components - "recognition" and "resources" (1989: 737), which is congruent with my framework of positive and negative political rights.[22] Most of my discussion has focussed on the recognition element, but in this section we should consider fully the level of resources that would undermine the possibility of legitimate policy making in these terms.

Two concerns arise from this requirement that mirror each other. One is that outcomes that produce a level of injustice undermine the deliberative process, whilst the second is that the production of such outcomes might 'trump' procedural concerns, and imply that the authority of the state ought to be disregarded. On the first, Rawls argues that a situation where private individuals can influence political parties through donations is unjust. The unjust kind of influence is that which can take place in "private", i.e. not in the public forum, where special interests may be advanced (*ToJ*: 198). Moreover, there is an inevitable link between income and status in deliberation - see for example Anderson's account of democratic equality, that forbids inequalities that prevent citizens from having enough resources to "convert" in to equal political standing, and the social bases of self-respect more generally (Anderson 1999: 326). Anderson argues, correctly, that this 'conversion' of resources into status in deliberation or electoral voice will depend on background cultural norms. It might be possible for the state to mitigate for most inequalities, partly through the measures I have described in this thesis such as support for political parties and a pluralist media. However, because status is relational, and because of the role of social networks (in the broad sense rather than just websites) in shaping political decisions, it appears unlikely that a modern state can completely mitigate for the pervasive effects of income inequality in deliberation without some redistribution of wealth. This appears to be a good basis for outlining the level of injustice that undermines legitimacy: if economic inequality enables some citizens to influence decisions without this being subject to publicity, then this undermines legitimacy. In practice this means that even in a society where donations to political

parties are limited, inequality may undermine deliberation. Wildly unequal societies that are class-riven will remain unjust, because of the networking effect amongst the (super-) rich.[23]

A trickier case is whether there is a level of injustice that does not undermine the process of deliberation, but does mean citizens may disregard the laws generated by the political process. Cohen acknowledges a greater range of reasonable pluralism about justice than Rawls, which I agree with (2003: 131). An account of the relationship between justice and legitimacy as he stipulates it must acknowledge this. There will be disagreement about individual claims and the demands of justice, different versions of justice, and how justice might be implemented (126-130). Whilst this might seem impossible to reconcile with anything more than a test for legitimacy, Cohen's account provides some clues as to what we ought to consider in demarcating the set of laws that are legitimate through their sheer injustice. To begin with, his explicit link between resources and self-respect, and recognition from others, suggests that the level of injustice that undermines legitimacy might not be so different in practice from that which undermines legitimacy as a process. Secondly, the emphasis on self-respect here is important because factors that will create an injustice that undermines legitimacy will go beyond mere income inequality. In practice, far-right party members are often denied the opportunity to access a fair level of the social basis of self-respect, not just due to lack of income, but also due to ongoing structural conditions - persistent high unemployment, neglect of infrastructure, neglect of educational institutions, lack of secure employment. The case that the injustice a citizen suffers undermines the state's authority over her must be built on more than a reference to income inequality alone. As far as reconciling this judgment with a 'meta-theory' of justice, or one that considers multiple reasonable accounts, persistent inequality across these metrics over a longer period are clearly severe according to any reasonable account of justice. We ought therefore to adjudicate injustices that undermine legitimacy by assessing factors beyond static indicators like income inequality.

It is against this backdrop of persistent economic malaise that far-right parties have

made some of their biggest electoral gains. The increase in support for Front National occurred in the early 1990s as they added disillusioned leftists and lower income voters to their existing coalitions of hardline xenophobes and conservative Catholics (Perrineau 1997 cited in Hainsworth 2000: 23-4). Non-unionised workers in particular have been drawn to the party (Hainsworth 2004: 103). It has sought to present nationalist solidarity as a kind of identity to replace civic ties that have been eroded more broadly.[24] Where economic factors do impact far-right support, the major empirical point to make is that there is a generally thought to be a link between far-right support and economic insecurity, rather than absolute economic position. Indicators like time spent unemployed and (lack of) union membership tends to correlate more closely with far-right support than income or wealth. Further evidence for this can be seen in Swank and Betz's analysis of far-right parties' electoral performance between 1991-8 which found that a generous welfare system suppressed far-right support a little (2003).

In the absence of effective leftist or centrist movements, Berezin notes the "palpable energy" that has emerged in Front National since that electoral breakthrough on a national level (Berezin 2007: 143). They have seized upon a perception that links higher immigration levels to unemployment that was already a trope in French politics (Chirac was the first to conflate immigration statistics and unemployment statistics) (2000: 26). Although it is plausible to argue that the emphasis of far-right discourse, at least in France, has shifted since 9/11 towards security rather than immigration issues (Shields 2011: 96), the party still appeals to voters who live in post-industrial towns, and who are not traditional conservatives, but rather suffer some level of social injustice. This mirrors a more general trend across Europe, where the far-right has shifted its emphasis from economic to cultural factors (Oesch 2008), but has successfully established regional strongholds by appealing to economic concerns (Lucassen and Lubbers 2012: 566-7).

What does all this mean for the legitimacy of sanctions brought against the far-right? Firstly, it implies that there ought not be sanctions that penalise many voters or rank-and-file activists. Instead measures ought to be taken, where possible, that target elite

actors alone. Recall the case of Catherine Mégret who was prevented from taking office due to a charge of inciting racial haters which I discussed in Chapter 7. She claimed that "[e]very reasonable person agrees that there are differences between the races… Jean-Marie Le Pen explained it well when he said that blacks were more talented for sports and dancing than whites and that whites had other strengths" before adding that it was her job to "scare people" who did not belong (Mégret quoted in Emmons 1997: 362). The last of these remarks is the important one, and she ought to have been removed from office.

For her voters, though, further sanctions beyond losing their chosen representative would be unfair. There is something qualitatively different about the post-industrial enclaves that FN established compared to their traditional rural voters. They targeted Vitrolles as part of a general strategy of: "Where things are going badly, we will be there" (Mégret quoted in Emmons 1997: 360). The town at the point of Mégret's election suffered from high levels of crime, unemployment persistently around 20% and widespread distrust of elites - all factors likely to favour a populist insurgency (Mayer 1997).[25] To ban the party, or to strip its resources, in such cases would be to enable existing parties that have been guilty of producing injustices that FN voters rightly reject more power. This might leave a situation where lame-duck administrations ought to be prevent from implementing laws, but ought not be removed: the examples for FN in this period were banning non-pork school meals (an obsession that persists to this day) (Kleinfeld and Kleinfeld 2014); seeking to remove certain benefits according to the principle of national preference to the Christmas gift given to children; removing leftist publications from public libraries; preventing a Jewish author from speaking at a literary festival; and generally removing funding from various cultural projects (Emmons 1997: 362-4). Ordinarily, such behaviour by a regional power might warrant more direct interference, either to dislodge or remove them. However, in this case, the perpetual injustices suffered as a result of state policy by the residents of these towns, might be the deciding factor in undermining the legitimacy of such efforts. Where authority is diminished, justifiable interference may be limited to a refusal to ratify laws.

5. Revisiting the Problem of Mainstream Parties.

In the previous chapter I discussed the problem that political parties tend only to observe informal restrictions on far-right parties - for example the norm not to form a coalition with them - when it suits them.[26] This is understandable; parties will, and in many cases ought to, act in the interests of their constituents. The opportunity to designate some groups as beyond the pale can be exploited by regimes that seek to impose deeply illiberal policies, or are themselves guilty of corrupt behaviour; this was apparent in the Sarkozy presidency in France, and the ascent of Berlusconi in Italy respectively. In the latter case the alliance with the far-right National Alliance allowed Berlusconi to present himself as the less radical and populist of the candidates, and burnish his own credentials as the 'respectable ' choice in elections. This was despite the lack of substantive policy differences between himself and his more openly prejudiced coalition partners.[27] Perceptions of legitimacy clearly matter in policy circles as well as amongst voters. The EU did not interfere in 2001 to prevent Berlusconi placing limits on the free press, despite having acted to register strong pre-emptive disagreement with the Austrian coalition government at that time (Van de Vleuten and Hoffman 2010: 738). It is hard to explain this without acknowledging that the stigma of being outside the mainstream carries some weight, even amongst elites.

Any account of sanctions directed at political parties must reconcile the fact that mainstream parties behave self-interestedly, and that they are partially responsible for some of the injustices that could undermine the legitimacy of state authority. Democratic sanctions ought to be administered by courts and institutions, and ought never be led by other political parties. This is because there is no strong normative case to preserve the 'mainstream/extremist' split that currently exists on a formal level, and because other parties are likely to exploit this power. Under nonideal conditions this requires a degree of flexibility. It is for this reason that I suggested in Chapter 3 that political rights, and possible interferences, be governed according to a constitutional settlement. This is a set of rules that can be changed, but this requires a greater mandate

than can be achieved day-to-day politics. This chapter ought to serve as a general reminder that the case for interference in political rights will always be contingent on the partial authority of the state. Liberals must be cautious that, whilst there may be a *pro tanto* case for interference in many cases, there is also substantial risk of making things worse. In the case of the far-right, there is a real danger that sanctions will alienate the supporters of parties who already suffer substantial injustices, without doing anything to restrict the support or power of the parties themselves in terms of influencing policy and discourse.

6. Conclusion.

The thesis has presented a genuine dilemma over whether to interfere with political rights in some cases. In real-life, there are often strong *pro tanto* reasons both to limit, and not to limit, political rights, and costs to citizens that are unfair whatever course of action is taken. Most of the preceding chapters have considered the case for interference, and used liberal theory to better stipulate when interference might be justified, and the costs of non-interference. This chapter has built the case for non-interference beyond the impact of interference on deliberation. I have argued that where individuals who are essentially reasonable have come to support far-right parties as a result of a faulty empirical beliefs and where far-right supporters suffer severe injustice themselves, these factors ought to be considered when the state deliberates on whether to restrict political rights. I have used the case study to show that both of these issues are present in some cases where the European far-right has gained support.

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[1] Though as I noted in the previous chapter, completely precise targeting of sanctions in this way is not usually possible, so any advocate of sanctions directed against party leaders will have to bear in mind the secondary effect of temporarily exceeding party supporters from the deliberative process.

[2] See the challenge to Gaus' view in Chapters 3 and 6 for a fuller discussion of this, and a critique of alternative 'public reason' positions.

[3] See the discussion in Chapter 3 Section 4 of justice pluralism.

[4] I have characterised this as both a 'second best' outcome and a 'local maximum' in Chapter 4.

[5] Although his definition has changed over time, Cas Mudde, one of the foremost scholars in the empirical

literature on the subject, defines the family of "populist radical right" as having three components: nativism, authoritarianism and populism. See Mudde (2014: 217-8)

[6] For a non-academic piece where Mudde lays this out clearly and eloquently see Mudde (2015).

[7] Though social media may be changing this.

[8] Overzealous application of no-platforming rules is not only objectionable, but is generally counter-productive.

[9] See section in Chapter 5 Section 4 for a fuller discussion of what these might be.

[10] Collier fleshes this out by suggesting there might be some benefits for 'donor countries' in limits to migration, but this is his central insight, and is the argument I am bothered with as it is congruent with the liberal xenophobic argument. One of the reasons I am not a fan of *Exodus* is that for such a big project that garnered attention, I am not sure what it really adds to Putnam's work and the academic responses to this.

[11] Collier introduces Haidt's psychological work as proof that most of us really just look for confirmation bias in our politics, and pledges to at least try to do better in the introduction. He then briefly brushes over potential concerns of cultural biases of his own in a brief tirade against complete cultural relativism (14-22; Haidt: 2012). I am not convinced by this assertion, and I think it bolsters the 'conspiracy cloak' narrative supplied by far-right parties for no good reason.

[12] For example, research by Stockemer and Lamontagne suggests that the Austrian Freedom Party do well in areas of high social cohesion, especially rural areas (2014).

[13] For an example of how the far-right have adopted a muscular liberal dialogue, see the appropriation of French republicanism by the far-right. Front National have managed to appropriate the idea of läcité in France. Läcité is, broadly speaking, the exclusion of religion from politics, and has been mobilised as an intellectual smokescreen to support discriminatory policies. However, we cannot just dismiss this as a 'Trojan horse' for racism; there are many French people who are strongly supportive of this kind of exclusionary secularism because they see it as a necessary part of their liberal national culture. The case for a ban on religious dress in some public spaces draws on läcité. Laborde suggests that there might be a "secular, neutral and egalitarian" argument in favour of the banning of Muslim headscarves in French public spaces - although she does not find it convincing - but that this depends on a particular interpretation of läcité as "a distinctively republic interpretation of the requirements of liberal neutrality… [that] endorses a more expansive conception of the public sphere than political liberalism, as well as a thicker construal of our 'public selves'" (2005: 306-307).

[14] See Chapter 5 Section 2, where I argue that unreasonable citizens often do not seek to inculcate a comprehensive ideology in others.

[15] In most cases this censorship should be in the form of a withdrawal of party accreditation and limits on the dissemination of such material rather than a ban on said party or a criminal charge.

[16] A positive review of Bowen's account of the debate from an anthropologist's perspectives notes it was probably an advantage to have lived through the period in France rather than just analyse the content of the political debate (Poirier 2007: 397).

[17] For a fuller discussion, see previous chapter.

[18] Putnam in particular is keen to emphasise that there are long-term gains in terms of social trust as well as economic benefits to immigration, so to arrive at the liberal xenophobe position from his work requires severe mis-interpretation on behalf of the reader.

[19] For this reason, 'no-platforming' of political parties in state institutions is very different from no-platforming in universities or cultural venues.

[20] This builds on my argument in Chapter 2 Sections 5 and 6 that a democratic system constructed correctly will prevent the vast majority of injustices that would undermine legitimacy.

[21] See also the three stage account of justification that Rawls suggests for theories of political justice, which I set out in Chapter 2 Section 4.

[22] I cite this requirement in Chapter 3 Section 3.

[23] There are some who argue that the level of equality demanded by deliberative democracy as Rawls defines it is greater that that produced by the difference principle - I do not agree, but nothing that I have argued here precludes that.

[24] See Le Gallou's statement linking the success of the party to the "primordial" need of individuals to possess an identity that locates them as part of a social reality (Cited in Simmons 1996:161).

[25] In reporting the 1997 for an American audience, the Baltimore Sun rather uncharitably described the suburb as "bleak" (Viviano 1997).

[26] See the previous chapter, and the discussion of the c*ordon sanitaire*.

[27] See for example Roxburgh as a researcher writing about the topic in a journalistic capacity, and from a liberal bias, who sees the use of wealth by Berlusconi to buy power as the biggest post-fascist abuse of democracy in Italy (amongst some competition) (2001: 16).

Conclusion and Epilogue.

Conclusion.

As the last three chapters have shown, applying an ideal of public justification in real-world cases whilst also considering concerns about the effects of implementing laws and their efficacy in achieving their intended purpose is a complex matter. In many ways the answers I have given are unsatisfying - I have suggested important considerations that apply in some common dilemmas around whether to restrict political rights rather than firm suggestions for action. Complete answers to these issues are probably unattainable, and even the best possible resolutions to these dilemmas will be reached by looking beyond political theory alone. Nonetheless, I have shown throughout the thesis both the normative strength of an appeal to a particular, Rawlsian conception of public justification, and that this can be applied in practice. In particular, the framework I set out that suggests a limited but vital role for ideal theorising when we reflect on decisions surrounding limits on political rights provides a way of using ideal theory in a more systematic fashion, without succumbing to the temptation to try to establish conclusive resolutions to moral blind alleys.

Much of the work has been concerned with mediating the tension between three aspects of liberal theorising: the liberal constraint on legitimacy; the complex set of institutions and practices that realise this under ideal conditions; and the complex set of institutions and practices that can realise the best approximation to this under nonideal conditions. Whilst the first of these is a deceptively simple principle, and something that can be discussed in the abstract, the question of how real, large nations ensure that citizens have an equal enough political voice for the legitimacy constraint to be met raises distinct difficulties. My hope is that even those who are unconvinced by my conclusions, or the conception of public justification that I defend, will nonetheless accept that a truly political theory of public justification requires a proper consideration of both the moral principles that determine when a law is sufficiently justified that it might be imposed, and the political process by which this process of justification might

occur in practice.

A Pessimistic Epilogue.

When I started putting together this research proposal in 2012 the world was a very different place: the Freedom Party had not come very close to the Austrian presidency; Donald Trump was not president elect of the United States; Nigel Farage was still a 'fruitcake' or a 'loon', and the idea of a populist right wing movement being ascendant in British politics seemed fanciful; the global refugee crisis was less marked; the far-right did not hold power anywhere in Eastern Europe; and Marine Le Pen did not stand a realistic chance of being the next president of France.

Since then, all of these things have occurred and liberalism appears to be in retreat. Indeed, the question of how to deal with an upstart far-right party that polls in the mid-teens feels almost quaint compared to many of the problems currently facing the world. Certainly I would have approached the debate differently if I were starting the project again. In 2013 it made sense to frame the issue as one of containing illiberal behaviour from within a structure of relatively secure liberal institutions. Now it appears that liberal institutions are going to be fighting a rearguard action in the near future, and the choices liberals face may well be whether or not they defend certain institutions in the face of popular opposition, and at what point they are obligated to resist states. Perhaps most troublingly, research is emerging that shows dwindling support for liberal and, in particular, democratic values (see, for example, Foa and Mounk 2016). Whilst the strength of this sentiment is unclear, as is the question of how this will shape public behaviour, it goes against an underlying assumption in this work that a significant majority of people in liberal states have at least some liberal convictions. The nature of liberalism means that it simply cannot be imposed upon a majority who opposes it. If the majority come to reject the basic tenets of liberalism, the question ceases to be how best to realise the best approximation to a liberal ideal, and becomes how to mitigate for the worst excesses of illiberal political actors.

Even in this environment, my work has, I hope, something to offer. I have shown that political liberalism can be applied to actual political decisions where trade-offs need to be made in a way that does not completely disregard liberal ideals. As the norms of liberal democracy are repeatedly transgressed, liberals will have to make decisions about which aspects of modern practice are worth defending. In this context, liberals ought to consider the effects of their actions on the process of deliberation as a whole rather than its constituent parts.

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