

DEMOCRACY EDUCATION AND THE CANADIAN VOTING AGE

by

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ABSTRACT

The existence of a voting age in Canada is unjust and educationally unsound. It is unjust both because it arbitrarily excludes some people from voting who by any reasonable definition are competent, and because this restriction is not necessary for the safeguarding of Canadian democracy. The existence of this unnecessary, arbitrary restriction on one of the most basic forms of democratic participation teaches a lesson that is antithetical to democracy.

Jürgen Habermas's explication of a theory of democracy provides an understanding of democratic participation as consisting of the ability to communicate competently with others. While under this conception voting is necessary only when consensus cannot be reached, in mass democratic societies such as Canada's, in which the time required to reach consensus is generally not available, the act of voting shifts into a more central position. Education for democracy is concerned with the development of citizens who are able to participate in their governance autonomously and justly, which leads us to the question of whether such education is better aided by the existence or absence of a voting age.

An analysis of the Canadian political and legal context of the voting age provides a frame for this question. It appears that a Charter challenge to the Elections Act might well result in the age requirement being struck. A reading of Hansard indicates that, in response, Parliament would have two concerns of merit.

The first pertains to whether or not permitting those under 18 to vote would harm their interests. The question here is one of who has the right to act paternally toward them in this matter. The second pertains to the need to ensure, in the interest of the whole society, that the values necessary for the continuation of a free and democratic society are not undermined, and where possible enhanced. It is argued that the interests of no one are better served by the existence of a voting age. Educationally, this restriction is unsound in terms of the acquisition of both reason and justice.

The implications of this conclusion for educational curriculums are discussed in the final chapter.

TABLE OF CONTENTS

Abstract.....	ii
Table of Contents.....	iii
List of Tables.....	iv
Acknowledgements.....	v
Introduction.....	1
Chapter 1 - <i>Democratic theory</i>	9
Chapter 2 - <i>Democracy education</i>	31
Chapter 3 - <i>Political and legal context of the voting age law</i>	45
- The general legal context	
- Court rulings with respect to suffrage	
- The legal context with respect to age	
- The constitutionality of the voting age restriction	
- The legal place of the judiciary	
Chapter 4 - <i>History of voting in Canada</i>	67
Chapter 5 - <i>The voting age and paternalism</i>	90
Chapter 6 - <i>The voting age and the public good</i>	109
Chapter 7 - <i>Implications for practice</i>	124
Bibliography.....	134
Appendix 1 - <i>Use of gender neutral pronouns</i>	144
Appendix 2 - <i>History of schooling in Canada</i>	147

LIST OF TABLES

Voting turnout rate by age group, Canadian National Election Survey, 1965-88... 121

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INTRODUCTION

This thesis will examine the implications for democracy education of the Canada Elections Act voting age qualification. By democracy education I refer to that learning which Canadian citizens might be expected to acquire about the meaning of democracy from their interaction with the structures of the Canadian state. I will argue that the absence of an age qualification for participation in the Canadian electoral system would more closely accord with the fundamental nature of democratic participation, and hence with the educational needs of democracy, than does the provision of an age qualification.

To speak to this contention, it will be necessary, following a discussion about what democracy and democracy education entails, to show that state sanctioned, age based, discrimination, on an issue as fundamental as electoral participation, cannot be justified on two, inextricably connected, grounds. On the one hand, this form of discrimination is unjustified in and of itself, since it runs counter to the requirements of democracy. On the other hand, such discrimination is unjustified in terms of what people learn about what is needed to move toward the realization of these requirements.

Before outlining how I intend to proceed in developing this argument, I will set out briefly why I believe this form of discrimination cannot be justified. In doing so I will establish, provisionally, why it is important that research into this subject be conducted.

Reasons can be given at three levels: the personal, the sociological, and the philosophical. Although arguments exist for understanding such distinctions as essentially spurious, in the present context these distinctions provide a useful basis from which to proceed. As the issue in question actually exists as a point of law in the Canadian state, I will start with the contradictions existing at the sociological level, by which I mean the Canadian political and legal context.

The force of law currently remains located at the level of the nation state. In Canada the highest expression of that law is to be found in the Canadian Constitution. In cases where the provisions of this document appear to be in conflict with legislatively enacted statutes, the Supreme Court alone has the power to interpret the provisions. There is perhaps an element of paradox in having a constitutional document that, while designed to protect democratic rights, in fact provides that the interpretation of that document be conducted by justices who function at some remove from the democratic process. Issues around justice and democracy are complex, and I mention this here simply by way of pointing out that the central democratic provisions of the Constitution are not subject to the so called "notwithstanding" clause. The supreme law, then, is to be found in the nexus of Court and Constitution. Where the statutes are not in accord with the constitution, there exists a need on a procedural level to examine the reasons for the disjuncture.

With regard to voting qualifications, the Constitution states that every Canadian citizen has the right to vote in federal elections. The Elections Act, however, requires that one first attain the age of eighteen years. Two other disqualifications that were not specifically related to the election process were to be found in the Act after the patriation of the Constitution in 1982, but these have not withstood court challenges. It appears likely, for the following reasons, that the age qualification would also be found to be unconstitutional.

The two groups that were previously excluded were prisoners, and those deprived of management of their affairs by reason of mental disease. Like those under eighteen, the latter group might be considered irrational, and for that reason unfit to vote. However, in finding for the plaintiffs, Justice Reed noted that, "this assumption of blanket incapacity has been widely rejected. An individual incapable of making particular types of decisions may be fully capable of making many others". He declared himself unable to find a way to apply the legislation only to those who might legitimately be denied the right to vote. (Canada Disability Rights Council v. Canada 1988: 269)

As the reasons given for finding the section disqualifying prisoners to be unconstitutional are quite involved I will mention here only those that might most easily be seen as relating to the age restriction. For one, the Court found that the assertions by the Government that the restriction was necessary to affirm and maintain the sanctity of the franchise, and to preserve the integrity of the voting process, were insufficient when weighed against the ideal that, "in a democratic state it is the voters who choose the government, not the other way around." (Belczowski v. Canada 1991: 107) Further, the Court found that in the context of readjusting inmates for reentry into society, voting "could form part of that readjustment." (1991: 111) When the Government rewrote the statute to disqualify only those incarcerated for two or more years, the Court again struck the pertinent section because, by not providing for the option of disenfranchisement of offenders "on a case-by-case basis, by the sentencing judge" it did more than minimally impair the constitutional right to vote.¹

The difficulty inherent in determining what constitutes a rational voting choice, the ideal of universal inclusion, and the notion of participation as the most appropriate way of educating people for citizenship, would appear to be compelling reasons for including under eighteens in the franchise, unless specific reasons could be found for their exclusion. Such reasons are not to be found in court rulings as, currently, there are none that pertain to the voting age. It appears that the best one can do toward gaining insight into how the Court understands the capacities of those under eighteen is by reference to the Irwin Toy (1989) ruling. In this the Court determined that people develop the ability to draw distinctions between fact and fiction somewhere between the ages of seven and twelve, and for this reason permitted a Quebec statute banning advertising directed at those under thirteen to stand.

Combining this age related ruling with those rulings pertaining to the vote, it appears that the age qualification may well be found unconstitutional as it now stands. Whether it could be justifiably set at a lower age is a question the answer to which is not to be found in the legal history of Canada. The implication of the above rulings may appear to be that a case could be made for setting the voting age at thirteen years. Applying the reasoning found in the Canada Disability Rights Council ruling, the argument might be extended to include those between seven and twelve since some of them may be capable of drawing reasonable distinctions. However, following this line of reasoning it may appear that it would be justifiable to restrict the vote to those over the age of seven.

¹ A recent 2 to 1 Federal Appeals Court ruling which reversed this finding is being appealed to the Supreme Court.

It is necessary, though, to bear in mind that the ruling on which this justification is based pertained to deciding to whom advertising could be directed. The issue was the extent to which the right to free speech might legitimately be curtailed by a legislature. The ruling curtailed that right for self-interested fiscal concerns whose advertising directly targeted children, but it continued permission for educational advertising. In effect, the ruling was designed to protect those who "always believe." (1989: 622) It should be pointed out that the competing viewpoints presented by commercial advertising to children are almost always between competing products. The very notion of anti-materialist advertising is so antithetical to the medium of television that a group called the Media Foundation has found it necessary to seek recourse from the courts to gain the right to show anti-consumer ads. (Adbusters 1998) Certainly, it would be very difficult to effectively argue that the children affected by this ruling were being deprived of exposure to speech from people who might genuinely have been interested in their well-being.

There is an additional level of complexity in the issue of voting rights, however. While the case was made in the above cited ruling that children under the age of seven cannot distinguish fact from fiction, children are, nonetheless, often strong willed, and capable of exercising what Case (1985) refers to as "want-regarding" reason.² It is quite feasible that children under seven are capable of deciding what they want, at least in a rudimentary way, when the options are presented to them in a form which they can understand. Further, Case points out that to the extent one attempts to modify the behavior of a child through punishment, rather than conditioning, that child is being perceived as a moral being.

The obvious objection here is that they do not have sufficient foresight to know what is in the future interests of themselves and others, yet the question remains as to who does know those interests best. Although it is recognized that there are situations in which the parents or guardians of a child clearly do not have the interests of that child at heart, the general understanding is that the caretakers of a child do actually care about that child, and are in a privileged position with regard to knowing what represents the best interests of that child. The notion of self-rule inherent in democratic government assumes that adults know their own interests and are capable of balancing these (or at least of having the system weigh them) against the interests of others. It seems reasonable that as no one is more able to decide for an individual than is the individual him or herself, that person would also be the most qualified to make decisions on behalf of those who depend on him or her for the basic requirements of life. The ethics of caring propounded by writers such as Nel Noddings would seem to support this conception.

Yet, if this can be seen as a valid way of understanding the relationship of a child to his or her caregivers, then there is a curious gap between the private representation of the interests of that child by his or her caregivers, and the representation of both the child

² It should also be noted that post-structuralist writings have increasingly brought the distinctness of the notions of fact and fiction into question. I am in no way implying that the abilities of adults and young children to make such distinctions are similar simply because at the higher levels of debate on questions of language and reality such distinctions become increasingly difficult to support. What I would like to keep an open mind about, however, prior to exploring the question through argument, is that with respect to some issues this distinction between fact and fiction is not as important as the process by which such distinctions are generated.

and his or her caregivers in a political system which holds a monopoly on the legitimate use of force. Whether that child is seen as a moral being (for which I believe there is a strong argument), or a future moral being, s/he will be affected both now and in the future by those political decisions that are made today. Yet despite being a person (or potential person) that child has no formal representation.

It might appear at this point that if it could be agreed that children should be formally represented through the ballot on the basis that political decisions taken now will affect their future selves, then the person who should rightly have the power to cast that ballot would be the caregiver of that child. Yet there is a difficulty with that approach. Children often have two primary caregivers, and these caregivers do not always agree on the best course of action. If, as indicated above, a child has some understanding of his or her wants, and if s/he can be seen to some extent as a moral being, even though both of these reflect quite strongly the wants and morals of the caregivers, it would seem to make more sense to permit the child to cast the ballot him or herself.³

This approach would avoid a second problem. Although there is fairly compelling evidence that children under seven are not, in most recognized senses of the word, autonomous individuals, it can be argued from that same evidence that at some point between seven and twelve most, in many respects, become autonomous. Since the point at which this happens varies according to the individual, if the caregiver had the right to cast the ballot on behalf of the child, a problem would arise in determining at what point that right should revert to the child. By permitting only the child to cast the ballot, this problem is not present since, when s/he is ready to cast it according to his or her own conscience, the change is registered and acted upon by the only person truly qualified to make that decision.

There is, of course, another side to this argument. It might be pointed out that children do not always listen to their parents, even when it is apparent to everyone else that it is in their best interests to do so. A reply to this is necessarily more equivocal. Nonetheless, it is perhaps not an inaccurate observation that children generally do listen to their parents, especially on matters of importance. While some, like some adults, operate from a basis of strict self-interest and immediate gratification, I believe it is incorrect that most children, when taught differently by those who care for them, continue to act in blatant disregard of that instruction. Some certainly do, as do some adults, yet the fact that some adults act in ways contrary to their apparent interests, and contrary to the apparent interests of society, was not enough to support in a Charter challenge the Elections Act sections prohibiting those people from voting. That one person does not meet the (as yet indeterminate) requirements of voting has not been understood as sufficient justification for arbitrarily depriving the rest of a group of adults of their right to representation. Given the fundamental nature of the right in question, it seems that a strong argument exists for applying this reasoning to those who are not adults.

To this point the issue of a voting age restriction has been discussed from the standpoint of individual rights. However, it can be argued that society as a whole is

³ A justification might be made here for a differential treatment of children who are physically unable to cast ballots due to their age, and those who are unable to cast ballots as a result of physical handicap. This latter difficulty is addressed by our electoral system through a variety of mechanisms, such as through mail in ballots.

poorly served by a qualifying age that is essentially arbitrary. To be more precise, our society in the future is potentially ill served by a restriction that teaches the young of the current day that one of the most fundamental rights in their democratic society is conceived in a way that is both unjustified and undemocratic. It is unjustified both for the reasons outlined above, and with respect to its genesis in the middle ages in a custom that is not connected in any way to the requirements of contemporary Canadian democracy. This constitutes a problem for a democracy, such as the one in Canada, which has at its foundation a reliance on the ability of the members of its polity to engage in rational discourse. To the extent that people learn from what they are told, this incoherence in their lesson does both them and the polity a disservice. It is unfair to them in that they are less able to participate in a meaningful way in a liberal democratic society, and the society itself, in that its central tenet is that of self-rule, is weakened to the extent that its members are not able to fully participate. The obverse of this is that the society itself is undemocratic to the extent that those who are excluded from the franchise are, in fact, capable of self-governance. To the extent that people learn from what they experience, they are learning that it is acceptable to exclude people from political participation for arbitrary reasons. Essentially, in miseducating the children in our society, we are harming the future of that society.⁴

On one level my personal reasons for examining this issue are probably evident: to the extent that I identify as a member of Canadian society, I have an interest in its future. This does not, of course, exclude an interest in the future of human society more generally, but simply reflects the contemporary situation in which the legitimation of the force of law occurs at the level of the nation state.

What has not been included in this thesis are the opinions, or a method for seeking the opinions, of those under the age of eighteen. The difficulty in doing so is that prior to a conception of the Canadian franchise within which the exclusion of the young can be understood, the grounds on which an empirical investigation of youth attitudes might be founded are problematic. By way of illustration, the argument could be made that if even just one person under eighteen wants the right to vote, then it is wrong to deny that person suffrage. Yet by including that person in the franchise, all are thereby included since all that is required for their participation is their individual will to do so. Even if absolutely no person under eighteen wanted suffrage, the question could still be raised as to what the place of education should, or at least might, be in the matter. There is, for example, certainly a substantial literature arguing that education has an emancipatory role to play in the lives of those who are not aware of their subjugation. If one accepted such contentions, the results of a survey which indicated that a given number of those under eighteen did or did not want the vote would seem to have little bearing on what were understood to be the substantive issues.

This thesis did, however, have its genesis in my personal experience, and so, in lieu of the voices of those whose exclusion from the franchise I am addressing, it is perhaps pertinent to briefly include some anecdotal observations.

⁴ One might point out that such an assertion casts aspersion on the past education of present day adults, and by corollary, on our own understanding of, and ability to act in, democratic ways. I am not sure that such an aspersion is entirely unwarranted, however. Certainly, a view that there is no room for improvement in the ways in which we live together would be, for many, a depressing thought.

As with every other full member of the polity I was once younger, and although my notions, during that time, of what might constitute emancipation were even fuzzier than my understandings of how that might be achieved, I was to some extent aware that I was not, in the legal context, a free agent. It should be noted, as well, that I did not find in this situation, when I had occasion to reflect on the matter, reasons for joy. After becoming a middle school teacher I was able to observe matters from the other side of the fence, and while it appeared that many students were quite happy with their situations, there were others for whom the legal strictures defining their lives seemed oppressive. While they might indicate one or another aspect of their situation as representing the problem - compulsion to attend school within a rigid time frame, for example - as an outsider to their particular circumstances it began to occur to me that it was not my place to change the rules governing their lives, but to find a way that they might be included in their own governance. This observation was reinforced both by media stories describing lives, such as those of street kids, that seemed implicitly to be calling for more freedom, and by those that showed people explicitly indicating a desire for greater autonomy by seeking recourse in the courts. Closer to home, an essay assignment in a grade 7 class, on the topic of whether they should be allowed to vote, split the class roughly in half, with the reasons given by both sides strongly reminiscent of those I have since read and heard from adults. Finally, a survey conducted for the Royal Commission on Electoral Reform indicated that of the sixteen year olds who were asked whether or not the voting age should be reduced to sixteen years, nearly half indicated that they thought it should. (Hudon 1991)

As there is currently neither a solid conceptual basis on which to do empirical research into the subject, and perhaps consequently, little empirical research on the topic, this study might be seen as an attempt to provide the former. However, the purpose of the above paragraph is not to point the way toward empirical research. It is simply to indicate that my personal experience has demonstrated to me a need for the study that I am proposing beyond that arising from the problems posed by the logical contradictions existing within our current liberal democratic system.

This thesis will first consider what is meant by the term “democracy”, then set out what, given this understanding, democracy education must entail. From here we will move to a discussion of how the existence of a voting age concords with our notions of what democracy is and how this ideal is best communicated. This will be done through an examination of the status of the law in Canada, followed by a brief history of voting in this country, and an analysis of the Parliamentary debates that lead to a reduction in the voting age in 1970. The concerns which emerge from those debates, that in light of the discussion in chapters 1 and 2 appear to remain valid, will then be taken up in greater detail.

Specifically, chapter 1, having briefly noted the structure of the Canadian government, will attempt to sort out from the various conceptions of democracy the one that appears to be most defensible. The difficulties inherent in grounding a theory of democracy have been addressed in the literature (e.g. Benhabib 1996), without any firm conclusions being reached. About the only definitive conclusion is that the subject remains open for discussion. Given that theory itself consists of rational discourse (the

nature of "rational" itself being open for debate), it would appear that provisional grounds might, in fact, be found in rational discourse. Habermas, although not the originator of this idea (e.g. see Peters 1966), has given it perhaps its fullest expression. His recent work, Between Facts and Norms (1996), explicitly moves from the conception of a discourse principle toward a full explication of the genesis of democratic society and the ways in which democracies can currently claim to be legitimate. In doing this he incorporates such powerful contractarian theories as Rawls' Theory of Justice, and develops a paradigm of law that promises to reconcile the current dichotomy existing between liberal and republican viewpoints. The extent to which Habermasian theory might legitimately provide a coherent description of democracy will be tested through reference to other political conceptions, particularly those propounded by his critics.

The explicit and implicit ways in which learning is understood in the democratic theoretical debate will also be explored in chapter 1. Habermas has not specifically addressed the role of education in democracies to a great extent, and to the extent he has, the focus has been on post-secondary education. (Young 1989: 62-3) It appears to me that this omission results from his particular understanding of what democratic interaction entails. While he understands the capacity for rational thought to be an innate human characteristic, what people actually decide is constitutive of rational thought is intersubjectively determined. Learning, in effect, occurs through every action which is communicatively, rather than strategically, motivated. The theoretical conception of democracy developed in this chapter will provide a basis for understanding the requirements of education for democracy, and, in later chapters, the relationship between the Canadian people, constitution, courts, and legislature.

Chapter 2 will consider several views of what the constitution of education for democracy ought to be. An argument set forth by Callan, in which the development of autonomy is taken to be an essential aspect of such an education, will be discussed in detail, and defended.

Chapter 3 will situate the law that governs voting age within the Canadian political and legal systems. In doing so, it will make specific reference to the incompatible delineations of the franchise provided by the statutory and constitutional levels of Canadian law. This will be followed by an analysis of those court cases pertaining to voting, and to age discrimination, with a view toward understanding their implications for the Elections Act age qualification.

Chapter 4 will concern itself with three aspects of the historical situation of the voting age in Canada. First, it will provide a brief general history of voting in Canada. The House of Commons debates that occurred between 1955 and 1970 over whether or not to lower the voting age from 21 to 18 will then be outlined in some detail. The chapter will conclude with the views put forward by the 1991 Royal Commission on Electoral Reform, and with arguments raised in recent debates in the House of Commons, over whether the voting age should be reduced to the age of 16. The intent will be to set out the arguments that have surrounded the voting age in Canada, and to examine the soundness of those arguments with respect to democratic theory.

The question of the constitution of maturity broached in historical debates on the voting age will be taken up more fully in chapter 5. In doing so the various arguments relating to justifications for paternalism will be considered, with particular attention paid

to the ways in which educational concerns underlie these justifications. The chapter will conclude by delineating where such justifications intersect with concerns for the public good, especially in relation to education.

Chapter 6 will return to the concerns broached in chapter 4, and consider the degree to which the existence of a voting age can be justified in the public interest. In particular it will examine to what extent the voting age contributes to democracy education, and assess, where the age does not contribute in this way, the degree to which the undemocratic message is outweighed by concerns over the ability of democracy and democracy education to be sustained in the absence of such an age.

Chapter 7 will consider the implications that the contents of the previous chapters have for the development and delivery of curriculum in Canadian schools.

Throughout this dissertation I have made the unusual decision to use the gender-neutral pronouns "hir" and "sie". My justification for doing so is in appendix 1.

CHAPTER 1 - DEMOCRATIC THEORY

In a 1971 brief on the reform of the Supreme Court, Jim Matkin noted that, “the Supreme Court is but an arm of the federal government and could be repealed at any time.” He then remarked that, “In fact the likelihood of this happening is so remote as to be non-existent.” (Matkin 1971: 2) Certainly, it had not happened to that point, and within a decade, Parliament entrenched the Supreme Court in the Constitution, thus rendering the possibility of such an occurrence even more remote. Matkin supported the constitutional separation of the judiciary from the legislature, in part, because, “the Supreme Court must not only be independent, but it must *appear* to be independent.” Yet, although the constitutional independence of the Court has become a reality, in fact, the Court and Parliament remain inextricably bound. Parliament can still dissolve both the Court and the Constitution, although, admittedly, only with widespread agreement by the Canadian populace. In the absence of such an extraordinary action, the Court, as the expositor of the meaning of the Constitution, can “exercise a power over specific policy measures and the general political character of the regime that is not subject to the ordinary mechanisms of democratic accountability.” (Manfredi 1993: 188) While Section 33 of the Charter - the “notwithstanding” clause - can be invoked by elected legislatures with respect to rulings made under some of the sections of the Charter, this is not true of all sections, including the one pertaining to voting. That democratically elected legislatures choose to separate these powers indicates that a strong connection exists between law and democracy. This is especially true of Canadian democracy as it has moved away from its British roots and entrenched democratic rights in its Constitution in such a way that judicial interpretation of those rights cannot be overturned by a democratically elected government. To understand the basis on which a democratic government would constitutionalize these rights in this way, a survey of the literature dealing with democratic theory will be helpful.

There is a difficulty with conducting such a survey, however, in that any articulation of the basis on which rights in fact rest must have some further foundation from which that articulation is, itself, legitimated. This paradox is of a form noted by Bertrand Russell, wherein, “if the metarule is a member of the class it regulates it ceases to be ultimate; if it is not then it ceases to be a rule.” (Ingram 1997: 283) As Seyla Benhabib has noted, “any definition of essentially contested concepts like democracy, freedom, and justice is never a mere definition; the definition itself already articulates the normative theory that justifies the term.” (Benhabib 1996: 68) This aporia is addressed in the literature discussing the constitution of the foundations of democracy, so that questions concerned with which theoretical literature should be surveyed - and why that literature as opposed to some other - are answered to an extent by the existence of a literature that deals with the concerns underlying such questions.

Benhabib, for example, in Democracy and Difference (1996), solicits the opinions of four prominent writers on democratic theory on whether or not democracy needs foundations. These articles are presented in an order that begins with an anti-foundationalist stance expressed by Richard Rorty. This is followed by Robert Dahl’s assertion that without some foundations, then “in times of serious crisis - and all countries go through times of serious crisis - those who try to defend democracy will find the going

much harder, while those who promote nondemocratic alternatives will find it that much easier.” (Dahl 1996: 338) Amy Gutmann, in her piece, asserts that both foundationalist and antifoundationalist “perspectives presuppose a metaphysical truth without warrant.” (Gutmann 1996: 343) She remarks that we are almost all foundationalists if all that is meant by this foundationalism “is that democracy can be defended by publicly accessible reasons”, and almost all antifoundationalists if all that is meant by antifoundationalism “is that democracy cannot be deduced from self-evident truths.” (1996: 346) Instead, she defends a deliberative approach to democracy through which particular forms of democracy can be provisionally justified, “provided they respect the basic liberties and opportunities of all individuals and leave citizens free to deliberate in the future.” (1996: 344-5) Benjamin Barber, finally, argues that the question of foundations is of an epistemological nature, and that it is therefore concerned with philosophy rather than the pragmatic politics which lie at the heart of democracy. He considers politics, and particularly democratic politics, to be, “a system of conduct concerned with what we *will* together and *do* together and how we agree on what we will do.” (Barber 1996: 348) Democracy, under his conception, “legitimizes itself [...] without the help of foundations, whose purposes can only be to explain but never to justify a democratic polity.” (1996: 357)

The emphasis of Barber’s antifoundationalism initially appears to be different from that of Rorty’s. Rorty remarks that we need to distinguish between foundations and idealizations, since the latter, in asking how we can make our present practices more coherent, are typically what political debates at high levels of abstraction are about. It appears that his emphasis is on the discursive aspects of democracy while Barber is concerned with the practical, action oriented aspects. Yet both take democracy to be an unjustifiable set of practices rooted in history. With respect to why we should be inclusive in our moral and political concerns, Rorty writes: “Worthiness does not come into it, because there is no standpoint outside of the accidents of evolution from which to judge worth.” (Rorty 1996: 334) Instead, we need to accept that we *do* believe that people should be inclusive and trust each other, and “think of language as a tool for breaking down people’s distrust of one another rather than as one for representing how things really are.” (1996: 335) For both writers, ultimately, democratic action results from the human will to live together democratically. To look for epistemological foundations for this act of will is both futile and dangerous. It is a futile search because such foundations do not exist, and dangerous because any claim that certain principles are foundational to democracy would, to the extent that these were not in accord with the will of the people, constrain the will of the people and thus be antithetical to the democracy that they purported to ground.

Yet while on one level this rejection of foundations appears logical, it also begs the question as to on what grounds anyone might say anything about what democracy is at all, for in these brief pieces, Rorty, Gutmann, and Barber certainly do make assertions regarding what they believe democracy to be. Rorty refers to inclusiveness and trust, Gutmann to “basic liberties and opportunities of all individuals” and the freedom “to deliberate in the future”, and Barber to reaching agreement “on what we will do”. Rorty, at least, though, would not consider these foundational since, to “ask for a foundation of democracy is, typically, to ask for a reason why” a given action - in his case,

inclusiveness - should be undertaken, and neither he, nor Gutmann or Barber explain why. To my reading they believe that history and human will must be sufficient since attempts to provide foundational reasons simply terminate in groundless assertions. In other words, they recognize democracy as a good rather than as something that can be justified as a right.

I do not believe they are entirely incorrect on this point, but I am also not sure that they are entirely right. I do think that it is, at least, possible to much more closely approach the articulation of foundational reasons for acting democratically than the brief chapters to which I have referred above might lead one to believe. At present, we do not really even know what we mean by democracy, or where to turn for a definition. There are two ways of addressing this problem. On the one hand we could survey what others have written on the subject to determine which conceptions of democracy appear to be most popular, which are most firmly grounded in historical precedent, and which most cogently argue from the common understandings of those precedents for a conception of democracy. On the other hand we can look at the language on which all of these arguments - on which all theory - depends, in order to determine whether the very use of language in some way determines the structure of the arguments made in favour of one or another conception of democratic, or other, issues.

Although the idea of seeking foundations, in language, for justifiable human interaction, has been explored by others (see, for example, Peters 1966; Watt 1975; Apel 1980 & 1987), Jürgen Habermas is the theorist who has most consistently pursued thinking related to this matter. In Knowledge and Human Interests, originally published in German in 1968, he attempted to ground human action and reason on cognitive interests (Coulter 1997: 3), but a shift in his focus from interests to language was apparent when The Theory of Communicative Action was first published, in German, in 1981. He has, since that time, continued to ground his complex and comprehensive analyses of human action and modern societies in language. The validity of Habermas's work is enhanced by what Bernstein has described as a genuinely dialectical approach, in that he listens carefully to his critics and modifies his arguments when he has been convinced that changes are required. (Coulter 1997: 4)

In 1996 the English translation of Between Facts and Norms was published, in which Habermas develops a theory of democracy based on his research over the previous three decades. For reasons that will become apparent later in this chapter, I believe that to the extent that it is possible to provide a foundational basis for democracy, the approach taken by Habermas has as much or more to recommend it, in terms of both rigour and scope, than other extant contributions to democratic theory, whether they be liberal or republican. In order to show why I believe this to be the case, however, it is necessary to first provide some of the theoretical backdrop to the argument presented in Between Facts and Norms.

In The Theory of Communicative Action, Habermas examines what it means to say that a person is behaving rationally, or that a statement that a person has made is rational. A reiteration of the argument developed in this work is not necessary here. The details relevant to our purposes emerge in support of the argument developed in the essay "Discourse Ethics: Notes on a Program of Philosophical Justification" (1990), in which he develops a basis for understanding morality as being grounded language, and in the

discussion of Between Facts and Norms. It is this argument that I shall now present in some detail.

Habermas begins by differentiating the view that reason is purely calculative from the cognitivist moral view that maintains that “in one sense or another practical questions admit of truth.” (Habermas 1990: 43) He names several theorists, including John Rawls, who have analyzed the conditions for making impartial judgements of practical questions based solely on reasons. Of these he mentions Karl-Otto Apel’s theory as one that, although not elaborated in the greatest detail, recognizably outlines an ethics of discourse. Beyond this he mentions specific cognitivist approaches only in passing, focusing instead on elaborating “the shared problematic that distinguishes cognitive theories from noncognitivist approaches.” (44)

He moves from here to a phenomenology of the moral through reference to an essay by Strawson. He distinguishes anger from resentment, and explains how the disruption in social interaction caused by insult can be repaired through either of two forms of excuses: those indicating that the act was not a wrong (i.e. circumstances prevented the offending actor from acting otherwise); and those indicating that the actor was incompetent (i.e. a child, madman, etc.).

The crucial point here is that in order for one to feel resentment, instead of anger, it is necessary, despite the fact that the resentment is directed at a specific person, that an “underlying *normative expectation* that is valid [...] for all members of a social group or even [...] for all competent actors” be violated. (48) It is only the connection to an impersonal kind of indignation arising from the breach of a generalized behavioural expectation that gives the emotional response of one individual directed against another individual its moral character. “It is only their claim to *general* validity that gives an interest, a volition, or a norm the dignity of moral authority.” (49)

Strawson’s conclusion is that the question “What ought I to do?” must be situated within “the web of moral feelings that is embedded in the communicative practice of everyday life,” if one is to justify a mode of action in moral-practical terms. (50)

Habermas then refers to an analogy that Stephen Toulmin draws between the search for truth in empirical science that takes place through discussion, and the search for moral truth that takes place through discussion. He points out that, just as two people will attempt to reach rational agreement on the physical nature of something, by reference to an objectivating point of view, when their perceptions do not coincide, so too they will attempt to reach moral agreement through reference to an objective moral sphere when their moral judgements do not coincide.

Philosophers seeking this objective moral sphere have generally turned to Kant’s categorical imperative, which can be understood “as a principle that requires the universalizability of *modes of action* and *maxims*, or of the *interests* furthered by them (that is, those embodied in the norms of action).” (63)

The difficulty Habermas has with this principle is that it presumes that it is sufficient “for *one person* to test whether he can will the adoption of a contested norm after considering the consequences and the side effects that would occur if all persons followed that norm.” (65) He does not consider this sufficient, and so reformulates the principle so that:

every valid norm has to fulfill the following condition:

(U) *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation). (65)

In order to operationalize this principle, however, a second principle is required that will allow for the determination of whether everyone does accept the consequences of the observance of a norm. For this purpose, Habermas proposes a discourse principle which he formulates so that:

(D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*. (66)

In other words, what can be ascribed as valid is not that which each can will without contradiction to be a general law, but that which all can will in agreement to be a universal norm. (67) Habermas refers to ethics based on these principles as "discourse ethics", which he states stand or fall on two assumptions. These are:

(a) that normative claims to validity have cognitive meaning and can be treated *like* claims to truth and (b) that the justification of norms and commands requires that a real discourse be carried out and thus cannot occur in a strictly monological form, i.e., in the form of a hypothetical process of argumentation occurring in the individual mind. (68)

To help clarify what he means by this he turns to a theory of informal argumentation articulated by Ernst Tugendhat, which he considers to be situated obliquely to cognitivist and skeptical conceptions. With the intent of defending the cognitivist position he explains why even if one accepts the semanticist presuppositions underlying Tugendhat's theory, the theory itself does not hold up. These presuppositions hold that, with the truth of sentences being a semantic matter, the justification of sentences is a monological matter. (69) The implication is that, "argumentation is designed to make possible not *impartiality of judgment* but *freedom from influence or autonomy in will formation*." (71) Habermas, however, states that it is not sufficient for a person to have the equality of opportunity that follows from these implications because to determine whether a norm ascribes to "Tugendhat's predicate 'equally good for everyone' demands an impartial *judgment* about the interests of all concerned." (72) By reducing the predicate to a balance of power, Tugendhat conflates consensus with compromise. Yet consensus is required on the principles of compromise formation in order for a discourse of compromise to occur. In other words, the distinction between valid norms, and socially accepted norms disappears under Tugendhat's conception. This leads to the problem, Habermas argues, of the intersubjective process of justification being reduced to "a

contingent communication event unrelated to validity.” (73) Here, norms are not discussed between affected parties and validated with reasons, but simply declared valid on the basis of an incontestable moral authority (with regard only to “the imperatives of power”). The problem with Tugendhat’s approach is that he retains the idea that norms require justification while removing the cognitive aspects of justification from his analysis. In effect, he does not explain why a “*reflective mode of justification*” is required for the validation of norms. To do this, Habermas asserts, “a normative theory is required” under a pragmatic analysis of discourse, rather than a semantic analysis of validity. (75)

To present a normative theory he begins by presenting Apel’s analysis of performative contradictions. Moving from an example based on the phrase “I do not exist (here and now)”, which contains the assumption that one does exist, Apel demonstrates that a performative contradiction underlies any denial, by an ethical skeptic, that it is possible to ground moral principles. (81) As Habermas states it, “This is in fact the case, since in putting forward his objection, the opponent necessarily assumes the validity of at least those logical rules that are irreplaceable if we are to understand his argument as a refutation.” (81)

This leads to the position that, “Just as someone interested in a theory of knowledge cannot adopt a standpoint outside his own cognitive acts (and thus remains caught in the self-referentiality of the subject of cognition), so too a person engaged in developing a theory of moral argumentation cannot adopt a standpoint outside the situation defined by the fact that he is taking part in a process of argumentation.” (81) The awareness that moral argumentation must be, at some level, self-referential, leads the theorist to give up attempts to deductively ground “ultimate” principles, and instead focus on explicating the unavoidable (i.e. universal and necessary) presuppositions of such argumentation.

Habermas begins this explication by referring to A.J. Watt’s analysis, in which it is argued that while it may not be possible to claim the existence of certain principles based on the presuppositions that underlie any argument, it can be claimed that, “a mistake is involved in repudiating them while continuing to use the form of thought and discourse in question.” (83)

He then describes R.S. Peters’ derivation of basic norms from the presuppositions of practical discourses, beginning with a fairness principle, but states that in the form in which Peters presents them Peters could be accused of deriving norms that he had already placed into his definition of practical discourse. To meet this objection, Apel extends the analysis to include all, not just moral, argumentation. The problem remains, however, that while these principles might hold while people are involved in argumentation, it has not been shown that the principles are valid with regard to action outside of discourse.

What is meant by this is best explained by first pointing out the distinction Habermas makes between morals and ethics. Morals are tantamount to universal expressions of justice, while ethics are those norms of behaviour that are embedded in contextualized social relations, in the lifeworld. We cannot derive “basic ethical norms *directly* from the presuppositions of argumentation. Basic norms of law and morality fall outside the jurisdiction of moral theory; they must be viewed as substantive principles to be justified in practical discourses. Since historical circumstances change, every epoch

sheds its own light upon fundamental moral-practical ideas.” Nonetheless, he asserts the existence of a link between the morality inherent in discourse and context specific ethics, stating that, “in such practical discourses we always already make use of substantive normative rules of argumentation. It is *these rules* alone that transcendental pragmatics is in a position to derive.” (86)

Toward explicating the rational link between morality and ethics, Habermas distinguishes three levels of presuppositions of argumentation: “those at the logical level of products, those at the dialectical level of procedures, and those at the rhetorical level of processes.” (87) A list created by R. Alexy provide examples of the presuppositions of argumentation at each of these levels. At the logical-semantic level, which contains no ethical content, Habermas cites three such rules:

(1.1) No speaker may contradict himself.

(1.2) Every speaker who applies predicate *F* to object *A* must be prepared to apply *F* to all other objects resembling *A* in all relevant aspects.

(1.3) Different speakers may not use the same expression with different meanings. (87)

At the procedural level, proponents and opponents in an argument test validity claims that have become problematic. The presuppositions underlying this level are that the participants are involved in a search for truth. Also situated at this level are rules regarding the jurisdiction of that search and what counts as relevant to it. Examples of rules at this level are:

(2.1) Every speaker may assert only what he really believes.

(2.2) A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so. (88)

These contain some ethical import in that they contain presuppositions common to both discourses and such actions as mutual recognition. However, unlike with traditional ethical philosophies, there is no “dogmatic core of fundamental convictions” that has to be protected from all criticism. (88)

The rules suggested by Alexy with respect to the rhetorical level of processes are based on an analysis by Habermas of the symmetry conditions that “every competent speaker who believes he is engaging in an argumentation must presuppose as adequately fulfilled.” (88) This structure “rules out all external or internal coercion other than the force of the better argument and thereby also neutralizes all motives other than that of the cooperative search for truth”. The rules are:

(3.1) Every subject with the competence to speak and act is allowed to take part in a discourse.

- (3.2) a. Everyone is allowed to question any assertion whatever.
 b. Everyone is allowed to introduce any assertion whatever into the discourse.
 c. Everyone is allowed to express his attitudes, desires, and needs.

(3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2).

In demonstrating that contesting these rules necessarily involves one in performative contradictions, Habermas appeals to “the intuitive preunderstanding that every subject competent in speech and action brings to a process of argumentation.” (89-90) From this position he derives the universalisation principle and from there the discourse principle. The only moral principle here is inherent in the process of argumentation itself, which is stated by the universalisation principle. This is distinguished from the discourse principle “which stipulates the basic idea of a moral theory but does not form part of a logic of argumentation.” (93)

The status Habermas claims for discourse ethics is that it is not foundational, but that, “In competition with other ethical approaches, it can be used to describe empirically existing moral and legal ideas. It can be built into theories of the development of moral and legal consciousness at both the sociocultural and the ontogenetic levels and in this way can be made susceptible to indirect corroboration.” (98)

Habermas is aware of the difficulties inherent in a moral theory that seeks consensus from those capable of rational speech. He wonders, first, if it is not wrong “for present-day beneficiaries of past injustices to expect the posthumous consent of slain and degraded victims to norms that appear justified to us in light of our own expectations regarding the future.” (1990: 210) Secondly, he points out that, “Compassion for tortured animals and the pain caused by the destruction of biotopes are surely manifestations of moral intuitions that cannot be fully satisfied by the collective narcissism of what in the final analysis is an anthropocentric way of looking at things.” (211) Two further considerations regarding the universal applicability of discourse ethics, which he does not mention, but which are germane to the subject of this thesis, concern the young, and those who are not capable of rational speech. The latter group could encompass those who are in coma, suffering from psychosis, exceptionally developmentally delayed, and the like. In all of these cases we must make decisions for such people based on what we believe to be their best interests, but without discursive validation. With respect to the young, there is the expectation that they will eventually become capable of competent rational speech, but until that time, how their interests can best be represented remains problematic. This question will be addressed in detail in chapter 5.

With the publication of Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, Habermas provided an explication of the connection between moral validity and political legitimacy. In this work, Habermas moves from the arguments regarding communicatively oriented human interactions set forth in The

Theory of Communicative Action, and his discourse theory of morality⁵, to present a theory encompassing a “sociologically informed conceptualization of law and basic rights, a normative account of the rule of law and the constitutional state, an attempt to bridge normative and empirical approaches to democracy, and an account of the social context required for democracy.” (Rehg 1996: ix-x) Obviously, in the space available here, it is possible only to summarize those central features of his argument that pertain to the subject of this thesis, and to indicate how selected other democratic theories might be understood in relation to these selected features. At the least, though, this will provide insight into such questions as to how constitutional law and democratic will are related within the Canadian state.

Although Habermas tests his discourse theoretically informed conception of deliberative democracy through specific reference to the governments of Germany and the United States, the intent of his work is to present a philosophically and sociologically informed understanding of the requirements for democratic legitimation that will be true for any modern society. It is important to understand that Habermas is referring to societies that are modern in a specific sense which is contingent on the conception of rationality outlined in Theory of Communicative Action. Habermas understands premodern societies as those that hold mythical worldviews. These, however, are not really worldviews as such because they lack the reflexivity necessary to understand their own way of life as a cultural tradition. This absence results from an “insufficient differentiation among fundamental attitudes to the objective, social, and subjective worlds” (1984: 52), which, when present, allows members to understand their worldviews, “as interpretive systems that are attached to cultural traditions, constituted by internal interrelations of meaning, symbolically related to reality, and connected with validity claims - and thus exposed to criticism and open to revision.” (1984: 52-3) Since the Canadian state structure fulfills this criteria of modernity, Habermas’s contribution to our understanding of the nature of the tension between popular rule (or facts), and a universal conception of justice (or norms), is useful for interpreting the relationship that exists between the courts and the citizens of this country, and for providing a context within which we can explore who, in Canada, might legitimately be allowed to participate in the processes of self-rule, and for locating the place of voting in self-rule.

In Between Facts and Norms, Habermas situates the discourse principle “at a level of abstraction that is neutral vis-à-vis the distinction between morality and law.”⁶ (459) He argues for this because, while the discourse principle “is supposed to have a normative content sufficient for the impartial assessment of norms of action as such,” if it is not prior to the moral principle (U) then the moral principle “would once again, as in natural law, be the sole source of legitimation in law.” Yet this legitimation, which under the moral principle takes the form of a rule of argumentation, also requires a democratic

⁵ Habermas indicates, in Justification and Application (1993: vii), that while the phrase “discourse ethics” constitutes established usage with respect to the aspect of his project discussed above, “it would be more accurate to speak of a ‘discourse theory of morality’”.

⁶ Here, Habermas more specifically distinguishes between the discourse principle and the moral principle, stating that, “For the justification of moral norms, the discourse principle takes the form of a universalization principle,” while, “For application of moral norms to particular cases, the universalisation principle is replaced by a principle of appropriateness” (109).

principle that establishes “a procedure of legitimate lawmaking.” (110) This is not to say that argumentation is not also crucial to the democratic principle, but that while “the moral principle operates at the level at which a specific form of argumentation is *internally* constituted, the democratic principle refers to the level at which interpenetrating forms of argumentation are *externally* institutionalized.” (110) Specifically, Habermas understands the democratic principle as stating that, “only those statutes may claim legitimacy that can meet with the assent (Zustimmung) of all citizens in a discursive process of legislation that in turn has been legally constituted.” (110)

The difference between the moral and democratic principles, as I understand them, is as follows. The moral principle refers to any norm, but in justifying any given norm, a specific rule of argumentation must be followed. This rule requires that those participating in the justification of the norm must include all of those who may potentially be affected by the norm, that they all be oriented to reaching the truth, and that all must consent to the norm. In essence, this requires a situation in which all of these people are able to participate in an ongoing conversation with one another, which would be an ideal situation, and may be possible in communities of a size small enough for each individual to redeem any validity claims they may make⁷. However, in large, highly differentiated, complex, pluralistic societies such as the one inhabited by thirty million Canadians, an interpersonally based regulation of action is not possible. For this reason, Habermas postulates a democratic principle, which refers only to norms that “display the formal properties of legal norms” (460), but does not specify the forms of interaction - which might include bargaining and voting - that may be used in reaching agreement regarding the interpretation of a particular norm. The phrase “legal norms” refers to those norms that are valid within a particular legal community rather than those held to be applicable universally but which can only be affirmed intersubjectively. Instead, the legal community comprises a particular community of citizens bound by a law which has validity despite the state guaranteeing both, “average compliance, compelled by sanctions if necessary” (448), and “the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law.” (448)

This conception of law is only possible if those subject to the law are involved in its making since it is “only participation in the practice of *politically autonomous* lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves.” (121) The key, here, is to understand the genesis of rights as comprising “a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law - hence the democratic principle - are *co-originally* constituted.” (122) In light of this understanding, Habermas specifies which rights citizens must confer on one another “if they want to legitimately regulate their interactions and life contexts by means of positive law.” (122)

The first three define the status of legal persons:

⁷ The place of trust in any speech situation that is not ideal is not explicitly discussed by Habermas. The concept is covered, however, by his conception of a lifeworld consisting of an unquestioned background consensus in which we live most of our lives. It is only when something tears at the fabric of this consensus that we need to move to rational speech, in which redeemable validity claims need to be made, in order to repair this consensus.

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*. (122)

The fourth defines how legal subjects become the authors of their legal code:

4. Basic rights to equal opportunities to participate in processes of opinion-and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law. (123)

A fifth, implied by these four, but that can only be justified in relative rather than absolute terms, is:

5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4). (123)⁸

It is, however, important not to conflate these theoretically derived rights with the rights actually embodied in a constitution, as the following passage makes clear:

To do justice to both democratic self-determination and the rule of law requires a two-stage reconstruction. First, one starts with the horizontal sociation of citizens who, recognizing *one another* as equals, mutually accord rights to one another. Only then does one advance to the constitutional taming of the power (*Gewalt*) presupposed with the medium of law. By proceeding in two steps, one sees that the liberal rights protecting the individual against the state apparatus, with its monopoly on violence, are by no means *originary* but rather emerge from a transformation of individual liberties that were at first *reciprocally* granted. The individual rights linked with the legal code as such acquire only secondarily the negative meaning of delimiting a private sphere that is supposed to be free from arbitrary administrative interference. Rights against the state arise only as a

⁸ These are similar to the guarantees that Robert Dahl has postulated are necessary for the reaching of legitimate, binding decisions: (a) the inclusion of all those affected; (b) equally distributed and effective opportunities to participate in the political process; (c) an equal right to vote on decisions; (d) an equal right to choose topics and, more generally, to control the agenda; and (e) a situation that allows all the participants to develop, in the light of sufficient information and good reasons, an articulate understanding of the contested interests and matter in need of regulation. (Habermas 1996: 315) To date, Habermas writes, these five criteria "have not been *sufficiently* satisfied by any actual political order" (1996: 316).

consequence of the process of differentiation in which a self-governing association of consociates under law becomes a legal community organized around a state. Such rights arise co-originally with the constitutional principle of legality of administration.” (457)

In presenting the origination of state power in this way, Habermas appears to reconcile the tension between liberal and republican conceptions of the state. Here there is no choice between the liberal understanding of the state as being a mechanism for facilitating economic transactions, and against which citizens have rights when the administrative power contained therein threatens individual liberties, and the republican understanding in which the essential rights of state are those providing for participation in government. Instead, these two positions co-originate in the participation of people in consensually granting to each other individual liberties, which are then legally inscribed as an administrative power under which those people are now also citizens who have agreed to live together as free and equal consociates. (268-70)

Given this understanding of democracy, it is not readily apparent as to how it might account for voting as a legitimate form of decision making. On a thin liberal conception, citizens can be seen, in the role of voters, as supervising “the exercise of governmental power so that it responds to the interests of citizens as private persons.” (270) On the republican view:

The right to vote, interpreted as a positive liberty, becomes the paradigm for rights in general not just because it is constitutive for political self-determination but because its structure allows one to see how inclusion in a community of equal members is connected with the individual entitlement to make autonomous contributions and take positions of one’s own[.] (271)

A quotation taken from Michelman (1989: 484) elaborates on this conception:

The claim is that we all take an interest in each other’s enfranchisement, because (i) our choice lies between hanging together and hanging separately; (ii) hanging together depends on reciprocal assurance to all of having one’s vital interests heeded by others; and (iii) in the deeply pluralized conditions of contemporary American society, such assurances are attainable ... only by maintaining at least the semblance of a politics in which everyone is conceded a voice. (272)

Yet neither of these views resolves the problem that arises with voting under a conception of democracy that is based on discussion oriented to achieving consensus - by all who will be affected - on what is to be done, because voting does not involve either discussion or consensus. There will nearly always, under the results of a vote, be those for whom a decision is made about which they do not agree.

However, this does not mean that discussion has not preceded the taking of a vote, nor that those who oppose the decision resulting from that vote will not consider that decision to be legitimate and consent to the enactment of that decision. As John Dewey noted: “‘it never is *merely* majority rule.... ‘The means by which a majority comes to be a

majority is the more important thing': antecedent debates, modification of views to meet the opinions of minorities....The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion.” (Habermas 1996: 304) In a sense, the need to take a vote can be seen as a failure by those involved to reach consensus, yet the decision can be seen as legitimate to the extent that there remains a consensus that the more abstract level of the procedures under which the vote was taken were legitimate. The legitimation of this process by the majority is contingent on the matter at hand remaining open for discussion so that a future vote might reflect any more persuasive arguments that have been made in the period following the last vote. (179) There is an obvious limit to the application of majority decisions, however, set by the boundary at which these decisions undermine the legitimacy of the process itself. In other words, such decisions “are generally constrained by basic rights protecting the minority, for in exercising their political autonomy citizens must not violate the system of rights that first constitutes this autonomy.” (180)

It is this understanding of basic rights that is, to an extent, entrenched in the Canadian Constitution. A number of basic rights, such as freedom of the press, of assembly, and of association, legal rights, and the equality of individuals under the law, are subject to section 33 which provides for legislative abrogation of these rights. This section was a compromise to the provinces in order to gain their assent for the patriation of the constitution. The legitimacy of such a compromise under the conception of democracy expounded by Habermas could be interpreted as questionable since the abrogation of such basic rights as “*equal individual liberties*”, “*individual legal protection*”, and “*equal opportunities to participate in processes of opinion-and will-formation*” would prevent the members of the polity from legitimately regulating “their interactions and life contexts by means of positive law”. If these rights were abrogated, then the opportunities for opinion formation prior to voting would exist only in a truncated and distorted form, if at all, rendering the outcome of any poll meaningless in terms of producing a decision that those affected could understand as arising from a legitimate procedure. A consideration of whether or not the less rigorous protections given to these rights is justifiable is, however, beyond the scope of this thesis. What is pertinent, beyond the fact that these rights are, at least, constitutionalized, is that the right to vote is not subject to section 33, and thus can only be abrogated according to much more stringent rules pertaining to constitutional amendments.⁹

We now have an account of how a supreme court could come to be in a position to make binding decisions on democratic matters contrary to the wishes of a democratically elected government. Contained in this account is a description of the place of majority rule and of voting within a democracy. Yet, this is only one of a number of theoretical accounts of democracy. Prior to considering how education might be understood in relation to citizenship in a liberal democracy, and how this understanding might relate to the establishment of a voting age, it will be useful to briefly consider how the discourse based theory of democracy set out by Habermas accords with other conceptions. For reasons of space the location of Between Facts and Norms within the

⁹ These will be outlined in chapter 3.

literature specifically concerned with *deliberative* democracy will not be discussed here. Bohman and Rehg provide a good overview of this debate in the essays selected for Deliberative Democracy, with the views of most of the contributors accounted for either specifically, or in substance, within the account set out in Between Facts and Norms. I will also not specifically consider the elitist or majoritarian¹⁰ conceptions of democracy as I believe the discussion of discourse theory, and the description of the co-origination of liberal and republican views, respectively address the central concerns of these conceptions.

Perhaps the most widely known and influential conception of justice and democracy advanced in North America in the last 30 years is John Rawls' Theory of Justice. In this contractarian account of "the most appropriate basis for the institutions of a democratic society" (Rawls 1996: xvii), Rawls begins from a position in which people have already agreed that they want to live together justly, and are now in the situation of exploring what the best means of doing this might be. The two principles of justice which he proposes that all would accept as fair from the "original position"¹¹ are:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. (1971: 60)

These are not, in essence, different than the rights that citizens who wish to live together under legitimate law must confer on each other under the conception put forward by Habermas.

In Political Liberalism Rawls addresses a problem that was disregarded in Theory: that the "fact of a plurality of reasonable but incompatible comprehensive doctrines - the fact of reasonable pluralism - shows that [...] the idea of a well-ordered society of justice as fairness is unrealistic." (1996: xix) Given this fact, Rawls attempts to answer the question of what political construction could be stable and just over time while gaining the support of an overlapping consensus of a pluralistic population. (xx) In a critique of this work, Habermas notes that he sees the essential conclusions drawn by Rawls as correct (434), but takes issue with Rawls' use of the original position as a theoretical starting point as it does not contain what he understands to be the legitimating dialogical aspect. Rawls, while not denying that Habermas's conception is comprehensive, while his is limited to the political, argues that a civil society also includes all citizens, and like the ideal discourse situation it involves a dialogue in which everyone "appeals equally to the

¹⁰ Jon Elster provides a useful critique of social choice theory in his essay "The Market and the Forum".

¹¹ This refers to a hypothetical situation in which "no one knows his [sic] place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like [, or even] their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain" (1971: 12).

authority of human reason present in society”. Rawls would include his Theory of Justice as simply one voice in this dialogue. (1996: 383)

What is crucial here is what it is that constitutes reasonableness. Rawls states that, under his conception, the “overall criterion of the reasonable is general and wide reflective equilibrium; whereas we have seen that in Habermas’s view the test of moral truth or validity is fully rational acceptance in the ideal discourse situation, with all requisite conditions satisfied. Reflective equilibrium resembles his test in this respect: it is a point at infinity we can never reach, though we may get closer to it in the sense that through discussion, our ideals, principles, and judgments seem more reasonable to us and we regard them as better founded than they were before.” (1996: 385) As citizens, Rawls understands reasonable persons as having two basic features: “first, their willingness to propose and to abide by, if accepted, what they think others as equal citizens with them might reasonably accept as fair terms of social cooperation; and, second, their willingness to recognize the burdens of judgment and accept the consequences thereof.” (1996: 395)¹²

It is not possible to claim that the conceptions of Rawls and Habermas are not different in important respects. Yet, for our purposes here, it seems to me that the differences between the two are not crucial. Each regard the exercise of reason as being foundational to democracy, and understand what counts as reasonable as being intersubjectively determined.¹³ Both consider majority rule to have a legitimate place within civil society, but only when it results from reasoned deliberation. (Rawls 1971: 358-9) Rawls also recognizes that voting is required due to time constraints on discussions that preclude the reaching of consensus in many situations. (1996: 393;430) Necessary, although not necessarily sufficient, conditions for the enactment of just legislation, according to Rawls, “are those of political liberty - freedom of speech and assembly, freedom to take part in public affairs and to influence by constitutional means the course of legislation - and the guarantee of the fair value of these freedoms.” (1971: 356) While voting is not the only means of influencing the course of legislation, it is an essential one.

There is another perspective on democracy that returns us to the earlier question of whether or not democracy has foundations. One expression of this stance views such conceptions as those propounded by Habermas and Rawls as being foundational in a sense that precludes an understanding of pluralism as being an axiological principle that is “constitutive *at the conceptual level* of the very nature of modern democracy and considered as something that we should celebrate and enhance.” (Mouffe 1996: 246)¹⁴ Yet this view is inherently contradictory since it requires, insofar as it intends to constrain difference within the parameters of language rather than allowing it to spill over, as it

¹² The “burdens of judgement” are the sources of disagreement that arise between citizens when confronted with equally reasonable, but competing, comprehensive doctrines (1996: 55).

¹³ There are a number of other, basic, similarities between their views, which Rawls details in his “Reply to Habermas” (1996: 372-434). For example, like Habermas, Rawls understands the liberties of private and public autonomy as being co-original, and the creation of a constitution is seen as a second step that cannot be conflated with the derivation of rights (413).

¹⁴ The views of writers such as Carol C. Gould (1996), who understands Habermas to be propounding a discourse theoretical understanding of society in which public and private discourses are too starkly differentiated, are not discussed here as I believe the paradigm Habermas sets out in chapter 9 of Between Facts and Norms substantially accounts for and addresses these concerns.

frequently has and does, into violence, that certain norms be held that can only be understood as universal in nature. These norms may be implicit in the sense that the reader, in order for an argument from this perspective to be coherent, must understand them to be presupposed, or they may be explicitly stated. Mouffe illustrates the latter approach with her assertion that, "What is at stake is the legitimation of conflict and division, the emergence of individual liberty, and the assertion of equal liberty for all." (1996: 246) What I believe she is discussing is the legitimation of non-violent conflict, which discourse theory clearly legitimates in the form of argument.

Yet the size of the existing body of anti-foundational democratic literature indicates that there is something more to the position than this. Among others, Mouffe cites Rorty and Derrida as being antiessentialist thinkers. (1996: 255) While there is no space to treat this position in depth, an essay by Rorty is helpful in locating it with respect to Habermas. Stating that he thinks of "Jacques Derrida as the most intriguing and ingenious of contemporary philosophers, and of Jürgen Habermas as the most socially useful - the one who does the most for social democratic politics" (1998: 307), he proceeds to examine how they might complement each other. Having redefined the private/ public distinction as being between "idiosyncratic projects of self-overcoming, and public concerns [...] having to do with the suffering of other human beings" rather than between "the domestic hearth and the public forum" (1998: 307-8), he explains what relevance private concerns so defined might have for social justice. In essence, those writing private philosophies "make more vivid and concrete our sense of what human life might be like in a democratic utopia - a utopia in which the quest for autonomy is impeded as little as possible by social institutions. They do little to justify the choice of such a utopia or to hasten its arrival. But they do show us how the creation of new discourses can enlarge the realm of possibility." (1998: 310) He believes that Derrida would agree with Habermas that "'the world disclosing force of interpreting language has ... to prove its worth' before such metaphors get literalized and made into socially useful tools." (1998: 314)

The conceptual confusion resulting from democratic perspectives such as the one articulated by Mouffe can be attributed, Rorty indicates, to admirers of Derrida who "commit him to having 'demonstrated' something original and startling about the nature of language. His defenders make him into a quasi-metaphysician and refuse to let him remain an ironist." (1998: 314) It is just such attempts that Derrida has, in fact, satirized (1998: 314), and which Rorty believes "are useful only to that quite small group of people for whom 'the tradition of Western metaphysics' still looms large - the people whose self-image is stated in terms of the quarrel between the ironists and the metaphysicians." (1998: 317) In effect, then, we return to Gutmann's remark that both foundationalists and anti-foundationalists essentially understand democracy the same way, and that what we need to be doing is discussing how best we might live together. Rorty appears to concur with this assessment when he writes that:

the rich democracies of the present day already contain the sorts of institutions necessary for their own reform and that communication among the citizens of those democracies is not 'distorted' by anything more esoteric than greed, fear, ignorance, and resentment. This amounts to saying that the instruments of

perfectibility are already, in the rich North Atlantic constitutional democracies, in place - that the principal institutions of contemporary democratic societies do not require 'unmasking' but rather strenuous utilization, supplemented by luck. (1998: 326)

There is still, in this view, the notion that justification is not necessary, that as Barber states the matter, the purpose of foundations "can only be to explain but never to justify a democratic polity." (Barber 1996: 357) This continuing discrepancy between these positions, that appears to be one that cannot be resolved but only ignored, results from this paradox at the heart of democracy: "a revolution is always a founding (and thus a foundation) as well as the kindling of a certain spirit of spontaneity hostile to foundationalism." (Barber 1996: 351) The democratic institutions to which Rorty refers emerge from those historical moments when people agreed to institutionalize the rights presupposed by discourse. It is almost tautological to refer to these presuppositions as justifications, which is in no way a denial of the force of this discourse based explanation of the genesis of rights.

There has, to this point, been an emphasis on the liberal requirements of autonomy and justice. However, the republican view, which is set out in detail by writers such as Barber, understands participation to be a virtue that exists prior to these liberal values. As Barber states the matter, "Autonomy is not the condition of democracy, democracy is the condition of autonomy." (Barber 1984: xv) It is only through democratic participation, he contends, that reasonable solutions might be found to problems for which there is no rationally superior approach. Consequently, his understanding of the Rawlsian position is one in which, "[i]ndividual men are decontaminated of the special psychologies and particular interests by which we understand them to be men, so that a political theory of justice can develop from an antiseptic starting place." (Barber 1984: 51) Barber finds this view to be problematic. "To create an area of neutrality for a rational conception of justice is to strip men of their particularity; but that is in turn to depoliticize them, and to depoliticize them may be to denude them of their human features altogether." (Barber 1988: 60) To avoid these difficulties Barber advocates what he terms a strong democratic approach.

According to Barber,

Because it acknowledges that the condition of politics is the absence of an independent ground by which conflicts might otherwise be settled or common goods fashioned, strong democracy avoids reintroducing external criteria into the political process. Its central value is the autonomy of politics, and it therefore requires that participants put whatever moral codes, principles, interests, private ideas, visions, and conceptions of the good they may bring into the process as individuals or groups to the test of politics itself. (Barber 1984: 156)

What this conception requires if it is to be enacted is an "unmediated self-government by an engaged citizenry. It requires institutions that will involve individuals at both the neighborhood and the national level in common talk, common decision-making and political judgment, and common action." (Barber 1984: 261) The glue that would enable

this is, in Barber's words, "talk", by which he means discussion that "always involves listening as well as speaking, feeling as well as thinking, and acting as well as reflecting." (Barber 1984: 178) In this his view of democratic foundations, although he would not use that phrase, is similar to Habermas. Unlike Habermas, he ventures into a much more specific description of how a polity firmly grounded in his ideas would look. In essence, he envisions a society which relies heavily on the idea of neighborhood assemblies and the concomitant structures that would allow these to have real impact on the political process, and which would ensure a viable form of direct, participatory democracy.

This aspect of his work does not seem to me to be problematic. Habermas is likely less prescriptive because he wants to present a conception that outlines a legitimate process, while Barber ultimately presents a view that might more properly be regarded as the outcome of a legitimate process. This perhaps begs the question of exactly what form the legitimate process that could give rise to Barber's conception should take. This is not a trivial question, and it remains the subject of ongoing debate. I do not believe that it requires resolution for our purposes, however. For one thing, the framework set out by Habermas does, I believe, more adequately explicate the current state of Canadian democracy than does an explicitly republican view, while simultaneously highlighting those areas, such as the need for greater civic discourse, that fall short of what is required for the government to be truly legitimate. For another, while Habermas's approach may be short on specifics, it has the important virtue of providing a form of resolution for the divide that exists between the philosophical positions held by liberals and republicans.

In attempting to present his position while still addressing some of the very legitimate concerns, such as the possibility of descent into mob rule or despotic majoritarian rule, that the liberal view has with the republican, Barber involves himself in a contradiction over the place of autonomy. His privileging of democracy over autonomy was cited above. Yet he later asserts:

If action is to be political, it must ensue from forethought and deliberation, from free and conscious choice. Anyone can be an actor. Only a citizen can be a *political* actor. (Barber 1984: 126)

This makes little sense in the context of a further assertion that, "[t]he need is rather to create a citizen community that regards the preservation of autonomy as even more sacred than its exercise and that will therefore never sacrifice the former to the latter." (Barber 1984: 160) Barber appears to present us with the choice of being either autonomous citizens involved in political action, and therefore *exercising* our autonomy, or defending our right to be autonomous without actually having the quality necessary to genuinely provide that defense.

He smuggles in other terms from the liberal vocabulary as well. In writing that the terms "freedom", "equality", "justice", and "right", cannot be defined "a priori or by reference to some abstract philosophical lexicon" (1984: 157), but only through a conception of politics as epistemology, which inverts "the classical liberal priority of epistemology over politics" (1984: 166), he leaves in question how it has been determined that these are terms that do in fact connote things that we value. We are also left in the paradoxical position of being asked to give credence to a theoretical conception

about the correct understanding of politics which states, within its own text, that such conceptions are ultimately flawed.

I would not argue against Barber's position that we require an actively engaged political culture, nor that it is from this culture that the shape of governments must emerge, nor that his book can be seen as part of a political debate over how to transform the structure of government toward the revitalization of the public sphere. The dichotomizing of the liberal and republican stances undermines his argument, however, rendering it less than fully satisfactory as a description of democracy.

By contrast, Habermas is able to transcend this dichotomy by offering an understanding of democracy in which the liberal and republican conceptions cooriginate. In doing this he is able to provide a justification for seeing autonomy, justice, and participation as being equally fundamental aspects of the democratic process. It seems to me that his attempt to bridge this gap is successful within the scope of what he sets out to do, and certainly provides a fuller and more coherent account than that offered by those who more closely align themselves with one or the other sides in the debate.

However, there are other aspects of his reconstruction of democratic theory in Between Facts and Norms at which criticism has been leveled. William Scheuerman (1999), for example, points to Habermas's description of the function of law in mediating between the communicative and administrative spheres, and argues that the dissimilarity between these spheres, especially in light of the radically divergent theoretical work that he enlists in setting out his understanding of these spheres¹⁵, renders his claim that public discourse can effectively steer administration through law to be suspect. It should be noted that these spheres are different from the liberal/republican dichotomy in that both the liberal and republican views are conceived as aspects of the public's communicative, and hence normative, power, while the administrative sphere is the extant government structure which has been charged with carrying out public opinion. Where exactly the line between these two spheres exists is somewhat problematic, and it is one of Scheuerman's criticisms of Facts and Norms that this line does not appear to be adequately delineated.

At some junctures, Habermas seems to point to parliament as the main site for law making; at others, he accepts the 'realist' view that parliamentary sovereignty is little more than a moldy liberal myth. Sometimes parliament is envisioned as an extension of a deliberative civil society; at other times, parliament's deliberative capacities are demoted, in order to accentuate its pragmatic qualities and to distinguish it from the 'anarchical' processes of deliberation and exchange found within civil society. (Scheuerman 1999: 168)

Scheuerman traces this apparent confusion to the possibility that any attempt to describe how communicative power might be translated into administrative power despite the fundamental differences inherent between discursive and strategic power, might be "destined to remain enigmatic." (1999: 169) His criticism here, however, is not that the idea of law acting as mediator is without use, but only that Habermas "has conceptualized this nexus in such as way as to generate a series of tensions within his account that

¹⁵ Specifically, Scheuerman refers to Habermas's use of Nancy Fraser's explication of democratic socialism, and Bernhard Peters' critique from the perspective of democratic realism.

arguably could be avoided.” (1999: 176n42) It appears to me that while there is room for refinement and greater specificity in Habermas’s analysis, it currently remains less problematic on a conceptual level than others in the field.

Scheuerman also raises the related question of how opinion formation occurs in the communicative sphere, arguing that Habermas provides very little specific detail about how this actually occurs. He points out that while Habermas contends that an active civil society represents an important aspect of liberal political culture, that civil society may actually be distorted by social inequality. Earlier in this chapter it was noted that while the need for social equality is included by Habermas as an element of democracy, he understands it to be implied by the other four elements, and therefore to be relative rather than absolute. A detailed analysis of the connection between social capital and political power is certainly absent from Between Facts and Norms, although again I am not sure this is a flaw so much as a practical necessity given the size of a volume which is already tightly focused on what might be considered the necessary although not sufficient aspects of democracy.

At any rate, while these criticisms cannot be dismissed - they clearly address theoretical areas that require much further discussion - they do not, and I do not believe that Scheuerman thinks they do, undermine the reconstruction of democratic theory that forms the core of Between Facts and Norms. It therefore provides a useful basis from which to develop our understanding of voting, age and democracy education in the Canadian state, for our concern here is one of structural rather than social inequality. To clarify this point, consider that a person who is socially marginalized in a host of ways might still, through the sheer force of hir being, manage to make hir voice heard and to have a profound influence. With a structural inequality such as voting, no one under the age of 18, regardless of the magnitude of their being, will be allowed to cast a ballot until they come of age.

Further, this thesis is also concerned with a fairly well accepted aspect of democracy. If it is proven here that the voting age should be abandoned, then, in terms of how the law might be changed, the question of how communicative power can be transferred into administrative power might become a concern. With respect to the abstract terrain often contested in theoretical debates on the nature of democracy, the ground this thesis will tread is far less disputed insofar as the right to vote is generally considered a crucial, if not sufficient, element of any large democratic government.

Underlying this entire discussion is the question of whether or not a theory of democracy is foundational. Although a strictly philosophical view of democracy generated without the actual input of those who are affected cannot be directly equated with the strategically oriented action of the administrative sphere, there is a similarity between them in the sense that to the extent that a purely philosophical, and hence monological, approach to democracy could be proven to be legitimate, then the administrative sphere would have no need of the communicative. Hopefully, though, by this point it is clear that Habermas’s contribution to democratic theory is not foundational in any strong sense. It simply demonstrates that when people autonomously agree together to enchain the “violence of the Leviathan” (1996: 457), that there are certain ideas and actions which are logically consistent with this agreement. The connection of this essentially philosophical insight to human participation is made apparent by an

historical observation: The premise that the legal system legitimates itself “is already contradicted by the evidence that democratic institutions of freedom disintegrate without the initiatives of a population *accustomed* to freedom. Their spontaneity cannot be compelled simply through law; it is regenerated from traditions and preserved in the associations of a liberal political culture.” (1996: 131) In this respect, Barber’s understanding of democracy is mirrored by Habermas in his remark that, “Again and again, it is the same phenomenon, *the close kinship of communicative action with the production of legitimate law*, that Arendt tracks down in different historic events and whose exemplar she found in the constitution-making force of the American Revolution.” (1996: 148)

This raises an interesting question with regard to what can actually be taught about democracy. If there are no foundations, or if the foundations are simply those presuppositions inherent in every rational speech act, then what can be said about what can be taught? This is a question that will be examined in greater depth in chapter 2, but the general parameters of the question can be outlined here.

Essentially, the notion of education is what lies at the heart of Barber’s paradox, for a foundation implies that there is something there which can be taught - that the values from which the revolution arose can be transmitted to others so that the wrongs of the past will not be repeated. Yet inherent in those values is the idea that the yoke that people had formerly been educated to accept could be thrown off, and if this idea, too, is taught, what is to prevent this understanding of what is right from being used to discard these new teachings of which this idea is an inextricable part? In a somewhat different context it is to this that Arendt refers when she writes: “The problem of education in the modern world lies in the fact that by its very nature it cannot forgo either authority or tradition, and yet must proceed in a world that is neither structured by authority nor held together by tradition.” (Arendt 1963: 195)

It is because Arendt understands education in this way that she writes:

Education can play no part in politics, because in politics we always have to deal with those who are already educated. Whoever wants to educate adults really wants to act as their guardian and prevent them from political activity. (1963: 177)

For Arendt, the idea of political education is a contradiction in terms. This accords with a conception of liberal democracy in which what constitutes the political is intersubjectively determined, for if education is rooted in authority and tradition, the revolutionary, mutual conferring of rights that constitutes the political involves an action that is completely antithetical to these roots.

I agree that if education is understood in this way, the idea of political education is, indeed, an oxymoron. However, Arendt insists on a conception of education that is too narrow. She specifies as mistaken the belief, based on the assumption that “you can know and understand only what you have done yourself,” that, insofar as possible, doing should be substituted for learning. (1963: 182) Yet it seems to me that with respect to politics, doing and learning cannot be separated, to the extent that learning is taken to be instruction through language.

There is a way of understanding political teaching as not involving doing, although I expect such teaching results in its students learning something quite different from what they are being taught. It requires one to understand the students as being capable of morally understanding what they are being told, while at the same time withholding from them the rights to which they are told all moral beings are entitled. Education does, certainly, involve the invoking of tradition. As Arendt argues, it is the responsibility of adults, who have already been inducted into this world, to tell children how the world is to be best understood. Yet this is only half of what is required, for in telling children this, we are using rational speech, which requires, in order for it to be rational, that it be in accordance with our actions. In the course of articulating the presuppositions of speech, we are making certain claims about how everyone who understands those claims ought to be treated. Telling people what constitutes the basic liberal democratic rights, while treating them in a way that is antithetical to those rights, would appear to have a greater chance of teaching them fascism than an approach that demonstrates through action that for which it is arguing. Further, it seems that this holds as true for children as for adults since presumably part of what makes them children is that they do not know what the words mean. Although many concepts can be built on preceding understandings, our initial introduction into our native tongue is through demonstration. It is at this stage that the basic moral concepts upon which a liberal democracy is built might first be learned.

All of this, of course, is with respect to the essential morality underlying liberal democracy, which is a step removed from the constitutional enactment of rights within a state. Participation in processes of opinion-and will-formation, of which voting is a part, is a basic right under an ideal conception of democracy, and, in the form of voting, one of the absolutely basic Canadian constitutional rights. However, it is a step removed from the procedural morality underlying speech. In chapters 5 and 6 we shall more closely examine the implications that the exclusion of people from voting on the basis of age has for educating people in the values that underlie this form of participation. First, though, it is necessary to turn to the question of what people should and can be taught in order for them to understand and embrace democratic values, while not simultaneously undermining those values.

CHAPTER 2 - DEMOCRACY EDUCATION

A far broader literature pertains to the question of the requirements of democratic education than can be considered here. The field can be narrowed considerably if we limit our examination to those theories that are founded on the discursive understanding of democracy set out in the previous chapter. John Dewey is certainly one of the earliest and most prominent of these theorists. His writings on democratic education prefaced contemporary discursive conceptions of democracy, as the following passages illustrate.

A society which makes provision for participation in its good of all its members on equal terms and which secures flexible readjustment of its institutions through interaction of the different forms of associated life is in so far democratic. Such a society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder. (Dewey 1916: 114)

This view of education runs counter to technocratic views of what is required for participation in a democracy, and is in keeping with his understanding of majority rule, which he declares:

“never is *merely* majority rule.... ‘The means by which a majority comes to be a majority is the more important thing’: antecedent debates, modification of views to meet the opinions of minorities....The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion.” (quoted in Habermas 1996: 304)

Contemporary theorists are not, essentially, in disagreement with him. They tend to argue, instead, over the appropriate place and constitution of an education that has as its end the creation of citizens capable of participating in democratic discourse.

Patricia White, for example, affirms justice, tolerance, and personal autonomy as the “bedrock democratic dispositions”, noting that there is a large accompanying body of literature concerned with the clarification and application of these dispositions.¹⁶ Instead, she focuses on other “essential elements of citizenship education which have not [...] so far been given sufficient attention in the growing body of literature on citizenship.” These elements are, hope and confidence, courage, self-respect and self-esteem, friendship, trust, honesty, and decency, and her book focuses on why she believes these to be important, and what the role of the school is in promoting them. (White 1996: 3)

James Tarrant, having noted that “the view that one takes of the constraints which democracy imposes on the notion of what it is to be educated, depends crucially upon what sort of democrat one is” (Tarrant 1989: 4), proceeds to argue for a moral conception of democracy. He contrasts this with a market conception which, he argues, to the extent that it is democratic, and able to remain so, rests on such moral understandings as those advanced by Kant and T.H. Green. These, loosely stated, refer to the moral community

¹⁶ She uses Kenny’s definition of the term “disposition” as being something that is “half-way between a capacity and an action” (1996: 2).

that develops amongst people who work together reasonably, in an other regarding way, to reach mutual understanding. This positions him to argue that, without a politically critical populace, the range of issues, and the scope accorded those issues, is in danger of being constrained by articulate groups not interested in the public good, so that voting no longer provides a way to change policy. To prevent this from happening he recommends that politics, finance, and legal studies be taught in schools, and that arrangements be made to continue the provision of this education to employees who have not attained some minimal facility with these subjects upon leaving school. Tarrant considers that a citizenry of critical thinkers may have implications for the continuance of such current institutional features as secrecy and the capitalist economy as the compatibility of a democratic citizenry with existing institutions remains "an open question." (Tarrant 1989: 185)

White does not comment on how those who are under the age of majority ought to be treated with respect to that diminished citizenship status. Her silence on the question, as I will argue in more general terms in chapter 7, tacitly sanctions current practices, but provides no argument as to whether these practices are educationally necessary, beneficial, neutral, or harmful. Tarrant also makes no specific reference to the question, although his argument that a minimal facility in certain subjects can be determined, and tested for, in order to provide for the extension of education to those who have left school without attaining that facility implies a basis for the restriction of the franchise. However, such a restriction would reasonably apply to all people who fall short of the standard, regardless of age. How such a standard would be determined, and by whom, would be problematic in ways that Tarrant did not begin to address, quite possibly because a restriction of the franchise on such a basis was not part of his intent. At any rate, nothing more can be said about his position on the non-qualification of the young for voting than can be said of White's.

This is not true of the stance taken by Amy Gutmann. In Democratic Education she comments that children are "future citizens" (1987: 46), and leaves no doubt that this refers not only to the social location of children, but to their readiness to participate in society. She states that it is necessary, for example, that "*all* educable children be educated adequately to participate as citizens in shaping the future structure of their society" (1987: 46), and remarks that, "Were students ready for citizenship, compulsory schooling - along with many other educational practices that deny students the same rights as citizens - would be unjustifiable." (1987: 94) She not only argues that compulsory schooling is necessary, but asserts that, "Were the only goal of a democratic state to prepare its members for citizenship, its maxim would be, 'Mandate the maximum education.'" (1987: 278) She acknowledges that this would be insupportable as follows:

Who, then, would educate the educators? The best answer again is Plato's, but it is unacceptable. We cannot accept the rule by philosopher-kings or -queens unless we reject democracy. Democracy *is* educationally demanding, but its first and foremost demand is that adults be treated as sovereign citizens, not as the students of philosophers or the subjects of kings. This is why we encounter no paradox, only a serious problem, when we acknowledge that democratic states have the authority to make schooling compulsory for children but not for adults who fall

below the democratic threshold of education. Since the threshold defines not a fully but an adequately educated citizen, this constraint on democratic authority may leave many adults less than adequately educated. A stricter constraint - mandating the maximum education - is ruled out by our recognition of the primacy of treating adults as sovereign citizens. (1987: 278)

The intent of her book is to develop a democratic theory of education which "provides principles that, in the face of our social disagreements, help us judge (a) who should have authority to make decisions about education, and (b) what the moral boundaries of that authority are." (Gutmann 1987: 11) The principles she refers to are those of nonrepression and nondiscrimination. The former she distinguishes from freedom from interference by limiting it to only that extent to which it "forbids using education to restrict *rational* deliberation or consideration of different ways of life." (1987: 44) The latter principle, by referring to the "distributional complement to nonrepression," asserts that no "educable child may be excluded from an education adequate to participating in the political processes that structure choice among good lives." (1987: 45)

From this position Gutmann proceeds to argue the merits of a public school system in which the curriculum is determined substantially, but not entirely, by teachers and school based administrators. In this and other ways, Gutmann's work is far more specifically prescriptive than the work of either Tarrant or White. Ultimately, though, her argument appears to be for a continuance of the current direction of education in the United States, albeit with substantially increased funding.

This, in itself, is not problematic. Her analysis of the balance required between the interests of parents and the interests of the state in educating the children of a democratic nation is, of course, open to debate. Her use of history to hypothesize the potentially deleterious consequences of not integrating Catholics and Protestants into one public school system in the United States (1987: 32), for example, is questionable with respect to the Canadian context. Although the number of Catholics relative to Protestants was greater in Canada than in the United States, thus perhaps reducing the intolerance shown toward Catholics, the creation of two separate denominational school systems would still be seen as highly divisive under the argument that she develops. This is clearly not the place for an extended analysis of the respective merits and demerits of the various publicly supported denominational school systems in such provinces as Ontario, Quebec and Newfoundland, but the debilitating effect on democracy that Gutmann forecasts such systems would have had in the United States do not appear to have occurred in Canada in the hundred plus years since Confederation. This is obviously not the place for a comparison of the democratic merits of the two countries - the point is simply that issue could be taken with aspects of her analysis, at least with respect to their pertinence for countries other than the United States. Nonetheless, the question of balance between public and private interests in a democratic polity is central to an understanding of the functioning of that polity and to the challenges to its survival.

What *is* problematic is that at no point does she examine either the potential consequences of extending full citizenship to people of all ages, or the current distinction between adults and children with respect to citizenship. In raising these issues she

indicates her belief that such a distinction exists and that this distinction justifiably forms a basis for the denial of the extension of full citizenship, but I do not think that she offers an adequate justification for this belief. Part of the difficulty in understanding her objection to the extension of citizenship is that it is not clear what she believes citizenship entails in concrete terms. She does explicitly state that democratic citizens must uphold the principles of nondiscrimination and nonrepression. That these are essentially theoretical concepts, the social application of which must be debated in the social arena under the rules of discourse, Gutmann affirms by upholding deliberation, and hence the ability to "participate in conscious social reproduction," as the central democratic value. (1987: 46) However, there is a gap between the ideal of a discourse situation in which all affected by the outcome of a discussion were participants in that discussion and were in agreement with the outcome, and the real world in which constraints such as available time mitigate against the reaching of consensus. The best we can generally do is agree on the procedure by which decisions are made, hence agreeing to be bound by the outcome. In mass societies such as nations, this procedure is often reduced to the election of representatives from a limited number of choices, the views of which we know to only a minimal degree on a restricted range of topics. In societies such as those found in the United States and Canada, in which the ideal of democracy informs but is not very closely represented by our current systems of government, those ideals of discursive participation are reduced to such formalized elements of citizenship as voting. In making reference to what she believes are necessary restrictions on citizenship in the interests of the continued reproduction of democratic society, Gutmann fails to address this gulf between the ideal and the actual. The result is that we are unable to determine either what her specific criteria are for an adequate democratic sensibility, or how she understands the relationship of such aggregating mechanisms as voting to the development of that sensibility.

She acknowledges the difficulty of specifying the educational criteria for citizenship in the following passage.

Schooling, according to [...] critics, should not be compulsory for either children or adults because there are no (or only the most minimal) necessary educational conditions for democratic citizenship.

It makes more sense, however, to draw just the opposite conclusion. We are unable to specify necessary or sufficient educational conditions for citizenship not because citizenship is educationally undemanding, but because it is so demanding. (1987: 278)

I will leave aside the question of compulsory schooling at this point except to note that whether or not the extension of the vote to youth would affect school attendance laws remains an open question. It is certainly an important question if we accept that it is important that people be educated for democracy, and it would, in fact, be incoherent for me to argue that democratic education is not necessary, to the extent that democracy requires the use of rational discourse. However, the appropriate form of education remains open. I also do not disagree with Gutmann that democratic citizenship is demanding. If it were not demanding, there would be no need for such extended academic

discussion on the subject, and brutal oppression would be the subject only of history and fiction. However, it is the very nature of the demands of democracy that renders the question of the appropriate form of education so contentious.

At one point Gutmann acknowledges that the shift from childhood to adulthood is along a continuum. She remarks:

As children mature, however, the paternalistic ground for denying them the same free exercise rights as adults gradually erodes, and then democratic schools should *as a matter of right* respect their conscientious dissent unless it interferes with the democratic education of others or severely limits their own democratic education (the evidence for which must go beyond the act of dissent itself). (1987: 122)

Yet, the difficulty remains as to who should decide upon the point at which the free exercise of democratic rights ought to be extended (and what constitutes sufficient interference with the democratic education of self or others), and why that person or group of people should have that power. If we are to take seriously the requirement that all participate equally in decisions which affect them, then Gutmann's assertion that those who do not already have formal citizenship as a result of their age should remain disenfranchised, is not helpful. Although to an extent she acknowledges the contradictions inherent in an age discriminatory and commensurably repressive education system that is designed to ready people for participation in a society that is nondiscriminatory and nonrepressive, she leaves them essentially unexplored.

While Eamonn Callan's analysis of the requirements of democratic education in Creating Citizens is, on the question of voting age, similarly unhelpful, he avoids the contradictions inherent in Gutmann's analysis. He does not, for example, assert that a period of time should pass prior to the extension of political rights. Instead, his references to the delayed attainment of full citizenship by children appear to be statements of fact, rather than the passing of judgement on whether or not this delay is necessary. (See, for example, pages 8, 35, 147-9, 177, 210, 215, 219, and 222) As a result, the focus of the book is fixed more tightly than Gutmann's on the difficulty inherent in providing an education that upholds the rights of parents, and the rights of children, while simultaneously transmitting the values of the state.¹⁷ Callan depicts the dilemma faced by any state attempting to balance the values of freedom and equality as follows.

The need to perpetuate fidelity to liberal democratic institutions and values from one generation to another suggests that there are some inescapably shared educational aims, even if the pursuit of these conflicts with the convictions of some citizens. Yet if repression is to be avoided, the state must give parents substantial latitude to instil in their children whatever religious faith or conception of the good they espouse. Similarly, the state must permit communities of like-minded citizens to create educational institutions that reflect their distinctive way of life, even if that entails some alienation from the political culture of the larger society. How can we honour both the commitment to a shared political morality

¹⁷ The extent to which the question of age can legitimately be left out of deliberations on democratic education will be addressed in the closing chapter.

and the accommodation of pluralism that is commonly in tension with that morality? (1997: 9-10)

His ensuing argument, which holds a conception of political virtue that presupposes autonomy (1997: 11)¹⁸, relies on concepts expounded by John Rawls in order to set out a conception of common education that is not only morally credible, but morally required of citizens who wish to continue to live together in a free and equal society.

Rawls states that, "The basic idea [inherent in thinking of citizens as free and equal persons] is that in virtue of their two moral powers (a capacity for a sense of justice and a conception of the good) and the powers of reason (of judgement, thought and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree makes them equal." (Callan 1997: 24) Callan is primarily concerned with the sense of justice that this idea presumes that people with the powers of reason would cultivate. He argues that this sense has two aspects.

First, it is necessary that there be "a commitment to moral reciprocity," (Callan 1997: 25) in which people fairly discuss what ought to be done, and then comply with whatever decision everyone agrees upon. Second, people must be willing to "recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime." (Rawls, cited in Callan 1997: 25) This concept of the "burdens of judgement" refers to the fact that even when the people engaged in a discussion both reason competently, and exhibit the requisite reciprocity, it is still possible for there to be sources of divergence between them that will lead them to reach different conclusions regarding how they should act. The point at which Callan is driving is that for reciprocity to adequately function, citizens must be able to reliably distinguish between

those sources of conflict in their moral practices that are due to the burdens of judgement from those that are not. To the extent that they fail to make the distinction appropriately, the difference is muddled between collective, reasoned moral reflection on what fairness demands and non-moral bargaining among rival and sometimes irrational interests. The very point of reciprocity - reasonable agreement on fair terms of cooperation - cannot be achieved without acceptance of some of the burdens of judgement, even in the idealized circumstances of an ethically and religiously monistic society. (Callan 1997: 27)

For Callan, a political education worth having is one that teaches "the young the virtues and abilities they need in order to participate competently in reciprocity-governed political dialogue and to abide by the deliverances of such dialogue in their conduct as citizens." (Callan 1997: 28)

Callan does not claim that youth, or adults for that matter, need to understand the abstract philosophical reasoning in which the principle of the burdens of judgement is grounded. While it may be preferable that people understand the rational basis of the central principles by which they lead their lives, all that is actually required is that people

¹⁸ This position, he states, is one with which Gutmann would agree.

accept the operative principle of the burdens of judgement. This, he states, “seems a more realistic, though no less noble aim for the ordinary citizens of a free society.” (Callan 1997: 220) However, such a statement raises the question of how one might be considered capable of justifiably acting upon a principle that one does not fully understand, and yet still be considered autonomous. The answer, of course, largely depends on his understanding of what constitutes a sufficient autonomy for participation in a liberal democratic society, which we will turn to shortly. In part, though, the answer lies in his distinction of two separate qualities that a liberal democratic education needs to instill in its citizens. While a sense of justice is obviously necessary, Callan contends that without a sense of patriotism the idea of justice will lack efficacy amongst the citizens of a nation state.

The term “patriotism”, of course, has some very negative connotations rooted in the savagery that sovereign nations have visited upon one another; in the less visceral but still unpleasant self-interest that marks the way in which the governments of countries, generally with the support of their citizens, regularly deal with other nations; and in the subjugation and extermination of those within the gates who are deemed, from time to time, to not be citizens. Patriotic identification with a nation state provides people with a justification for understanding themselves as different from others, which in turn can be used to treat those others with less respect than one would treat those who are as fully human as oneself. Callan acknowledges this interpretation of patriotism. However, he also points to the patriotism of the citizens of the United States as providing an example of a patriotic loyalty that is “also more often self-consciously tied to the constitutive principles of liberal democratic government than it is elsewhere.” (Callan 1997: 100) He argues, in effect, that while patriotism can be used to defend narrow, and unjust, self-interest, that that same rational pursuit of the individual good can conversely help to engender a liberal patriotism to the extent that the citizens in a pluralistic society are aware that their personal interests are best met by a shared sense of justice. (See, for example, Callan 1997: 96)

Essentially, Callan’s concern is with the sources of motivation upon which people draw when acting as they know they ought to act. It is not enough, for example, for people to know that something is wrong. They must also be willing to act on that knowledge. Borrowing a phrase from Thomas Nagel, Callan refers to reason that is conceived as an abstracted objectivity removed from all contingency and particularity as “the view from nowhere.” (Callan 1997: 114) The difficulty he has with this view is that it “may or may not be capable of underwriting the constitutive ideals of liberal democracy, and if it cannot, critical reason seems once again to bring us to a political dead-end. So long as the philosophical jury is out on the rational necessity of liberal democracy, it may seem as if the denizens of the view from nowhere must remain agnostic on the question of whether or not liberal democracy deserves their fealty.” (Callan 1997: 114-5) Although people may know what is true and right both for themselves and others, this is no guarantee that people will choose to act on this knowledge rather than out of narrow self-interest.

If one bases the rationale for liberal democracy in language itself, however, as Habermas does through his discourse theory, to the extent that we use rational speech oriented toward understanding, then we are implicitly endorsing liberal democracy. This

rationale does not apply to those who are operating entirely from a basis of self-interest, but those who might comprise a philosophical jury on the matter must necessarily contradict themselves to support a claim that liberal democracy is not rationally necessary. To the extent that Habermas is correct, the need for patriotic education is a fallacy since the search for truth requires us to act in a liberal democratic way, and it is only through acting in this way that we can arrive at just normative conclusions. The concern with this view, of course, is that by asserting the logical necessity of liberal democracy, one is assuming the stance of a philosopher king, which is in essence the antithesis of a democratic position. Yet Habermas, unlike Kant, evades this pitfall. It is difficult to see how a claim that all must be party to, and in agreement with, the making of decisions which affect them, can be inherently undemocratic.

The difficulty with the Habermasian view in its ideal form, though, is that we do not live in an ideal world. While it may be true that liberal democracy is rationally necessary, and while this may account for what appears to be a halting yet still discernibly steady movement toward a democratic form of governance by humankind since societies turned to reason for their foundations, the fact remains that much progress remains to be made on a global level before we are even at the point at which conflict is entirely mediated through language. The current preoccupation of the heads of nation states to place economic agreements such as NAFTA, the MAI, and the concerns of the WTO, under the rule of law, while doing little more than reminding one another of the provisions of the United Nations Declaration of Human Rights, is but one example of the distance we have yet to travel. The fact remains that insofar as we enforce liberal democratic values, we do so at the level of the nation state.

Given this, Callan's insistence on the need for a liberal democratic education that emphasizes patriotism as well as justice is understandable. He argues:

The reasons that properly motivate us as moral agents are not necessarily confined to the ones that apply at the most basic level of justification. The very idea of common citizenship in a world of different polities entails the principle that a more substantial set of rights and duties links the lives of fellow citizens than connects those who lack that common status. That being so, it becomes rational to nourish a sense of solidarity among those who share that common status so far as solidarity makes it more likely that the relevant rights and duties will be honoured. (Callan 1997: 98)

This position is still open to an argument raised by Weinstock that patriotic sentiment might just as easily support injustice as justice. As Callan points out, though, the existence of rights, even encoded in a legal order, will not bear weight if those rights are "altogether alien to our socialized emotions". What is needed in this "instance is an education that would align patriotic feeling with the claims of justice." (Callan 1997: 98)

The problem with aligning patriotic feeling in this way, of course, is that no nation can currently lay claim to a history in which its government has always acted justly. In attempting to explicate an education in which people come to have an affective regard for those ideals, while simultaneously developing solidarity with one's fellow citizens, Callan navigates a course between a pervasive condemnation of a national history that

can leave no ground upon which to build support for the state whatsoever, and a falsely sanitized view that would further marginalize those who have been already badly treated by the nation, and who would know on a visceral level the mendacity of that view. He does this largely through reference to a piece of writing by Theodore Parker. In this, Parker draws attention to the discrepancy between such ideals of his forebears that all people have the right to liberty, and the fact that they kept slaves. Yet Parker is able to draw on what is universal in that tradition, while abandoning a particular subtext arising from the actions of those forebears that could be read: "All men are created equal, and endowed by their Creator with certain inalienable rights, if born of white mothers; but if not, not." (Callan 1997: 120) It is the development of this ability to draw on what is best in a national tradition that Callan refers to as "the rightful inheritance of all children." (Callan 1997: 125)

I believe there is merit to Callan's position with respect to the need for this particular form of patriotism. In an ideal world he may not be right. Habermas argues that "Reaching understanding is the inherent telos of human speech." (Coulter 1997: 6) Strategic speech, in other words, can be seen as parasitic on speech oriented to understanding:

If the hearer failed to understand what the speaker was saying, a strategically acting speaker would not be able to bring the hearer, by means of communicative acts, to behave in the desired way. To this extent, what we initially designated as 'the use of language with an orientation to consequences' is not an original use of language but the subsumption of speech acts that serve illocutionary aims under conditions of action oriented to success. (Habermas 1984: 293)

Yet while it may be logical to argue that those who are able to argue competently have a right to participate both in terms of the origin of speech, and in terms of that use of speech which is fair to all speakers, precedence and fairness do not immutably govern human behaviour. In fact, power and wealth govern many interactions. In an entirely democratic world, it is possible that an education based on the necessarily democratic implications of speech would be sufficient. In the world in which we live, however, speech in even the most democratic nations is often strategically oriented through the influence of money and power. This orientation of speech can have a corrupting effect on education that is purportedly oriented toward the seeking of truth. This fact, coupled with the difficulties many of us experience when dealing with the abstracted nature of democratic interaction, supports the idea that patriotism to democratic ideals as they are located within particular, not yet ideally democratic polities, may well be necessary if the members of that polity are to continue to work toward improving the democratic nature of that polity.

What constitutes the best of the Canadian tradition with respect to the existence of the voting age law will be addressed to some extent in later chapters. The ideals of democracy were outlined in chapter 1, while the contemporary law and its adjudication will be discussed in chapter 3, with the historical struggles to bring Canadian law into line with those ideals being analyzed in chapter 4. The implications of this tradition for the education of people, particularly the young, in Canada, will become apparent later in this

chapter. Specific curriculum implications, considered with regard to the historical context of education in Canada, will be discussed in chapter 7. First, though, it is necessary, if we are to understand how one might be able to support ideals of justice without, as the argument for a liberal democratic patriotism implies, being able to fully articulate the philosophical principles which underlie them, to turn to Callan's conception of the autonomy required of citizens.

The autonomy that Callan considers to be necessary is much less than what he considers desirable, but the problem with insisting that the latter is necessary is that in order to do so one runs the risk of infringing those rights of self-determination that an attainment of autonomy is supposed to protect. He points out that the "rights of freedom of conscience and association are widely accepted as among the necessary requirements of any recognizably liberal regime, [but that] the freedom to rear our children according to the dictates of conscience is for most of us as important as any other expression of conscience, and the freedom to organize and sustain the life of the family in keeping with our own values is as significant as our liberty to associate with others outside the family for any purpose whatsoever." (Callan 1997: 143) This has implications in two directions. On the one hand, there is the question of the extent to which the right to raise one's child as one wishes overrides the right of the child to be raised toward autonomy. On the other hand, there is the question of the extent to which a child can be educated toward autonomy without first having a grounding in one particular way of life. The problem in this latter case is not, as Galston points out, one of the child believing too deeply in one thing to even be capable of considering other ways of interpreting the world, but of the child not believing anything very deeply at all. (Callan 1997: 134)

The latter Callan addresses through a conception of the educational system as a "great sphere," in which children are born in different places on this globe. The task of education is to help these children explore the remainder of the sphere so that they might then locate themselves at any place on it that they choose. Children thus learn one form of life deeply, and having done so not only have a basis for understanding deep beliefs in other contexts, but have a basis from which they might embrace a new deep seated set of beliefs. The ability to do this concurs with his definition of autonomy as being the development of powers of practical reason, a disposition to value those powers and use them in giving shape and direction in one's own life, and a corresponding resistance to impulses or social pressures that might subvert wise self-direction. (Callan 1997: 148) The difficulty with this conception of what children have a right to, from the point of view of some parents, is that the very acquisition of the power of autonomy can be seen simply as opening the possibility of their children being turned away from the only life worth living. While it may appear self-evident to us that a truly autonomous person is not passively turned away from a given way of life, but actively chooses to turn himself away, for those parents who are themselves the products of the upbringing for which they are advocating, and who are not, in important ways autonomous themselves, a way of life in which one may choose to reject the only worthwhile form of living must appear to hold real dangers.

This brings us to the former question of the extent to which parents have a right to deny their children an education that will endow those children with the power to decide

for themselves in what it is they will believe¹⁹. Callan does not argue that the educational standard should be set at the attainment of maximum autonomy. Although such a standard may be an integral part of his conception of the good life, the reasonableness required of the citizens in a democratic society precludes the imposition of this conception on those who do not share his views.

Acknowledgement of the great variety of lives that people permissibly lead under free institutions is fundamental to our prereflective understanding of liberal politics. But we cannot square that acknowledgement with a reading of personal sovereignty that protects only lives that aim to meet the maximal demands of autonomous reflection and choice. I think the point of trying to understand rights in relation to the 'adequate' rather than the maximal development of the moral powers is to seek a reasonable threshold that would be responsive to the range of lives that a free people could accept as worthy of political protection. (Callan 1997: 149)

Callan proceeds by defining an adequate level of autonomy as that which takes people beyond a state of "ethical servility."

Callan's idea of ethical servility is based on Thomas Hill's notion of deferential servility. The difference between the two is that while Hill focuses on a servility resulting from one person having "a false moral belief" that she has a paramount duty to serve another person such as a spouse or parent, Callan extends this thinking to create a category in which "the prime goal is still to ensure permanent control of my child's conduct," but instead of "instilling deferential servility, I rear my child so that as an adult she maintains an ignorant antipathy towards all alternatives to the ethical ideal I inculcated during childhood." By this he means that such a child would have "a settled affective disposition to refuse to register whatever reason might commend in the objects of one's antipathy, even if, at some later date, one might acquire much knowledge about them." In effect, such a person could clearly articulate her rights, and even prize them, yet remain incapable of living any form of life beyond that in which she was raised. (Callan 1997: 152-4)

In holding that it is not justifiable to raise a person into a state of ethical servility, Callan is not placing autonomy above all other goods. However, in order for a person to be able to choose among different goods, it is necessary for autonomy to be *one* of those goods. In effect, such a position allows one to choose to abdicate one's own autonomy,

¹⁹ The argument can be made that we never ultimately choose what we believe in because there are simply too many influences. We have no control over our individual biological makeups, or over our early experiences. While on the one hand an education toward autonomy may serve to mitigate these influences as we develop, there remain things over which equally rational and reasonable people can disagree. What it is that a person may ultimately believe in might well be beyond rational control. However, this is irrelevant to our purposes here. Our concerns are with what rights democratic citizens have, and what they need to learn in order to both exercise those rights and participate in the creation of a society that allows others also to exercise those rights. In this context, all we can hope to do is demonstrate what is necessary for one to achieve an acceptance of the burdens of judgement, not explore what might move one toward a particular conception of the good beyond the requirements of justice.

but this choice cannot be made by one person, such as a parent, for another, such as a child. Callan points out that:

One might still coherently say that a servile happiness or intimacy is a substantial human good. But that is nothing to the point within a rights discourse where the child's prospective interest in personal sovereignty carries equal weight with any adult's. Within that context, the accommodation of efforts to instil ethical servility makes no sense at all because to be made servile is effectively to forfeit one's sovereignty to another. (Callan 1997: 156)

Any claim by parents that they have a right to raise their child as they see fit naturally places them within a rights discourse. Given this, it is incumbent on the parent and the state to ensure that children are raised to a level of autonomy sufficient to allow them to choose those goods that will become a part of their lives.

This level of autonomy is obviously much less comprehensive than one at which a person might understand the rational basis of the operative principle of the burdens of judgement, yet insistence on such a level of intellectual awareness for participation in a polity would clearly be undemocratic. Similarly, insistence on a level of education sufficient to bring people to such a level would place the liberal principle of self-determination at risk. This leaves open the question of how, in the non-ideal democracy that we currently inhabit, we might bridge this gap between what a liberal democracy is required to provide for its citizens, and what it may require of its citizens in order to survive. As Callan states in his conclusion, "even under the best conditions we might realistically hope for, centrifugal tendencies inhere in the very values that constitute liberal politics, and hence these tendencies cannot be extirpated without distorting the ends that political education must serve." (1997: 222)

While Gutmann argued for a narrowing of the gap through the provision of an education that might be perceived as encroaching on the principle of self-determination, Callan turns to the idea of liberal patriotism as a way to bridge this divide. Although many citizens may not be able to articulate the philosophical grounding of the burdens of judgement, they will have learned, on the emotive level at which patriotism operates, that while some rights are universal and must be mutually conferred, there will remain ethical dilemmas on the resolution of which reasonable, rational people will disagree. The requirement of a form of education that instills a sense of patriotism toward universalist liberal democratic values, however, is problematic in a nationalist context in that the assumption of citizenship simultaneously requires one to also be patriotic to a state the borders of which are intended to exclude the majority of the human race. Consideration of the implications of the existence of a voting age in the provision of an education in Canada that is justifiable requires that we look more closely at this concern.

Habermas examines this issue through reference to the European situation in which economic integration has progressed much further than is currently the case in North America. He traces the development of the European democratic state from the territorial states, in contrast to empires and federations, that existed in such countries as Portugal, Spain, France, England and Sweden. Following the French Revolution, these developed into nation-states in which the rule of law "guaranteed a realm of individual

and collective action free of state interference [...and] laid the foundation for the ethnic and cultural homogeneity that made it possible, beginning in the late eighteenth century, to forge ahead with the democratization of government, albeit at the cost of excluding and oppressing minorities.” (Habermas 1996: 493) In this view, democracy and the nation state arose in tandem.

The rights and duties of democracy have been divided into the civil, social, and political, referring to negative liberties of non interference by the state, guarantees of a minimum level of economic security, and rights of participation in the political process. Habermas argues that while the first two can “be viewed as the legal basis for the social independence that first makes it possible to put political rights into effect,” this is an empirical, not a conceptually necessary, relationship in that citizens, given civil and economic guarantees, could just as easily retreat from public life as enter into it. That citizens might in fact do this, if not educated in the requirements of democratic society, is precisely the concern with which Callan begins his argument in Creating Citizens. It is from this understanding that Habermas, too, recognizes the need for a form of patriotism, although, he states, “Unlike the American variant, a European constitutional patriotism would have to grow together from various nationally specific interpretations of the same universalist principles of law.” (Habermas 1996: 507)

From this basis, Habermas argues that:

the European states should agree on a liberal immigration policy. They must not circle their wagons and use a chauvinism of affluence as cover against the onrush of immigrants and asylum seekers. Certainly the democratic right to self-determination includes the right to preserve one’s own *political* culture, which forms a concrete context for rights of citizenship, but it does not include the right to self-assertion of a privileged *cultural* form of life. Within the constitutional framework of the democratic rule of law, diverse forms of life can coexist equally. These must, however, overlap in a common political culture that in turn is open to impulses from new forms of life. (Habermas 1996: 514)

Habermas continues by arguing that this conception points the way to a world citizenship, the realization of which is a long way hence, but of which the contours are becoming visible.

This view of overlapping cultures forming a common political culture that is open to new forms of life appears to me to be essentially the same as Rawls’ conception of an overlapping consensus, which he presents in Political Liberalism as consisting of, “all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself.” (Rawls 1993: 15) Although Callan argues that Rawls unrealistically imagines an overlapping consensus evolving in an environment devoid of forces detrimental or fatal to the process, which, he states, “may explain why Rawls thinks political liberalism can be reconciled with an agenda for political education that is modest to the point of banality,” he does not disagree with the requirement of such a consensus in a liberal democratic society. (Callan 1997: 50)

In this context, the patriotism that Callan contends is a requirement of the education required by citizens is not ultimately contradictory to the universalistic principles of a liberal democratic education. Although those principles orient us toward a world citizenship inclusive of all people, movement in that direction requires a patriotism that is simultaneously oriented toward national borders.²⁰ Inclusion of the burdens of judgement, which require that there first be an overlapping consensus, as an appropriate object of a patriotic education, would similarly not embrace a disabling contradiction.

We have now reached an understanding of the central concern of democratic education to be the development of people with the personal autonomy necessary to comprehend the principles of justice and to feel allegiance to those principles. The question before us is whether this development is better aided by the existence or absence of a voting age. Before this question can be adequately assessed, however, it is first necessary to consider the political and legal place of the voting age in Canadian law.

²⁰ Perhaps a distinction could be made between patriotism and solidarity in terms of the former being oriented toward ideas, such as those principles that, for example, form a constitution, and the latter toward the people who are affected by those ideas.

CHAPTER 3 - POLITICAL AND LEGAL CONTEXT OF THE VOTING AGE LAW

The general legal context

The Canada Elections Act contains two sections regarding voter eligibility. Section 50(1), parts (a) and (b) respectively, qualifies as electors those who have attained the age of eighteen years, and who are Canadian citizens. Section 51, parts (a), (b), (c), and (g) respectively, disqualifies: the Chief Electoral Officer; the Assistant Chief Electoral Officer; the returning officer for each electoral district during his term of office, except when there is an equality of votes on a recount, as provided in the Act; and every person who is disqualified from voting under any law relating to the disqualification of electors for corrupt or illegal practices. However, with respect to voter eligibility, section 3 of the Canadian Charter of Rights and Freedoms states simply that, "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly."

This disjuncture between the constitutional and statutory laws raises an important question. As will be explained below, the Charter explicitly has precedence over statutory law, yet whether Section 50(1)(a) of the Elections Act can be understood as an abrogation or elaboration of that law is, at present, a matter for conjecture. The remainder of this chapter, in discussing some of the considerations relevant to such conjecture, will contend that the voting age requirement, as it is currently formulated, would be found unconstitutional if a well crafted action was brought before the courts.

The Constitution Act became law through democratic process, under a government elected by Canadians, in 1982. Section 52 of this Act states that the document "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."²¹ Section 24 of the Constitution confers the power to interpret its provisions to the court by stating: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." This presents an arguably paradoxical situation about which Manfredi comments: "if judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits." (1993: 37) In his exploration of this situation, Manfredi turns to Section 33 of the Charter, which contains the so called "notwithstanding" clause, as a "legitimate element of liberal constitutionalism" (1993: 16) through which the legislature can have some role in interpretation of the provisions of the Charter. The inclusion of Section 33, which covers sections 2 and sections 7 to 15 of the Charter, was in fact a blunt political compromise made in order to generate the necessary provincial support for the patriation of the Charter. As Manfredi demonstrates,

²¹ The preamble to the Charter situates the rule of law within the national context by stating that, "Canada is founded upon principles that recognize the supremacy of God and the rule of law".

a case can nonetheless be made for its utilization as a check for unrestrained judicial power.

However, democratic rights, which are covered in sections 3 to 5 of the Charter, cannot be overridden by this clause. Ultimately, if the Court, as empowered by section 24(1) of the Charter, struck down section 50(1)(a) of the Elections Act which precludes those under the age of eighteen from voting, then Parliament would have no choice but to amend the Elections Act. In considering this issue, then, it is necessary to look at those factors that the Court would be required to consider: namely, the provisions of the Charter itself, previous judgements based on these provisions, and any arguments and evidence having a specific bearing on the case.

While section 15, subsection 1 of the Charter states that, "Every individual is equal before and under the law and has the right to the equal benefit of the law without discrimination and, in particular, without discrimination based on [...] age or mental or physical disability," several provisions serve to weaken its force. It is, for one, subject to section 33, whereby Parliament could simply invoke the "notwithstanding" clause. Furthermore, subsection 2 of section 15 states that subsection 1 "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of [...] age or mental or physical disability." It is conceivable that one might argue that the absence of suffrage prior to the age of eighteen represents one prong of a program designed to ameliorate the ignorance of youth before allowing them to make decisions that are potentially against their better interests.²² The text of section 1, however, subordinates all sections of the Charter, and is the provision on which the issue of voting age would be debated.

The section states that the Charter is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." What might constitute such limits is central to the problem under discussion here, and while, short of a Charter challenge, the answer to this question must remain indeterminate, there is a test by which our speculations may be guided.

In 1986 the Court upheld section 11(d) of the Narcotics Control Act, in R. v. Oakes (1986), ruling that a reverse onus provision in the Act, which shifted the burden of proof from the State to the accused, could not be justified under section 1. In delivering the ruling the Court articulated the following test by which "reasonable limits" might be determined:

At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s.1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the

²² Free and compulsory education would, perhaps, comprise a second prong in such a program. Arguments of this nature will be considered in chapters 5 and 6.

effects of the limiting measure and the objective - the more severe the deleterious effects of a measure, the more important the objective must be. (R. v. Oakes 1986: 106)

The proportionality portion of this test was modified by Chief Justice Lamer in the 1994 ruling of Dagenais v. Canadian Broadcasting Corp. Regarding this, Justice Wetston wrote:

In that case, Lamer C.J. held that the conventional Oakes analysis is appropriate where a measure fully, or nearly fully, realizes its legislative objective. However, according to Lamer C.J., at page 889, where a measure only partially achieves its legislative objective, the proportionality requirements are as follows:

[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.* [Emphasis in original.]

At pages 887-888, the Chief Justice explained the rationale behind this reformulation of the proportionate effects test:

In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the Oakes test requires both that the underlying *objective* of a measure and the *salutary effects that actually result* from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the *objective itself* (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects. [Emphasis in original and added.]

The Supreme Court of Canada appears to have applied this reformulated test in RJR-MacDonald Inc., supra, and in Thibaudeau v. Canada, [1995] 2 S.C.R. 627. (Sauvé v. The Chief Electoral Officer of Canada 1996: 900)

However, while this test does represent a systematic approach to making section 1 determinations, what is fair, what impairs the right the least, and the importance of the objective over which a given right might reasonably be restricted, remain open to what is, essentially, individual judicial opinion. The extent to which this is so can be seen in the R. v. Keegstra (1990) ruling, in which the justices split 4 to 3 over the minimal impairment component. As this component is the second step of the second branch of the Oakes test, the split would not have been altered by the third step reformulation articulated by Chief Justice Lamer. While all agreed that section 319(2) of the Criminal Code, under which Keegstra had been convicted for promoting hatred, infringed freedom of expression, only four agreed that it represented the least severe measure by which to address activity “‘which is openly hostile to Parliament’s objective’ of preventing the general and specific harm caused by hate propaganda, as well as promoting the individual equality of Canadians guaranteed by section 15 of the Charter.” (Manfredi 1993: 82) The three dissenting justices expressed concern that sanctioning this measure might “‘have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process.’” (1993: 82-3)

Court rulings with respect to suffrage

With respect to cases that have a bearing on the extension of suffrage to those under the age of eighteen, two areas warrant examination: those concerned with the extension of suffrage, and those dealing in some way with questions of age. The current state of the nation’s electoral rights under the Charter is discussed by Mollie Dunsmuir in a current issue review for the Library of Parliament. (Dunsmuir 1996) This review establishes a general context in which specific age based issues can be considered.

In discussing the current situation Dunsmuir states that, if totally unqualified, “section 3 would confer the right to vote and to stand for election on, for example, a two year-old child or a citizen convicted of treasonous behaviour on behalf of another state. Some limits on these rights are obviously required, and these are usually justified under section 1 of the Charter.” (1996: 2) The assumed qualification appears to exist in the fact that Canada “was generally accepted to be a democratic society, with a well developed body of election law, prior to the Charter. Consequently, some limits on democratic rights (such as residential or age qualifications) may well be considered ‘prequalified’ or inherent in section 3 itself.” (1996: 2)

Dunsmuir continues by delineating five categories into which voting right limitations fall. These are: *nexus* with the geographic area which is electing a member; procedural and administrative limitations; voting power inequalities resulting from electoral boundaries; physical qualifications (such as age); and incapacities that affect legal status (such as imprisonment). The latter two are of particular interest here as they cannot be overcome by an act of will such as moving or changing jobs.

With regard to the former, a challenge from the Canadian Disability Rights Council resulted in the removal, through Bill C-114, of clause 14(4)(f) in the Elections Act which had disqualified from voting, “every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease.”

(R.S.C. 1970) Dunsmuir notes that the case suggests “that legislation disqualifying persons for mental incapacity must specifically address their mental capacity or incapacity to vote, rather than other characteristics or abilities,” and that while such a test has not yet been approved by a higher court, “it could create some interesting results if applied to age qualifications, which have not yet been challenged.” (1996: 5)

Specifically, Justice Reed, speaking for the Court, noted that a mentally handicapped or personality disordered person might be cared for at home by family, and therefore, falling into neither of the two categories of clause 14(4)(f), be qualified to vote. For this reason, Reed found that:

The limitation prescribed by 14(4)(f) is in that sense arbitrary. If it is intended as a test of mental competency, it is at the same time both too narrow and too wide. It catches people within its ambit who should not be there and, arguably, it does not catch people who perhaps should be.

(Canada Disability Rights Council v. Canada 1988: 269)

This point is elaborated upon through a citation of Robertson (1987: 240-42):

It does not follow that people who are declared incapable of managing their financial affairs are necessarily incapable of understanding the nature of the right to vote and of exercising it in a rational manner. It is simply a non sequitur to assume that psychiatric patients are necessarily incapable of voting. Indeed empirical research indicates that the voting pattern of psychiatric patients parallels that of the general population.

Reed accepts this argument, noting that “this assumption of blanket incapacity has been widely rejected [Notes: Feldman, Boris, Mental Disability and the Right to Vote (1979), 88 Yale L.J. 1644, at p.1657]. An individual incapable of making particular types of decisions may be fully capable of making many others.” While Reed states that he considered how the legislation might apply only to those who might legitimately be denied the right to vote, he had not found a way to do so. (Canada Disability Rights Council v. Canada 1988: 269)

With regard to the right of prisoners to vote, the courts have looked at the issue in both administrative and substantive terms. Arguments against allowing prisoners to vote for administrative reasons, however, were rendered difficult to justify after the successful involvement of inmates in the 1992 Referendum on the Charlottetown Accord. Of greater pertinence to the issue of youth voting rights are those questions that are concerned with what is of substantive importance for participation in the democratic process. The following three cases provide the essential background to the current legal status of inmate voting rights in Canada.

Section 51(e), of the Canada Elections Act, prior to the outcome of the first of these cases, stated that, “every person undergoing punishment as an inmate in any penal institution for the commission of any offense” is not qualified to vote, and cannot vote in an election. Belczowski v. Canada (1991) considered three issues in relation to this clause: whether it violated section 3 of the Charter; whether it violated section 15 of the

Charter; and if in either case it did, whether section 51(e) fulfilled the reasonable and demonstrably justifiable limits requirement of Section 1 of the Charter. Writing for the Court, Justice Strayer found that section 51(e) did not violate section 15(1) of the Charter because discrimination based on imprisonment is not specifically mentioned in that section. However, the right specified in section 3 was found to be impaired, and the impairment found not to be justified under section 1.

In making this determination, Strayer first looked to R. v. Oakes. He noted not only the test from this case, which I have already mentioned, but also the context the Court gave to the phrase “free and democratic society” from section 1 of the Charter.

The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (1991: 105-6)

Under the Oakes test, the objectives the Canadian government asserted for section 51(e) were: (a) to affirm and maintain the sanctity of the franchise in our democracy; (b) to preserve the integrity of the voting process; and (c) to sanction offenders.

With regard to the first objective, the position of the government was that “constitutional democracies require a decent and responsible citizenry who respect and voluntarily abide by the laws of the state.” (1991: 107) In rejecting this as a valid objective the Court stated that the proposition appeared more descriptive than prescriptive since “modern consensually-based societies [...] are based on at least the acquiescence of most citizens in the system of government in place.” (1991: 107) Without this acceptance the police would need to use such measures in enforcing the law that the individual rights and liberties would be destroyed. In other words, “in a democratic state it is the voters who choose the government, not the other way around.” (1991: 107) In addition to determining that it is “a very dubious proposition to accept as a corollary of such a state that its legislators may impose tests of ‘decency’ and ‘responsibility’ on voters going beyond basic requirements of capacity (related to maturity and mental condition) to cast a meaningful vote,” the Court determined that section 51(e) does not meet such an objective since “there are many indecent and irresponsible persons outside of prison who are entitled to vote and do vote”. (1991: 108)

With regard to the second objective, the government argued that voting “involves more than marking a ballot: it is the final step after discussion and debate,” (1991: 108) and that the withholding of inmate voting rights was a consequence of the inability of inmates to take part in such discussion. The court dismissed this argument on the basis that a variety of media is available to prisoners.

A further argument from the government, with respect to both of these objectives, was that disqualification of prisoners from voting was a practice in many countries that are considered free and democratic. The Court found that in fact there are considerable distinctions between countries on the matter, and that the objectives these governments were attempting to achieve, if any, were not known by the Court. One other point made by the Court was that this disqualification dates from at least the beginning of the 19th century, before which time "the franchise in most of these countries was already drastically limited to the privileged few". (1991: 109) Rejecting this argument the Court proceeded to consider the third objective.

The Court accepted that sanctioning offenders by withholding voting privileges represented a valid objective. However, in applying the second prong of the second part of the Oakes test, it found that the right was not impaired as little as possible, but rather, was completely abolished. In applying the third prong, the Court found the means employed to lack proportionality in three ways.

First, the punishment with respect to voting is the same for all inmates regardless of the crime committed. Secondly, the punishment is arbitrary in that someone incarcerated for a short period of time during an election will lose the vote, while someone imprisoned for a much longer period of time between elections will not be. Finally, with respect to sanction, the Court remarked that, over the last fifty years, corrections theory has moved towards rehabilitation of offenders, stating that, "[t]his process begins before inmates complete their sentences and may include vocational or academic training in prison or extramurally, temporary passes, day parole, full parole, or mandatory supervision." In this context of readjusting inmates for reentry into society, the Court stated that, "[v]oting could form part of that readjustment." (1991: 111)

In 1992, Sauvé v. Attorney-General of Canada et al. was heard in the Ontario Court of Appeal. The case was similar in many respects to Belczowski. That two such similar cases were heard, almost simultaneously, by two different courts is a result of the "de facto concurrent jurisdiction of provincial superior courts and the Federal Court." (1992: 647) Due to the similarity of the cases I will not reiterate the reasons given by Justice Arbour in Sauvé. In fact, on the question of proportionality, Arbour stated that, "I agree substantially with the reasons of both Strayer J. and Hugessen J.A. in Belczowski, supra." (1992: 652) The case was appealed to the Supreme Court, which affirmed the decision in May 1993, striking down provision 51(e) of the Elections Act.

This provision was replaced by one that prohibited inmates who were serving sentences of two or more years from voting in federal elections. This new provision was contested in Sauvé v. The Chief Electoral Officer of Canada (1996), and struck down December 27, 1995. Prior to the June 2, 1997 federal election the Canadian government requested a stay of decision pending appeal. The stay was not granted, which enabled inmates to vote in the election.

The objectives cited by the government for the rewritten section 51(e) were: (a) the enhancement of civic responsibility and respect for the rule of law; and (b) the enhancement of the general purposes of the criminal sanction. (Sauvé 1996: 859) Writing for the Court, Justice Wetston found there to be a rational connection between these objectives and the disenfranchisement of inmates serving sentences of longer than two years as the means taken to ensure these objectives. However, the Court did not find that

the Oakes test requirements of minimal impairment, or proportionality, were met. The judgement in this case is lengthy, so I shall endeavour to recount only those aspects of it that I believe have a bearing on the issue of minors' disenfranchisement.

With regard to minimal impairment, Wetston found this had not been met by the government because it had ignored the option of providing for the disenfranchisement of offenders "on a case-by-case basis, by the sentencing judge." (1996: 896) This option would not prevent Parliament from including sentencing criteria in its legislation, but with regard to jurisdiction, the question was raised as to why a judge charged with depriving a person of liberty should not also have "the responsibility of determining if disenfranchisement is warranted." (1996: 899) The current law, it was stated, "cannot distinguish the type of offender whose indecency is so profound as to threaten the principles of our free and democratic society." (1996: 899)

In considering the proportionality prong of the Oakes test, Wetston stated that, "even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects." (1996: 900) In making its finding that the negative effects of the legislation were not, in fact, sufficiently offset by the positive, the Court gave considerable weight to the testimony of three professors.

Dr. Schafer, who has expertise in biomedical ethics, jurisprudence, and moral and political philosophy, testified

that there was evidence to suggest that prison inmates who are given greater control over their lives during incarceration exhibit increased independence and self-control upon release. Thus, in Professor Schafer's opinion, the exercise of civic responsibilities, including participation in the electoral process, has a potentially educative effect in the area of civic virtue, and should represent one of the main reasons why prisoners should *not* be disenfranchised. (1996: 904-5)

Professor Neil Boyd, a lawyer and Director of the School of Criminology at Simon Fraser University in British Columbia suggested

that there is evidence that federal prisoners who become involved in political processes, such as inquires, often benefit substantially from their participation [... and there appears to be the possibility of] a morally educative benefit flowing from the enfranchisement of prisoners. (1996: 905)

Finally, Michael Jackson, a Canadian law professor, "contended that the exercise of the prisoner's right to vote in a federal election would promote citizenship skills and encourage responsible behaviour." (1996: 907)

In finding that section 51(e) of the Elections Act contravened section 3 of the Charter, and was not saved by section 1 of the Charter, the Court asserted that it was not

necessary to examine the constitutionality of section 51(e) of the CEA with respect to section 15(1) of the Charter.²³

One final point of interest with respect to this case pertains to the comments made by the constitutional scholar Dr. Christopher Manfredi, who testified on behalf of the government. The Court summarized his comments:

Dr. Manfredi testified that every liberal democracy restricts access to the franchise in order to maintain a connection between the members of the electorate and their communities. In this regard, various restrictions are attached to the right to vote, including citizenship restrictions and age restrictions. In Dr. Manfredi's opinion, as long as there are no positive prerequisites for voting (as with a literacy test, for example) and the application of disenfranchisement is universal (unlike with age restrictions), then it is not undemocratic to restrict access to the franchise. (1996: 886)

Stated another way, every adult has the opportunity to be disenfranchised. Youth does not have this opportunity since they are universally disenfranchised. In other words, it appears from this statement that, although supportive of inmate disenfranchisement, in Dr. Manfredi's opinion, age restrictions are undemocratic.

In October, 1999, the Appellate Division of the Federal Court, in a two to one decision, reversed the ruling of the Trial Court, upholding the disenfranchisement of prisoners incarcerated for two or more years. (Sauvé v. Canada (Chief Electoral Officer of Canada) 2000) The grounds for so doing were electoral and penological.

With respect to the electoral consideration, the court determined that:

The context of each case must determine the level of deference given by the courts to Parliament's impairment of the Charter right. It is Parliament's role to maintain and enhance the integrity of the electoral process. Parliament's choices regarding the gravity of offences and the punishment which follows from conviction are entitled to considerable deference. (2000: 120)

The context here is one in which the law has been "carefully tailored to affect only Canada's most serious offenders." (2000: 120) It was noted, through reference to a previous ruling, that, "The disqualification is in fact upon those who have chosen to disqualify themselves." (2000: 156)

The Court neither agreed nor disagreed with the "retributive and denunciatory" objectives of Parliament, but affirmed the right of Parliament to compromise Charter rights for the purpose of denouncing crime. (2000: 120-1) "This legislation sends a message signalling Canadian values, to the effect that those people who are found guilty of the most serious crimes will, while separated from society, lose access to one of the levers of electoral power." (2000: 185)

²³ It did examine this matter, nonetheless, and found that section 51(e) was constitutional with respect to section 15(1). The reasons given, however, are specific to people who have been found guilty of a crime, and do not appear to have applicability to minors.

Desjardins J.A. dissented. In part, the reasons given were that, "The new version of paragraph 51(e) involves the state interfering in the fundamental rights of a historically vulnerable group of people for a punitive purpose on behalf of society at large. It is a case where the state behaves as a 'singular antagonist.'" (2000: 122) As such, the claim by the state, of benefits derived by this infringement of rights, needed to be supported to a greater degree by empirical evidence.

Application for leave to appeal this ruling was granted on August 10, 2000. The appeal will be heard in either the Spring or Fall session of 2001.²⁴

The reasons given for disenfranchisement in this appeal are clearly concerned very specifically with the serious criminal actions of some Canadians, and do not relate in any trenchant way to the lack of franchise for those under the age of eighteen.

This is the current state of jurisprudence with respect to voting rights under the Charter. While much of this might be seen as pertinent to the issue of suffrage for minors, there still remain questions related specifically to age that this jurisprudence has not addressed. For example: are those under eighteen different from those over eighteen? if they are, then how? are there a variety of differences relating to a variety of ages with respect to under eighteens? are these differences similar to any segment of the adult population (such as, perhaps, the mentally retarded)? and, if so, how does the court address the fact of these similarities with respect to its decisions regarding under eighteens?

The legal context with respect to age

There does not appear to be a great deal of Charter law concerned with issues of age. The section 15 cases concerned with mandatory retirement are not particularly useful here. Since, in light of the decisions on prisoner enfranchisement, a successful challenge to the Elections Act would presumably be determined through a ruling on section 3, it makes sense to seek out cases that are concerned with the view the courts have of youth, rather than the view they take toward age discrimination under section 15.

Although the Young Offenders Act places under eighteens into direct contact with the courts, there is little in the way of Supreme Court jurisprudence related to age with respect to this Act. The Act itself, like many age based laws, is an amalgam of historical artifact, political compromise, and theory. (Reid-MacNevin 1991; Bala and Kirvan 1991)²⁵ Insofar as this Act relates to the Charter, section 3(1)(e) of the YOA states that:

young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms; (Bala and Kirvan 1991: 75)

²⁴ This information is from email correspondence with the registry office of the Supreme Court.

²⁵ The analysis of the House of Commons debates, in chapter 4, will provide some insight into the various influences on the creation of law.

There appears to be little question that under the YOA those under eighteen have the same rights and freedoms as adults, although special protections are also accorded. The Supreme Court has touched on the question of age with respect to the criteria for transfer of youths over the age of fourteen to adult court. On this issue, though, the Court did not discuss the matter in terms of age. Justice McLachlin wrote:

It is inevitable that in the course of review, some factors will assume greater importance than other, depending on the nature of the case and the *viewpoint of the tribunal in question*. The Act does not require that all factors be given equal weight, but only that each be considered. (Bala and Kirvan 1991: 103 Emphasis added by Bala)

Presumably “age” is one of these factors, and therefore to be weighted on a case by case basis according to the disposition of the court that is hearing a particular case.

The case of Irwin Toy Ltd. v. Quebec (Attorney-General) (1989) appears to be the one instance in which a Charter ruling has directly addressed the age based characteristics of minors. The case was concerned with sections 248 and 249 of the Quebec Consumer Protection Act, which prohibited advertising that was directed at persons under the age of thirteen. Irwin Toy challenged these sections under section 2(b) of the Charter which provides for freedom of expression. The Court found that section 2(b) was infringed, but that this was justified under section 1 of the Charter because the objective of protecting children was sufficiently pressing and substantial. Justices Beetz and McIntyre dissented.

In determining the rationale behind sections 248 and 249, the Court cited Payette, the Minister responsible for the legislation:

The proposal that pre-school age children be covered by the Bill did not seem adequate in the circumstances. It seemed to us that thirteen years of age was a good limit. It is possible that certain children are able to draw distinctions and make choices by the age of twelve. Certainly from the age of fourteen they are generally able to do so. So it seemed to us that thirteen, though arbitrary, was fair.

And since we have relied upon a regulatory framework which has been in place for a number of years and which uses the age of thirteen as a cut-off, we adopted that age, on the basis of our experience to date. (Irwin 1989: 619)

Given this, the Court examined evidence to determine whether children under 13 are unable to make “choices and distinctions respecting products advertised” and whether, if this was the case, restriction on advertising was justified.

The evidence presented indicated that children under the age of seven were not capable of distinguishing bias in advertising. Specifically, the Court accepted the findings presented in the 1981 report “In the Matter of Children’s Advertising” by the U.S. Federal Trade Commission, which “contains a thorough review of the scientific evidence”. (1989: 621) On the basis of this it concluded that “television advertising directed at young children is *per se* manipulative. Such advertising aims to promote products by convincing those who will always believe.” (1989: 622) Considerably more difficult to determine

was the age at which people do begin to “generally develop the cognitive ability to recognize the persuasive nature of advertising and to evaluate its comparative worth.” (1989: 622) The studies filed by the Attorney-General on this subject reached differing conclusions, allowing the Court to reach no more specific a conclusion than that “at some point between age seven and adolescence, children become as capable as adults of understanding and responding to advertisements.” (1989: 622)

On the basis of this information the Court of Appeal had found that it was only justifiable to restrict advertising to those under the age of seven. The Supreme Court dissented with this ruling, finding that the legislature, in creating the legislation, was not required to protect only the most vulnerable group, but only to assess the competing claims of the community, weigh the conflicting scientific evidence, and make a decision that mediated between those claims. In removing itself from the obligation of second guessing the assessment of the legislature, the Court cited R. v. Edwards Books & Art Ltd, in which businesses having fewer than eight employees were exempt from the Sunday closing law. In this decision, Dickson commented that, “[a] ‘reasonable limit’ is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw the line.” (1989: 622) The Court thus found it reasonable to accept, “on the balance of probabilities”, that children below the age of thirteen were susceptible to manipulation through advertising, and that “the objective of protecting all children in this age group is predicated on a pressing and substantial concern.” (1989: 623) On considering the “minimal impairment” prong of the Oakes test, they found that the total ban on advertising was justified.

In writing the dissenting opinion, McIntyre (Beetz concurring) accepted that children may not be able to distinguish fact from fiction in advertising, but stated that it had not been shown that children were at risk as a result. He continued by stating that even if there was such a possibility, that freedom of expression was too important to support a total ban on advertising aimed at children “below an arbitrarily fixed age”. In relation to this he noted that, “[i]t is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited.” After citing several examples he noted that while the restriction under discussion was of a less serious nature, that it nonetheless represented a step in the wrong direction, and that he could find no justification for supporting sections 248 and 249.

The constitutionality of the voting age restriction

Given this, what can be said about the constitutionality of the Elections Act’s preclusion of the franchise to minors? Given the foregoing, the qualification to vote of only those who have attained the age of eighteen years, clearly contravenes section 3 of the Charter, which leaves the question of whether section 50(1)(a) can be saved by section 1 of the Charter.

To date, it appears that there has only been one challenge to the voting age restriction. The Crown moved to strike the claim, which the Federal Court allowed on the

ground that the claim was vexatious. In this context, vexatiousness was defined as the bringing of one or more actions: (a) to determine an issue which has already been determined by a court of competent jurisdiction; and (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief. (Reid et al. v. Canada 1994: 299)

The essence of the action brought by Reid et al. appears to have been that the deficit financing used by the federal government would impoverish their children in the future, and should therefore be prevented by the courts. Bound into this action was the further claim that their children had a right to vote in elections and referendums from the age of twelve, and by proxy through their parents and guardians prior to this age. Although this claim of voting rights was based on section 3 of the Charter, and hence depended on that section to support the claim that this was a basic right, the reason for making the abrogation of that right part of a legal action in the first place appears to have been motivated not so much by a concern for the fundamental principles underlying that right as much as by a desire by the parents to gain additional electoral support for a position that those parents believed was in the best interests of their children.

Within the overall context of voting age limitations, as I will discuss in chapter 5, the concern of those parents regarding the best interests of their children, and the intersection of this concern with voting, is not without validity, although their designation of an age limit is problematic. Within the context of the action as it was brought by Reid et al., Justice Noël's assertion that, "it is so obvious to me, in the context of this claim, that the age requirement embodied in the Elections Act is a reasonable limit that I do not require any evidence on the subject" (1994: 299), is understandable. His opinion appears to stem from several problems with the plaintiffs' case. These include the plaintiffs' contention that the government is acting unconstitutionally by borrowing money in the absence of a referendum or an emergency, when no such constitutional principle appears to exist and no evidence was given to support the contention, and their conflation of the section 3 Charter reference to provincial and federal elections with referendums. Certainly, the case presented by Reid et al. with respect to the rights of those under 18 to vote in federal elections for reasons beyond their right to oppose deficit financing does not appear to have been rigorously argued.

By the same token, however, the reasons given by Justice Noël for dismissing the section 3 Charter guarantees with respect to age appear largely to rest on judgements that have been taken out of context, and at times they reference outdated law.

Having stated that, "The Plaintiffs assert that s. 3 of the Charter guarantees a radical equality of voting power for each citizen including children" (1994: 297), he contends that the purpose of section 3 of the Charter is not to ensure equality of voting power, but rather to guarantee effective representation. However, to support this claim, he cites Dixon v. Attorney General of British Columbia (1989), and Reference re: Provincial Electoral Boundaries of Saskatchewan (1991), both of which were concerned with electoral boundaries and the differential power accorded to individual votes as a result of those boundaries. Nothing in either case in any way implied that individuals should not have a vote at all. In Reference, the Supreme Court majority stated that, "Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account

countervailing factors” (1991: 35-6), which clearly indicates that the weight of an individual citizen’s vote is what is in question, not whether or not that citizen should have a vote. Three of the eight justices hearing the matter dissented with this ruling, however, arguing that not only should each citizen have a vote, but that each vote must be relatively equal in weight:

The right to vote is synonymous with democracy. It is the most basic prerequisite of our form of government. In a democratic society based upon the right of its citizens to vote, the right must have some real significance. In Canada it is accepted that, as a minimum, each citizen must have the right to vote, to cast that vote in private and to have that vote honestly counted and recorded.

There is, I believe, a further, equally important aspect of the right, namely, that each vote must be relatively equal to every other vote. (1991: 22)

This view is similar to that held in Dixon, wherein electoral boundaries in British Columbia which effectively created unequal votes was declared unconstitutional:

As I have earlier noted, the purpose of the s. 3 guarantee of the right to vote must be to preserve to citizens their full rights as democratic citizens. The concept of representation by population is one of the most fundamental democratic guarantees. And the notion of equality of voting power is fundamental to representation by population. The essence of democracy is that the people rule. Anything less than direct, representative democracy risks attenuating the expression of the popular will and hence risks thwarting the purpose of democracy. (1989: 259)

In other words, while the degree of equality to be accorded the vote of each citizen in this country appears to be in question, *pace* Noël, these rulings do not in any way appear to contravert the idea that each citizen should have *some* voting power.

He then cites three judgements that referred to voting restrictions on the basis of age and mental capacity as being reasonable. (1994: 298) However, two of these judgements were rendered in 1986, and the other in 1985. In 1987, as discussed above, disqualification from voting on the basis of mental incompetence was no longer considered reasonable, and that section was struck from the Elections Act. He also cites Badger et al. v. Manitoba (1986), which mentions “age requirements” as one of the “rational dimensions of the right” to vote (1994: 299), yet since Badger was concerned with the disenfranchisement of prisoners, the reasoning by which such requirements are to be understood as rational were not set out. As noted above, determinations of reasonableness are arrived at through the application of the Oakes test.

It is only possible to speculate on what objectives the government would offer in defense of the voting age restriction, if a Charter challenge to this restriction was to proceed to trial. However, according to Patrice Garant, who wrote on this subject for the Royal Commission on Electoral Reform, the objective of section 50(1)(a) of the Elections Act “consists of giving the right to vote only to citizens who are sufficiently mature”.

Given the analysis, in chapter 4 of this thesis, of the House of Commons debates around the lowering of the voting age from 21 to 18, this appears to be a reasonable contention.

He notes that at the time of his writing on this subject, there were “no Supreme Court decisions on section 3, but there [were] a fairly large number of cases in which other courts [had] explained how infringements of this fundamental right ought to be treated in light of section 1.” (1991: 78) None of the judgements that he cites, however, consider the matter in relation to maturity. Justice Taylor of British Columbia most closely does this in rendering his opinion that “the right enshrined in section 3 ‘means more than the right to cast a ballot. It means the right to make an informed electoral choice reached through freedom of belief, conscience, opinion[,] expression, association and assembly.’” (1991: 79) Exactly how maturity is related to these basic rights is not examined.

Garant asserts that “electoral maturity”:

consists of being capable of making an informed judgement on the past performance of a government and candidate, on their programs, and on their ability to fulfil an elected mandate in a satisfactory manner. To this end, it is necessary to keep informed, to take part in meetings and to dialogue with fellow citizens. A citizen who can do this has the desired electoral maturity. (1991: 82)

Yet, he does not provide a source for this definition, nor defend it with argument.

For our purposes here, however, it is as good a definition as any other. My intent is not so much to speculate on the likely outcome of a Supreme Court judgement on the question, as it is to begin to draw out some of the difficulties involved in discussing this particular topic, and to provide an introduction to some of the questions that will be addressed in later chapters. What follows is a rumination on some of the considerations the Court could bring to bear on the voting age question given the preceding judgements, and the hypothesis that the government would cite the need for sufficiently mature citizens for voting as its objective in setting the qualification.

Garant considers this objective to be “clearly legitimate” in that it “meets an important and genuine concern in society,” and contends that the Supreme Court would almost certainly accept this objective as sufficiently important. He states that, “according to the opinion of several Supreme Court justices in recent decisions, it is difficult to question a legislative objective,” and to date the Court had accepted such objectives in “all cases submitted to it.” (1991: 80)

Given that the objective relates to maturity, however, it is not clear of what the “important and genuine concern” underlying this objective actually consists. What, in other words, is society protecting?

Is it protecting children, and if so, how does it expect that they will be harmed by having a stake in the electoral system? Is it protecting them from influencing policies in ways that in the long run could be detrimental to them, perhaps even later in life?

Is it protecting the adult population, and if so, in what way? Is the concern that people with larger families will have a greater influence on national and provincial politics as a result? Pertaining to this, is there a concern that people would begin to have larger families in order to have a greater political influence? Is the concern that minors

would vote against their parents? Is it that they might vote for candidates who represent a threat to the social order, and in great enough numbers to bring such people to power? Is the concern that the sanctity of the vote would be undermined by extending it to minors? Is the concern simply with the impact a lowered or removed voting age restriction might have on existing laws? Or is it a combination of these?

These questions will be examined substantively in Chapters 5 and 6. Within the present context, they are proposed simply as some potential concerns, among others, that the government might put forward as pressing and substantial. For the moment, I would like to postulate that any of these might underlie the objective, and to consider whether the restriction of voting to those eighteen and older is a “reasonable and demonstrably justified” means of meeting this objective, as required by the second section of the Oakes test.

The first prong of this section requires that the measures taken to achieve the objective be fair, not arbitrary, and be rationally connected to the objective. The Court considered the provision disenfranchising those with mental disease to be arbitrary, and it did so on the basis that it was too broadly framed. Although Justice Reed stated that he had “no doubt that one such limitation [with respect to voting] might be what I will call a requirement of mental competence or judgmental capacity”, he found that the provision was not limited to those lacking the mental capacity to vote due to mental disease, but to all people with mental disease. The difficulty with this was that the limitation “clearly will include individuals who might suffer from a personality disorder which impairs their judgment in one aspect of their life only.” (Canadian Disability Rights Council 1988: 269) In effect, a specific definition of the judgemental capacity required for voting is needed.

Garant’s definition may meet this requirement, and this definition could be incorporated into legislation (although, presumably with a greater specificity). However, if this became the test for electoral maturity, there would then be no rational basis for saying that it should be applied only to those under eighteen. If it was truly a test of electoral maturity then it ought to be applicable to anyone regardless of age. If this was the case, it seems virtually certain that a large number of people under the age of eighteen would meet the required definition of electoral maturity, and that a large number of people over the age of eighteen would not. Given this, the legislative setting of electoral maturity as beginning at the age of eighteen is difficult to understand as anything but arbitrary.²⁶

Of course, as mentioned, we do not know how the state would actually approach this matter in trial. The questions above do not cover all of the possible positions, and may not be stated in the way they might be in trial, but they do address a number of potential concerns. Prior to proceeding to the next prong of Oakes, I will briefly consider each with respect to their rationality.

It is conceivable that the legislation is intended to protect children. Currently a large number of laws provide special protections for young people, and it may be a concern that enfranchising children will be seen as reason for removing those protections. However, the Young Offenders Act, which came into force after the Charter, makes

²⁶ In the literature on paternalism there are arguments as to which considerations are pertinent to an age cut off. These will be discussed in chapter 5.

specific reference to the fact that youth are entitled to the rights and freedoms contained in the Charter as well as to "special guarantees of their rights and freedoms." (Bala and Kirvan 1991: 75) It seems unreasonable to expect that a society so intent on protecting its children would turn around and remove all of the existing protections simply because those children had been given a voice. An amendment to the legislation pertaining to the drinking age in Ontario is interesting with respect to this issue. Although the federal voting age was lowered from 21 to 18 in 1970, with the provincial legislation of Ontario following suit in 1971, the drinking age in that province was actually *raised* from 18 to 19, nearly a decade later.

More reasonable is the concern that, being unduly prone to influence, and lacking knowledge in the workings of the world, children would vote in ways that were against their better interests. Certainly the Court ruled in favour of protecting children below the age of thirteen from commercial advertising. Aside from the fact, however, that by this logic people thirteen to seventeen years of age are being protected despite being able to distinguish bias on an essentially adult level, there is another difficulty with this concern. Unlike in the case of commercial advertising in which they are being protected from commercial enterprises which protect only the interests of their shareholders, their lack of franchise would be protecting them from having input into a system of government which purports to protect their interests. It would be interesting to know how the government expects election platforms and political promises to develop in a country with truly universal franchise. Would it anticipate politicians running on platforms that pandered to children with promises that offered short-term gratification to their long-term detriment? If this is so, it seems unlikely given the number of people whose interests would not be served, that they would be elected. As a vision, it also excludes the roles parents and teachers would play in explaining those promises and interpreting the consequences that could result from them.

This last observation contains a double edge. Parents may take a more persuasive than explanatory role, with the result that they effectively weight their ballots by the number of children they have. Certainly the line between persuasion and explanation is a fine one under any circumstances, but there is an additional dimension in that it is open to question how deleterious this effect would actually be. How would parents counsel their children to vote? It seems unlikely they would push them to vote in ways that were in their own best interests yet detrimental to those of their children. More likely, if they were to suggest to their children that they vote in one way or another it would be in a way that was seen as beneficial to the whole family.

The obvious concern arising from this is that this would give parents an influence on national and provincial politics that was directly proportional to the size of their families. It is an odd concern, though, in that it rests on the assumption that a larger family should not have a greater influence despite representing a greater number of Canadian citizens. The issue is not all that different, in fact, than the one presented by the greater political influence that any cohesive community holds. There are a number of problematic issues surrounding the drawing of electoral boundaries that stem precisely from such concerns. Yet no one would suggest that only the leaders of those communities should have the franchise. Each individual citizen is entitled to vote.

There is also the question of whether the concern is even valid due to the broad range of ages that the legislation covers. While children tend to listen to their parents, one stereotype of teenage behaviour is of willful contrariness. They may vote in ways that their parents consider misguided, against their better interests, or even dangerous to the public good. In taking this position, though, one is assuming, first, that enough dangerous candidates invest the time and money necessary in running for election to imperil the public good. Second, it assumes that enough people will vote for them that endangerment of the public good becomes a possibility. Third, it assumes that there is a large enough constituency among under eighteens to tip the balance in that direction. There is no evidence that the enfranchisement of prisoners has had any effect of this nature (Sauvé 1996: 860), and it seems that, while they represent a smaller population than do teenagers, they would be more likely, as a group, to vote against the public good since they have already acted against it. The majority of teenagers, on the other hand, do not, over the courses of their lives, contravene the public good severely enough to be incarcerated.

One final logical problem that arises if teenagers are being disenfranchised because they might vote against the public good is that it requires the government to make a distinction between autonomous thought that benefits the social order, and autonomous thought that acts against it. If it is doing this, though, it appears, on the basis of previous Supreme Court rulings, that a test would be necessary rather than an arbitrary distinction on the basis of age. Such a test should be applicable to the entire voting population. How this could be done without undermining some of the very fundamental tenets of our free and democratic society as it currently exists is a question that has not, to date, been satisfactorily answered.

With regard to the sanctity of the vote being undermined by extending it to those under eighteen, it is worth noting Justice Hugessen's comments on the subject in Belczowski, supra. (Cited from Sauvé 1996: 873) After stating that the government has admitted that this objective (along with the two others related to the disenfranchisement of prisoners) is "symbolic and abstract", he continues: "For my part, I must say that I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our Constitution." I contend that in the process of examining what it may actually mean in concrete terms if those under eighteen could vote, this justification becomes even more tenuous. For example, if people were in general worried about a reduction in voter participation resulting from an extension of the franchise, in fact it seems more likely that people would turn out in greater numbers in order to counter those effects.

The second prong of Oakes requires that the means should impair the right as little as possible. In Belczowski, regarding the disenfranchisement of prisoners, the Court found that rather than meeting this requirement, "Paragraph 51(c) is a direct frontal assault on the right to vote of those to whom it applies, a total abolition of that right for the period in question." (1991: 110) Similarly, section 50(1)(a) does not impair the right to vote of those under eighteen as little as possible, but instead completely abolishes it. Even in Sauvé, after the CEA had been amended to disenfranchise only those incarcerated

for a period of two years or more, the Court initially²⁷ still found the right to be unduly impaired since the option of determining, during sentencing, the right of a prisoner to the franchise on an individual basis, had not been adopted. (1996: 899)

The third prong requires that the more severe the deleterious effects of the measure, the more important the objective must be. In cases where the measure, even though rationally connected to the objective, only partly meets the objective, then a more stringent test is applied that considers whether the salutary effects of the measure outweigh the deleterious. (Sauvé 1996: 900) As the objective of ensuring that only electorally mature citizens are enfranchised only partially, at most, is met by the current age restriction, the more stringent test should be applied.

The deleterious effects cited in Sauvé, although applied to adults convicted of criminal offenses, provide some indication of the arguments that the Court would consider. Some of these arguments relate specifically to inmates, but others could also apply to those under the age of eighteen and so have been included below.

The plaintiffs argued that, “the disenfranchised class is a group which lacks power in society, and therefore has difficulty making itself heard in the political and social arenas.” (1996: 903) Prisoners lack power for social and economic reasons, and because they have lost some of their rights regarding mobility and association, as a result of their behaviour. Under eighteens lack power for the same reasons as inmates, but as a result of immaturity. Unlike the behaviour of inmates, though, this immaturity has never been individually determined.

The plaintiffs further contended that other deleterious effects of disenfranchisement included, “stigmatization, loss of rehabilitative opportunity, promotion of a message of inequality, and the characterization of our society as being intolerant and fearful of the less advantaged.” (1996: 903-4) Testifying for the plaintiffs, Professor Schafer stated that, “[t]he denial of the right to vote can be seen as a removal of one of the prisoner’s links to the community,” suggesting, as previously mentioned, that there was “evidence to suggest that prison inmates who are given greater control over their lives during incarceration exhibit increased independence and self-control upon release.” (1996: 904) Professor Boyd referred to substantial benefits gained through political participation, and the possibility of “a morally educative benefit flowing from the enfranchisement of prisoners.” (1996: 905) Professor Jackson contended that prisoner voting would “promote citizenship skills and encourage responsible behaviour.” (1996: 907) The obvious problem in applying these statements to those under eighteen arises from the fact that the age range is so broad that while all of them almost certainly apply to some members of this group, none of them may apply to others. Nonetheless, generally speaking, very little has been written that detracts from John Dewey’s notions regarding the value of experience in learning for people in general, or for those under the age of eighteen. (Dewey 1938)

The Court agreed with these arguments as set forward by the plaintiffs. It also found that the provision disenfranchising inmates was incapable of producing the salutary effects contended by the defense. Further, it noted that the four provinces in which inmates could vote “appear[ed] not to be adversely affected.” (Sauvé 1996: 915) It also

²⁷ Desjardins J.A., dissenting, still does (Sauvé 2000: 122).

noted that the same could be said of those democratic nations that did allow prisoners to vote. In sum, the Court found that the third prong of Oakes was not met. Given this, it is difficult to see how it could be met with respect to section 50(1)(a) of the CEA.

Even drawing on older cases, generally from lower courts, that were not specifically concerned with sections of the CEA, Garant found that, “we are not at all convinced that the Supreme Court would not invalidate fixing the voting age at 18.” It is certainly possible that the Court would strike down the provision. If it did so the legislature would have to decide whether to simply remove the provision, amend it to restrict voting to a lower age group, or establish some form of test of a citizen’s capacity to vote. If the legislature chose the latter option, it would have to decide whether the test should be applied to the entire population, or simply to those below the age of eighteen. The testing of only a portion of the population, and doing so on the basis of their age, would be unconstitutional under section 15(1) of the Charter. While the question of whether the courts would find this impairment of a right to be justified under section 1 of the Charter would remain open, it is difficult to understand how this could be justified if it had already been determined that the age restriction with respect to voting was more generally unconstitutional.

The legal place of the judiciary

The judiciary has the power, under the constitution, to nullify law enacted by the legislature. It is worth considering what the legislature would have the power to do with respect to a Section 3 Charter ruling with which it disagreed. As noted, the “notwithstanding” clause cannot be applied to Section 3 rulings, which leaves the formation of the courts, the appointment of the judges, and amendments to the constitution, as areas that may be within legislative control.

Canadian courts exist at varying levels of jurisdiction, and are governed by different statutes. There is, for example, a Federal Court Act, and a Supreme Court Act, governing those respective courts. Ultimately, of course, appeals end with the Supreme Court, so it is the place of this court within Canadian law with which we shall here be concerned.

The authority for the creation of the Supreme Court is to be found in the Constitution Act of 1867, the relevant section of which reads:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. (54)

Under this section, Parliament created the Supreme Court of Canada in 1875. In 1949, appeals to the Judicial Committee of the Privy Council in England were abolished, and the Supreme Court became the final court of appeal in Canada. (Bushnell 1992) The

current Supreme Court Act, which came into force in 1985, bases the mandate of the court through historical reference in the following section:

3. The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

Nine judges, one being the Chief Justice, are appointed to the Court according to sections 4 to 11 of the Act. Any person who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province can be appointed to the Court. A judge may hold office until attaining the age of 75 years, assuming good behaviour, but is removable by the Governor General on address of the Senate and House of Commons. Appointments are made by the Governor General, who acts by and with the advice and consent of those members of the Privy Council who make up the Cabinet.

The 1982 Constitution stipulates in Section 41(d) that the composition of the Supreme Court can only be changed through a constitutional amendment:

by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

Such unanimous consent is not required by the Constitution for an amendment to Section 3 of the Charter. A change to this section is, instead, covered by Section 38(1) which reads:

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

To alter Section 3 of the Constitution, then, the legislature would need the support of the non-elected senate, and the Governor General. If the legislature was able to obtain this, it could insert a requisite voting age directly into the Constitution, thus avoiding the judgement of the Supreme Court. To date the legislature has not done this with respect to the two sections struck by the courts that were discussed in this chapter.

An analysis of how members of the legislature have historically understood the rule of law would be interesting, but beside the point here. What does need to be explored

is the understanding members of parliament have had of that aspect of law which has not yet been before the courts. The following chapter will examine the attitudes held by Canadian MPs toward the issue of voting age. It will begin with a brief history of voting in Canada in order to provide some historical context for this discussion.

CHAPTER 4 - HISTORY OF VOTING IN CANADA

In the second half of the eighteenth century portions of the populations of the colonies that would eventually become Canadian provinces gained some measure of self-government through elected legislative assemblies. However, an executive council appointed by a non-elected colonial governor had veto power over any bills created by the assembly. As a result, the initial concern of those interested in reforming the government was the acquisition of full self-government. This goal was achieved only after colonial rebellions in Upper and Lower Canada in the 1830's. Although these revolts did not immediately result in greater autonomy, they were at least partly responsible for the subsequent refusal of the elected colonial assemblies to ratify legislation proposed by governors and their councils. To resolve this impasse secretary of state for the colonies Sir George Grey granted the colonies the autonomy they sought, permitting Nova Scotia and the Province of Canada to bring in responsible government in 1848, followed by Prince Edward Island in 1851, and New Brunswick in 1854.

Perhaps not surprisingly, extending the right to vote to women, to those without property, Catholics, and immigrants from countries other than Britain who had not been in one of the colonies long enough to become naturalized citizens, was not a concern for reformists prior to the establishment of responsible government, occupied as they were with gaining the rights that would endow their own votes with force. (*A History of the Vote in Canada* 1997: 7) Once these rights had been acquired, movement began toward the extension of the franchise, although this change was slow and initially, in a number of instances, actually regressive. The odd cadence of these changes can be attributed to three interrelated factors: paternalism, the retention of power based on race and class, and the utilization of power to determine the outcome of specific issues. The first two are reflected in a comment by Jean Hamelin that, "resistance to expanding the franchise reflected a general nineteenth-century discomfort with liberal-democratic ideals, an uneasiness with the concept of majority rule, and an attitude that equated universal suffrage with social upheaval and disorder created by teeming new urban populations." (1997: xv-xvi)²⁸ That this concern over extending the franchise can at least in part be attributed to a paternalistic concern for the general welfare of society, above and beyond a more self-interested concern with maintaining the economic and social power of the elite, can be seen in the discussion of the history of education in Canada in appendix 2. Although, as will also become evident, these concerns are generally inextricably intertwined.

Perhaps the most clear cut case of paternalism was the exclusion from the franchise of women in Lower Canada in 1834 under the pretext, supported by the deaths of three people in the election two years previously, that polling stations had become too dangerous for women. (1997: 63) Here, the line between self-interest and paternalism is brought into relief. Voting unquestionably contained an element of danger: 20 people died while engaged in this activity prior to 1867, with an indeterminate number of others injured. (1997: 3) Yet, in determining on behalf of the women that the activity was too

²⁸ I am assuming that by "general" what is being referred to is that small percentage of the population which had the vote. Judging by the impetus for change, those excluded groups did not appear to share this concern, at least insofar as their own particular exclusion was concerned.

dangerous, the questions remain as to why those with the power to make this determination valued the physical security over the autonomy of these women, and what they stood to gain from this taking this position. The various facets of this question will be analyzed in detail in chapter 5. At this point I simply wish to indicate the difficulty involved in attributing restrictions of the franchise to purely other-regarding motives, quite aside from whether or not one may consider such motives justified under any circumstances.

In fact, the motives are frequently even less clear cut. MP Jean-Joseph Denis, in opposition to a 1918 bill providing for universal female suffrage, stated, "I say that the Holy Scripture, theology, ancient philosophy, Christian philosophy, history, anatomy, physiology, political economy, and feminine psychology all seem to indicate that the place of women in this world is not amid the strife of the political arena, but in her home." (1997: 68)²⁹ On the religious reference alone one might wonder if Denis was more concerned for the souls of the women, or for the souls of the men who had a responsibility to protect the women. Whatever the confluence of, and motivations behind, the religious, social, economic and psychological factors underlying such attitudes, the fact is that the exclusion of women from the franchise was a "tacit convention of English common law" that occasionally, for example, in 1848 in New Brunswick (18), and in 1851 in Nova Scotia (12), became codified apparently in response to those women who, meeting the stipulated requirements, tried to exercise their franchise.

It is possible that the absence of franchise legislation directed against specific racial groups can be attributed to a perceived lack of need rather than strongly egalitarian feelings on the part of those already in possession of the franchise. Certainly in British Columbia, which had relatively larger Aboriginal and Chinese populations than elsewhere in British North America, legislation was enacted in 1868 that, by requiring that voters be able to read and write English, effectively precluded these groups from voting. In New Westminster and the districts on Vancouver Island, the Chinese and "Indians" were explicitly excluded. (1997: 36) By contrast, between 1867 and 1885, British Columbia had no property or income qualifications for enfranchisement, while Quebec and Ontario had property requirements, with New Brunswick and Manitoba also requiring an income. (1997: 46) As of 1854, Nova Scotia had no property requirement provided one had lived in the colony for at least five years, but in 1863 it also brought in legislation requiring real estate. (1997: 12)

The franchise was also manipulated in order to secure specific outcomes on given issues. Frequently the concerns were over the outcome of various attempts at confederation.

Governor General Sydenham, beginning in 1840, provided an example of this when he sought to secure support for the amalgamation of Canada East and West. In Canada West he did this through ensuring that candidates favourable to his cause were elected by persuading opposing candidates to withdraw by offering government positions, and threatening to "deprive voters of government grants if his candidate was defeated." (29) In Canada East, "where he could hope to see only a few candidates elected" (30), he

²⁹ Nellie McClung nicely revised such attitudes in legislature role plays by declaring that "Man is made for something higher and better than voting. Men were made to support families. What is a home without a bank account!" (1997: 66)

redrew riding boundaries, limited the number of polling booths to areas within ridings where he was guaranteed support, and sent gangs of men “armed with clubs and guns to take over the polling stations and prevent his opponents from voting.” (30) Further, as commander in chief of the army, he “refused to send troops to protect 15 opposition candidates who sought protection, while granting the same protection to any of his supporters who requested it.” (30)

Racial exclusions for specific strategic ends were evident in British Columbia’s 1868 requirement that voters be able to read and write English. This condition, “ruled out Aboriginal people,” (36), who, at that time, accounted for more than half the province’s population.” (48) These conditions were imposed by London just prior to a vote on whether British Columbia should join Confederation, “clearly with a view to assuring British Columbia’s approval.” (36)

However, economic and class concerns appear to be the pivotal factors in the power relations that resulted in the confederation of colonies that created the Canadian state. Not only was the loyalty of those without ancestral ties to Britain suspect with respect to the desires of the Canadian and British elites. Even those whose lineage was rooted in Britain could not be trusted to vote as the governing echelon desired. According to Elections Canada:

Unlike previous constitutions, Confederation was mainly the work of colonial politicians and businessmen, backed by a number of important London financiers and administrators. The plan was essentially drawn up in secret and without input from the electorate. John A. Macdonald, the plan’s chief architect, did not hide his aversion to popular consultation. As he put it, “As it would be obviously absurd to submit the complicated details of such a measure to the people, it is not proposed to seek their sanction before asking the Imperial Government to introduce a Bill in the British Parliament.” (1997: 37)

The BNA Act, given Royal Assent on 31 March 1867, came into force on July 1, without the express consent of the electorate.

Repercussions from such abuses can be seen in such undemocratic acts as the ensuing withdrawal of the franchise from federal public servants by a secessionist government in Nova Scotia, “presumably to deprive the opposition party of votes in a forthcoming election.” (xv)

With the BNA Act in place, one might have expected the 1885 Electoral Franchise Act, which centralized control of the enumeration of voters, to have been a step forward for democracy in the new nation. Had the result been a fairer distribution of the franchise evenly across the provinces, it would have been. In fact, the property qualifications were simply altered in favour of rural residents, with property remaining a prerequisite, and in British Columbia and Prince Edward Island, where there had formerly been no such qualification, one was brought in. The racial restrictions remained unchanged.

Further, the favouring of rural residents was of strategic advantage to Macdonald’s Conservative party in that the more highly urbanized provinces of Ontario and Nova Scotia had elected Liberal governments. In fact, “In just one province - Quebec,

a Conservative stronghold since 1867 - did the size of the electorate appear to have increased.” (51) Compounding this abuse of power, Macdonald ensured that the electoral lists be drawn up “by revisers appointed by the governor general in council, that is, by the government in power.” (51) If an elector was not on this list he could not vote - sufficient reason for his establishment over the years of “a complex countrywide network of his own appointees, which he controlled completely and effectively.” (52) Only Macdonald’s death in 1891 enabled the Liberals to gain power and bring about electoral reform.

This reform constituted returning to the provinces the responsibility for drawing up the electoral lists, while preventing them from discriminating against people based on race and occupation. This left the provinces with “some half-dozen factors that they could use to control the right to vote: age, sex, citizenship, length of residence, and property-based requirements.” (54) British Columbia effectively circumvented the anti-discrimination legislation by requiring that electors be able to read the provincial election legislation, which was written in English. The extent to which this requirement can be construed as discriminatory is evident from a similar strategy adopted by Manitoba which required that one be able to read its election act in English, French, German, Icelandic or a Scandinavian language. While this showed that, contrary to the implication in British Columbia’s legislation, it was quite possible to provide the legislation in languages other than English, this too was discriminatory as Manitoba had “many immigrants of Polish, Ukrainian and Russian origin.” (57)

Under Borden’s Conservative government, the electoral process was again subject to manipulation. Faced with insufficient numbers of volunteers to replace those killed in Europe during World War One, Borden introduced conscription. Opposition to this measure threatened to be sufficient to unseat his government in the next election, prompting Borden and his government to adopt two election acts designed to modify the composition of the electorate. They resorted to using closure to push them into law. The Military Voters Act essentially removed the usual voter qualifications for active and retired members of the Canadian Armed Forces, thus increasing the number of voters likely to support conscription. The War-time Elections Act went much further, enfranchising:

the spouses, widows, mothers, sisters and daughters of any persons, male or female, living or dead, who were serving or had served in the Canadian forces, provided they met the age, nationality and residency requirements for electors in their respective provinces or the Yukon. It also conferred the right to vote on those who did not own property in accordance with prevailing provincial law but had a son or grandson in the army. [...]

This act also disenfranchised conscientious objectors. [...] Individuals born in an enemy country who became naturalized British subjects after 31 March 1902 were also disenfranchised [... as were] British subjects naturalized after 31 March 1902 whose mother tongue was that of an enemy country, whether or not the individual’s country of origin was an ally of Great Britain. (59-60)

Ironically, it was Borden’s government that, in 1920, brought in the Dominion

Elections Act³⁰, which “provided universal access to the vote without reference to property ownership or other exclusionary requirements - age and citizenship remained the only criteria.”³¹ (68)

Not included in this brief overview of the undemocratic practices exercised over the franchise by those in power are those procedural practices that allowed for the manipulation of those who actually had the franchise. Examples of these were oral votes which provided the opportunity for people representing particular interests to threaten those voting contrary to their demands, and lax procedures under which written ballots could be manipulated in various ways. Such abuses, and the history of the changes in electoral procedure to eliminate them, make fascinating reading, but are beyond the scope of a thesis concerned with the franchise itself.

Perhaps what is most remarkable in this history from the perspective of this thesis is how volatile were the discussions around nearly all of the criteria for suffrage - whether that be sex, race, property, income, occupation, or residency - with the exception of that of voter age. Possible reasons for this - for example, that the young are incapable of such advocacy, or that, unlike other groups, they will eventually gain the franchise as a matter of seniority - and their importance for the fundamental contentions of this thesis, will be considered in the section of this chapter that examines the discussions that did arise over this criteria. At this point, though, it will be useful to place the existence of the voting age criteria within its historical context. To do this we must turn to a history of Britain, the country to which citizenship in Canada has, until very recently, required one to swear allegiance³², and the country that the origination of the age of 21 as the age of majority is to be found.

The age designations eventually adopted by the peoples living in the British Isles bear similarities to those held in Roman law. It is by no means clear whether these are a result of direct Roman influence, or simply the result of deeply set human assumptions regarding the attainment of various levels of maturity. Either way, the age based legal capacities ascribed by Roman law require mention.

Initially, Roman law recognized two ages of legal incapacity. The first, “infantia”, originally referred to infants not yet capable of speech, but around AD 407 this was fixed at under 7 years of age. The second, “tutela impuberis”, “ceased at puberty, a tutor no longer being required when the child might have children, since the interest of his relatives in the property then ceased.” (James 1960: 24) This was later fixed at 14 years of age for males, and 12 years of age for females. In effect, this set majority at the age at which males were deemed capable of “understanding and judgment as to acts in law, in particular in relation to property rights.” (1960: 25) Some time later a third age, “cura minoris”, was recognized, during which males were apparently not responsible for debts incurred. (Report 1967: 20) Except in circumstances in which an imperial decree of full age, known as “venia aetatis” was granted, this age ended after males had completed their 25th year. (1960: 24)

This law did not apply to the barbarian tribes, which included the peoples of

³⁰ This became the Canada Elections Act in 1951. (71)

³¹ This was not entirely true. One clause in this act, not deleted until 1948, stated that “people disenfranchised by a province ‘for reasons of race’ would also be excluded from the federal franchise.” (78)

³² This was, at least, required of those who were not born in Canada.

Britain. Here infancy could be terminated at 15, apparently in the sense that "this became established as the vital age both for combat and majority", although the significance of this age was largely that it was then that males were deemed old enough to bear arms. (1960: 24-5) The extent to which this age was a result of Roman influence is unknown. It seems likely to me that while Roman law may have provided the impetus for formalizing the age, the common biology of Romans and barbarians was what made the formalization seem reasonable.

In fact, the age of majority in socage, in which a person attained financial responsibility³³, was probably 14 years prior to the Norman invasion, and although this age fluctuated between 14 and 15 over the next few centuries, the choice of the higher age can be attributed to a custom whereby an "additional year was added, for the heir at majority was obliged to appear in the court of the lord and demand his inheritance." (1960: 30)

The designation of the age of twenty-one, however, which had occurred for men in knight service at least prior to the Magna Carta in 1215, appears to have been largely the result of technological developments in warfare. St. Palaye wrote that, "the profession of arms demanded an ability and strength not to be acquired till the age of twenty-one" (1960: 28), and although "it was not until about the middle of the thirteenth century that armour increased considerably in weight" (26), the addition of a knee-length mail shirt, a mail coif to guard the neck and face, and the lengthening of the sleeves and skirt, would certainly have added to the weight. Greater skill was required by the introduction of horses into combat, for the assurance of both success in battle and protection of the costly animal. James suggests that "the laborious training in the customs of chivalry would have been an added factor." (28) Roman law under Constantine may have been one further factor: he established that "venia aetatis" could be applied for at the age of twenty. (29)

By this point, then, as Holdsworth notes, "The tendency seems to have been to fix different ages for different classes of society. The knight came of age at twenty-one; the socman's heir when he was fifteen; the burgess's son when he was of age to count pence, measure cloth, and conduct his father's business." (Holdsworth 1935: 510) It was not until the 17th century that the age of majority for all intents and purposes became 21. At this time, military tenure was abolished and all of the lands so held became socage. As a result, under the laws governing socage, "wardship would then have ended in all cases at the age of fourteen when the tenant would choose his own guardian". To address the concern that the young tenants would choose inappropriate guardians, Charles II enacted a statute that their fathers could "in all cases appoint a guardian by deed or by will until his child attained twenty-one". In those cases in which a father neglected to appoint a guardian, it became common for the courts to do so. (1960: 31) These two ages, 14 and 21, were the same for women as for men. (Pollock 1968: 439)

It is interesting that while the Roman full age of 26 years never gained legal status in Britain, the frequency with which children have been vested in wills and settlements upon attaining the age of 25 indicates a continuing popular belief that it is around this age that one attains a true sense of discretion. (1960: 33) In other words, while the age of majority upon which suffrage was originally based arose from the technological

³³ Specifically, socage referred to the renting of land from a lord.

developments of armour and mounted combat, everyday conceptions of majority mirror those of the ancient Romans. Arguably, reference to the Roman age of puberty is evident in those statutes that set consent for leaving home and school, gaining employment, and driving a car at 16 years of age.

All of this implies, as did the socio-psychological data accepted by the Supreme Court in the Irwin Toy ruling, that people may become more capable of performing certain tasks, or fulfilling certain roles, at particular ages. It certainly indicates that there is a general perception in society that this is the case, and that there is a general inclination on the part of society to fix an age at which all become legally permitted to engage in a particular task rather than allowing individuals, in conjunction with their guardians, to self-determine their readiness. This of course raises the question of how the society in which these determinations are made is structured, and whether or not, given this structure, these determinations are legitimate for the affected individuals. Again, the problem relates to what is meant by "individual", and at what point one can be said to attain this status. The Supreme Court consideration of the capacity of children to critically assess advertising certainly appears to be more pertinent to a determination of when an individual attains the autonomy that the understanding of democratic participation developed in chapter 1 requires than do the historical categorizations discussed above. For example, even if 25 years does represent the age at which people who have been bestowed assets become more likely to dispose of those assets in a manner in which their benefactors would approve, this does not tell us anything about the legitimacy of the ends approved by those benefactors. There has been no discussion between all of those involved, and while the ends determined by the recipients may appear to be frivolous, and not in the best interests of those recipients, this does not necessarily mean that these ends were not autonomously determined.

As indicated, the nature of autonomy will be explored in chapter 5. What is of interest here is how the Canadian government understands the nature of the voting age with respect both to democratic ideals in general, and to autonomy in particular. While the adoption by Canada of 21 as the age of suffrage will tell us nothing about how the elected representatives of this country understand the voting age, the parliamentary discussions that eventually resulted in this age being lowered to 18 will.

Debates on this reduction began in 1954 and concluded in 1970 when the age was lowered as part of a general overhaul of the Elections Act. During this time the matter twice passed through the Standing Committee on Privileges and Elections, once in 1963-64 and again in 1969-70, each time gaining approval for a reduction in the age. On November 18, 1963, Prime Minister Pearson stated that his party, "has been committed to the reduction of the voting age to 18 years for some years, and we are anxious to see that it is done as quickly as possible." (Hansard: 4858) On April 12, 1965, however, he stated that the introduction of legislation lowering the voting age, "is not of immediate priority." (Hansard: 217) It appears that although there existed no great opposition to the idea, the political will to enact the change was lacking.

The lack of serious opposition is evident in the debates, both quantitatively and qualitatively. The extent to which opposition was voiced can be determined through tabulations of the amount of time taken in parliament to express such views, or by the

number of lines taken to express these views in Hansard, or by the number of arguments used and repeated in this expression. I have chosen the latter as there are instances in which speeches were made in opposition to the measure that contained little in terms of fact and argument, reflecting on the part of a member either a lack of focus, or a desire to talk out a bill. Any form of tabulation is contingent on my judgement of either what constitutes a specific argument, or what constitutes a passage promoting a specific point of view, and as such would require a detailed argument on my part if such a tabulation was to hold much weight.³⁴ What is of concern, though, is the extent to which the arguments offered can be justified in terms both of their internal coherence and the understanding of democracy developed in chapter 1. Nonetheless, a tabulation of the number of times a particular line of argument was used does provide an indication of the validity that argument was seen to have in the eyes of the members, regardless of how poorly a given argument was developed.

In the House of Commons over this sixteen year period some 354 arguments were made in favour of a reduction in the voting age, with only 74 being made against.³⁵ In other words, just over 80% of the arguments supported lowering the voting age to 18. Of these, 24 were in support of contentions by members that youth were expressing an interest in political activity and in having a reduced voting age, while 11 supported those arguing that there was not sufficient interest. Although this means that more than twice as many members cited youth support for the measure, this figure is small in comparison both to the total number of arguments made, and to the ratio of total arguments made in favour to those made against.

Certainly, the widespread movement that existed in support of women's suffrage was not present. This may have been due to a number of reasons. Fewer of those of eighteen or nineteen years of age would have had the time to learn the sophisticated lobbying techniques that those without political representation require if they are to attain legislative change. Further, they may not have had time to realize the connection between political rights and other aspects of their lives over which they desired control. This is particularly likely in view of the absence of education from this perspective. Finally, any desire for change, and inclination to effect it, was framed by the knowledge that by the time any changes that they did work for took place, they would almost certainly have already attained the age of suffrage. In other words, they would not only have needed an

³⁴ It is also contingent on the indexes to Hansard citing every instance of debate on the subject.

³⁵ The different lines of argument generally recurred several times over the sixteen year course of the debates. With respect to these lines of argument, I identified 37 reasons for maintaining the voting age at 21 years, and 78 reasons for lowering the age. The precision with which distinctions can be made between these reasons poses some obvious problems, and I note the count here anecdotally. A qualitative description of these arguments is the concern of the remainder of this chapter. Determining the number of MPs who spoke in the House either for or against a voting age reduction is not nearly so problematic, however, as most of these arguments concluded with the MPs indicating, regardless of the various lines of argument contained in their speeches, quite clearly whether they believe the voting age should be maintained or reduced. On this measure, 75 out of 101, or 74 percent, of the arguments presented were in favour of a reduction, with the rest against. Some members rose on more than one occasion, however. If we simply look at the number of Members who spoke on this issue, we find that 61 out of 80, or 76 percent, were in favour of a reduction, with 24 percent against, although 42 percent of those against were not adamant, but simply felt further study was needed. One member, J.P. Racine, has been excluded from these totals since he was clearly in favour of reduction in 1961, but had apparently changed his mind when he spoke in 1967.

abundance of skills and motivation, they would have needed to exercise these with a lack of self-interest, or at least a conception of their self-interest of a breadth, that few people of any age display.

Given this the question arises as to what brought about the debate on voting age in the first place. The first mention of a universal reduction in the voting age from 21 to 18 was in the form of Bill 126 introduced by H.R. Argue on March 29, 1954. Prior to this time, a number of countries, primarily in Latin America and the Soviet block, had extended the franchise to 18 year olds: Albania, Argentina, Brazil, Bulgaria, Czechoslovakia, Dominican Republic, East Germany, Ecuador, El Salvador, Guatemala, Hungary, Israel, Jordan, Nicaragua, North Korea, Paraguay, Poland, Romania, Russia, Uruguay, Venezuela, Yugoslavia. Costa Rica and Switzerland permitted those 20 and over to vote. (Cultice 1992: 76-7) It is likely that these examples carried little weight with parliamentary members. They lacked the geographical proximity of the United States, and the historical connection of Britain. At any rate, they did not factor into any of the discussions regarding the voting age until 1961. At that time, a member in favour of lowering the age simply referred to the existence of countries with ages above and below 21 (2034-5), while another member noted that, "by not adopting the measure this afternoon we will not exactly be turning our backs on a large and progressive step taken in a large number of countries." (2039)

However, precedents set by the provinces did underlie the inception of this debate in the federal parliament. When Bill 126 came up for second reading on June 4, 1954, Argue stated that:

I believe young Canadians would take a more active interest in public affairs if the voting age were lowered to 18.

We know that from our own experience in Saskatchewan. You can go out to Saskatchewan and you can campaign in a federal election, and you will find that your audience is older on the average than when you campaign in that province during a provincial election, because in Saskatchewan we have given our citizens the right to vote at the age of 18. (Hansard: 5533)

Saskatchewan extended this right in 1944. Argue continued by pointing out that Alberta and British Columbia had also reduced the age, to 19, in 1944 and 1953 respectively. Although these moves appeared to be the result of individual party policies, Argue predicted a more general trend, stating that:

when the C.C.F. party becomes the government in any other province, the voting age will be reduced to 18. From two precedents I think it also follows that should the Social Credit party be elected in any other province in Canada, the chances are that the voting age in that province will be reduced to 19. Hence the trend is definitely for a reduction in the voting age. I am sure the age will be reduced to 18. It is only a matter of time; and I do not see why the time should not be now. (Hansard: 5533)

The beginnings of what, in retrospect, obviously was a trend, were evident in the

United States as well. In 1943 the state of Georgia lowered the voting age to 18 on the position, as Governor Herman Talmadge stated, "that if a young man was old enough to be drafted to fight for his country that he was certainly old enough to vote." (Cultice 1992: 25) A decade later, on January 7, 1954, President Eisenhower lent his support to such initiatives in a speech to congress, presenting the age at which one could be drafted into military service as the reason. Argue mentioned this fact, also, in his speech to the house. (Hansard: 5533)

Argue made a number of arguments for lowering the age of suffrage, most of which form the starting points of what will become threads of arguments extending over the subsequent 16 years of debate on the subject, and to which we shall shortly turn. One is of particular pertinence, both in terms of the frequency with which it was cited, and because it was the reason behind the first extensions of suffrage to those under 21, albeit only for those serving in the military. Echoing the reasons cited by Talmadge, and later Eisenhower, for extending the vote, Argue noted that:

Whenever the country faces an emergency, whenever the country is engaged in war, then we are quite happy to extend the voting principle to 18-year olds when they are in the armed forces. If we are prepared to do that when we need them to defend democracy in wartime, why should they be denied the right to vote in peacetime, the right to a voice in public affairs, and the right to a voice by the ballot in the decisions that will be made which may result in their having to don a uniform and lay down their lives for their country. (Hansard: 5533)

This discrepancy between the age of entry into military service and voting rights was cited, in one form or another by various members in favour of reducing the voting age, a further 32 times before the age was reduced³⁶. Although this point was not central in either Argue's or most of the other members' remarks on the subject, no other single reason was so frequently drawn upon.

Exactly how this discrepancy was understood by the representatives is difficult to determine in many instances, however, because several different aspects of several different issues are conflated into a single comment. For example, a meaningful analysis of this discrepancy requires that we know whether one is referring to compulsory or voluntary military service. If it is the former, then the issue is one of those being drawn into military service having a say over the governments that might make the decision of whether or not to impose a draft. If it is the latter, before any inferences can be drawn as to the implications of an enlistment age of 18 years for voting, the question of whether what is seen as important is that the right to enlist has been given to people of age 18, or whether those who have been given the right to enlist make the decision to do so, must be answered.

The above remark by Argue, for example, appears to conflate conscription in the Second World War with the right to vote that was bestowed on 18 year olds when they

³⁶ Hansard 1954: 5532, 5536, 5666; 1955: 1620; 1961: 2034, 2036; 1962: 1453, 1455, 1490, 1492, 1495; 1964: 5045, 5049; 1967: 1908, 1909, 1912, 3901, 4966, 4971; 1968: 2827; 1969: 5933, 5935, 5936, 55, 309; 1970: 7467, 7912, 7929. Note that the distribution is fairly consistent over these 16 years, indicating that the argument retained its currency.

joined the military. In fact, 18 year olds in the military were not denied the vote in peacetime any more than every eighteen year old received it during the war. Not everyone under the age of 21 joined the military during the war, either through choice or compulsion, and hence these people did not have the right to vote. If they wanted to vote, all they needed to do, either during or after the war, was to join the armed forces.

The argument that I believe was in fact being attempted by Argue is as follows. The Canadian government equates military service with an assumption of responsibility sufficient for the granting of suffrage. The government sees fit, in wartime, to compel people to join the armed forces simply because they have reached the age of 18, and in doing so grants them the vote. In other words, in wartime, 18 year olds are sufficiently responsible to vote simply on the basis of their age, since many of them are not personally assuming any particular responsibility themselves. The decision is out of their hands, unlike in peacetime when they all have the option of taking the initiative to join the armed forces and in so doing earn the right to vote. So, if many 18 year olds in wartime are deemed sufficiently responsible to vote simply on the basis of their age, then why is their age not a sufficient basis for suffrage in peacetime?³⁷

This reinterpretation of the argument presents a question. Does the argument take to be valid the age of military service, and the connection between military service and voting? Or is it simply objecting to a situation in which people are compelled to military service by a government over which they have no control? Regardless of which of these positions forms the basis for the contention that the voting age ought to be lowered, they each contain serious flaws.

The difficulty with the latter position is with the age for voting that is being proposed in relation to the established age of military service under the draft. Before explicating this difficulty we need first to examine briefly the principle of participation in one's governance that the argument assumes. In short, is there an underlying requirement for those called into service to have had a voice in the determination that a call to service was necessary or desirable? An argument could certainly be made that the defense of one's country, and in the case of Canada, one's democratic way of life, requires obedience above all. Borden appears to have taken this position in the First World War, although more in the defense of British goals than of democracy. Yet, as the discussion in chapter 1 pointed out, the nature of democracy is ephemeral. Essentially, all that can be said about its nature is that its attributes cannot be determined a priori, but only through discussions involving all affected parties. In a world divided into self-interested nation states operating in only the most attenuated way within the rule of law, decisions made in Canada affect people who are not Canadian citizens and who consequently have no legitimized control over those decisions. This is a serious concern, requiring a discussion of democracy in global terms that is beyond the parameters of this thesis. The existence of this difficulty, though, does not mitigate the need for citizens of Canada to be treated democratically. The privileging of obedience above discussion and participation in the making of decisions, regardless of whether or not such obedience is suitable to certain tasks, is not democratic.

The idea that people need to consent to their governance in order for it to be

³⁷ Similar explications of this argument were given by N. Mandziuk (1962: 1455), and A. Caron (1962: 1453).

legitimate was occasionally mentioned in the house in a direct and unequivocal way. Patterson, for example, commented that, "We feel, therefore, it is a principle of democracy that, as far as possible, those who are subject to government should have a choice of the organ that governs them. We talk about the fact that democracy is government with the consent of the governed." (1964: 5049) Brown, remarked that such consent was a "fundamental principle of our form of government." (1967: 1910) Macquarrie, quoting Thomas Paine, stated that "the right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this class." (1970: 7398) Badanai stated that "The franchise should theoretically be granted to every citizen," although he then qualified this by referring to the practical need for those citizens to be mature. (1967: 4967) Nonetheless, affirmation of this principle of democracy in the house met with no dissent.³⁸

The problem is, if youth should not be subject to a draft that was enacted without their participation, then by setting both the voting and the draft age at 18, this principle will not in many instances be upheld. For example, even if an election occurred on the day that a person turned 18, if sie was drafted on that same day then that person would not have had an opportunity to participate in hir governance. In fact, many people would have been drafted in their 18th year while not having the opportunity to vote until an election one or more years hence. Under this argument, then, the voting age needs to be lower than the draft age, regardless of whether this means lowering the voting age or raising the age of compulsory military service. At no point in the debates was this suggested.

This is not altogether surprising, however, given that youth are subject to many laws to which they have not given consent, and the abrogation of this principle is not seen to be as problematic as is the bestowing of suffrage on people before they are mature.³⁹ Admittedly, many of the laws in place are there more for the protection of youth than the protection of society, which renders the dismissal of this principle somewhat more comprehensible. The voting age restriction occupies an interesting middle ground in this respect in that it ostensibly protects everyone in the society whether they are under or over that age by protecting society and the future society from wrong choices by an electorate too young to make competent decisions, unlike compulsory service on a battlefield in which a given individual may benefit only if sie lives through the experience. It is also not surprising given that at the time of these debates the draft was not in effect, and the focus of the comments of the members was most likely simply on the maturity required for voluntary military service, with the distinctions outlined above apparently having remained largely unformed. What more generally constitutes maturity with regard to voting is a question that was, in fact, more frequently addressed in the debates than the

³⁸ No member dismissed this principle, although some members appeared not to consider it to be important. J.A. Lambert, for example, commented that: "We know that once they have entered military service they are entitled to vote, but I submit that this is a concession to or derogation from the yardstick of age that we have adopted in view of the fact of military service. It is not a concession to the reasoning that the median age should be 21." (1962: 1457) Missing from this assertion is any reason why consent is not an issue.

³⁹ If it was, the franchise would, presumably, not be subject to an age restriction.

military issue. Before considering this larger discussion, though, the connection between military service and voting needs examining.⁴⁰

G.J. McIlraith's remark that, "Where it is clear that citizens as members of the armed forces have assumed the responsibilities of citizenship in the highest way, immediately they are given the vote" (1954: 5538), could be taken to indicate a belief that military service and the right to vote are intimately connected. What is not clear from the remark is why joining the armed forces is seen to represent the assumption of the highest responsibilities of citizenship. Here, despite the fact that many people, either through choice or for medical reasons, never join the armed forces, active participation in the legitimized force of the state is understood as demonstrating the highest possible acceptance of responsibility for the primary means by which the democratic way of life is defended. Given the understanding of democracy set out in chapter 1, however, military force is not the most fundamental means to this defense.

There is no question that the potential for violence is implicit in all human interactions beyond those interactions which are integral to the unquestioned background assumptions of the Habermasian lifeworld. The purpose of rational discourse and democratic interaction is to present an option to violence in those instances in which background assumptions are not shared. Under Habermas's description of democratic structures, this occurs through the consensual conferral of force to a third party constrained by law. Under this conception the military, along with the police, represent a vital component of democracy by permitting that consensual consociation of equals to continue their various forms of life under mutually conferred terms of equality and freedom. However, it is the law, and the reason based consensus by which that law is legitimated, that is primary to democracy. Violence may be primary, but not to democracy. Democracy requires that the human potential for unreasoning or self-interested violence be contained so that that violence is used only in a reasonable way in the interests of all. While one might be quite competent to participate in a democracy despite lacking the skills for military service, I would argue, one could not be a truly competent member of the armed forces of a democratic nation without possessing a democratic mind set.

There remains the problem mentioned above that is posed by living in a world in which many nation states may present a threat to the democratic way of life of a nation state such as Canada. Yet by treating its own citizens undemocratically in order to combat such a threat undermines the very reasons that can be propounded for defending its integrity in the first place. Only through voluntary consociation is democracy possible, which requires the defense of a nation to be voluntary. By requiring that military service precede equal participation, even though entrance into that service is voluntary, it is voluntary only within the framework of a non-democratic state. Put another way, "military service" is not necessarily equivalent to "defense of one's country" since the second is a far broader term that can be attempted in many ways, all of which, to the

⁴⁰ With respect to a history of the military service age, it would be interesting to explore the changing conceptions of youth and of political and military needs that resulted in this age being set at a point lower than that required for voting. However, the validity of the military service age did not figure into the parliamentary discussions, and what is at issue here, at any rate, is simply the validity of the notion that military service and the right to vote are intimately connected.

extent that "country" is synonymous with "democracy", require reasoned discourse and the basic rights that emanate from this discourse.

Ironically, on at least two occasions members who opposed lowering the voting age cited differences between the requirements of the military and the franchise as reasons for ensuring that the age of military service be below that of the voting age. Although, given the above discussion, these reasons are clearly not justifiable in any democratic sense, they are worth noting here because they touch upon the more general - and generally raised - question of what constitutes maturity with regard to voting. This, in turn, relates to the problem posed by the need of discursive democracy for autonomous actors with a capacity for rational speech.

J.M. Macdonnell remarked that males under the age of 21, "have a headlong attitude toward life which has been very valuable to this country but which would perhaps not contribute to the exercise of balanced judgment." (1962: 1458) A few years previously, A.B. Weselak cited an editorial in a University of Manitoba student journal that made a similar point:

[The] argument [that those old enough to fight are old enough to vote] is based more upon sentimentality of reward, than upon reason. The criteria of being able-bodied, and of being capable of obeying commands (which are the primary requirements for the bulk of any fighting force) do not in themselves ensure that youths at the age of 18 are equipped to mark a reasoned and responsible ballot. The execution of a military command and the exercise of one's franchise are subjects of widely differing mental processes. Development of the latter remains a more formidable problem. (1955: 1620)

This need for maturity in voters was iterated in a variety of ways over the course of the debates. Amongst those in favour of reducing the voting age, a couple of people made general assertions that under any criteria 18 year olds could qualify as readily as anyone (1955: 1617; 1964: 5044), with a number of others simply asserting that they were mature enough (1954: 5532, 5536; 1955: 2047; 1964: 5044, 5049, 5050; 1967: 3898, 3900, 4966; 1969: 5932, 309), reaching maturity earlier (1955: 1622; 1966: 240), or citing general attributes such as balance, seriousness, rationality, ideals, energy, creativity, enthusiasm, inquisitiveness, intelligence and competence. (1967: 1907, 1912, 3900; 1969: 202; 1970: 7930)

A few of the more specific observations of indications of sufficient maturity to vote pointed to the assumption of certain social roles by the young such as teaching (1961: 2034; 1962: 1454, 1490, 1492, 1495; 1967: 3900), gaining employment (1962: 1492; 1967: 1908; 1969: 309), being a reporter in the press gallery (1962: 1490), driving farm machinery (1961: 2040), or starting a family. (1961: 2060; 1962: 1454, 1455; 1964: 5042; 1966: 240; 1967: 1912; 1969: 5932, 5934) This last refers, variously, to the law which permits marriage, to the making of the choice to form a union, and the biological capacity to have children.

A large number of the remarks focused on what members believed was evidence that youth were maturing more quickly than in the past, and were thus ready to vote at an earlier age. One stated that youth were living away from home at an earlier age (1968:

2827), while another thought that the increased pace of economic activity drew them into marriage, work, and consequently taxation, more quickly than in the past. (1961: 2034) Two factors in particular were seen to be contributors to earlier maturation: a more pervasive media (1961: 2033, 2038; 1962: 1452, 1454, 1492, 1495; 1964: 5042, 5044; 1967: 1912, 3894, 4970; 1968: 2827; 1969: 5932, 309; 1970: 7926), and greater educational opportunities resulting in a better educated school and university population. (1954: 5532; 1955: 1616, 2047; 1961: 2033; 1962: 1452, 1454, 1455, 1492; 1964: 5042, 5044; 1967: 1907, 1912, 3894, 3900; 1969: 309; 1970: 7398, 7926)

One member referred to psychological studies showing that full intelligence is reached at 15 to 16 years of age⁴¹ (1955: 1623), with another asserting that 18 year olds were sufficiently intelligent, and a third stating that in many ways they were at the peak of their intellectual abilities. (1955: 2048; 1970: 7399)

A different form of argument drawn upon to prove that eighteen year olds were mature did not rely upon general assertions, observable choices made by individuals, increased educational opportunities, or physiological attributes. Instead, reference was made to the various laws that recognized different aspects of maturity in youth. The legal age for enlistment - as opposed to the age at which an individual might choose to enlist - was an example of this. Other examples included: the legal permission to marry at eighteen without parental permission (1955: 2046, 2048; 1962: 1452, 1454, 1455; 1964: 5042; 1967: 1912; 1969: 5934, 309); the legal responsibility for criminal actions (1955: 2048; 1967: 1907; 1969: 5932, 5936); the legal right to carry a gun (1969: 5932); the right to drive a car (1955: 2048; 1961: 2037; 1964: 5042; 1969: 5932, 5934, 5936), and the legal right to work. (1969: 5932) Unlike those observations relating to the roles that youth take it upon themselves to assume, and in so doing demonstrate a willingness to assume various types of responsibility, the presumption here is that at some point in time various legislators have accurately gauged the maturity of youth with regard to a particular privilege, and set the age limit accordingly. This leaves unanswered the question of what criteria those legislators used, whether those were the correct criteria correctly applied, and most importantly, how the establishment and application of that criteria was legitimated since those affected were not participants in the political process through which those legislators came to power.

A much smaller number of representatives argued that 18 year olds were not sufficiently mature. One expressed reservations about the maturity of youth emotionally, mentally, and physically (1961: 2040), with another specifically citing the higher automobile accident rate incurred by youth. (1962: 1456) Most reservations were similar to those expressed by A.B. Weselak, who felt that, "a large number of those in this age group have sufficient education and experience to exercise their franchise in a rational and reasonable manner, but on the other hand I question whether a sufficient majority of them have reached political maturity." (1955: 1619; other examples of this concern that voters be *politically* mature can be found at 1962: 1456, 1493; 1964: 5046, 5050; 1969: 5937, 5938) Two were specific regarding what they considered to be the political shortcomings of youth. One wondered whether "a young person of 18 has enough maturity to use his vote in a way that is consistent with the general opinion" (1961: 2040),

⁴¹ He contrasted this with wisdom. Argue interpreted this use of "intelligence" to mean "the ability to acquire knowledge" (1955: 2048).

while the other asserted that most youth had no interest in politics, but only in "dances organized in order to secure votes." (1969: 5939) This last representative also dismissed the arguments that youth were now better educated, remarking that, "At 18, the young are all schoolchildren, they all attend classes. So, they certainly do not have the time to keep abreast of politics." (1969: 5939)

Which form or combination of forms of maturity voting required, and how these might be distinguished, let alone determined, was either explicitly or implicitly the subject of the discussions. In fact, the arbitrary nature of age limitations in general, and with respect to voting rights in particular, was recognized by both sides in the debate.

A few representatives who opposed a lowering of the age, for example, noted that the age was to some extent arbitrary in that there would always be some people below the voting age who were in fact more competent to vote than a number of those who were above that age, but they maintained that this was unavoidable since some level of maturity was needed. (1954: 5534; 1962: 1493, 1496; 1967: 4966) One stated that in lieu of an intelligence test or other measure by which to distinguish those who were competent to vote, the criteria of age was as good as any other. (1962: 1456) This stance was reinforced for a number of members by the fact that the age of 21 had a long tradition, which they assumed must be founded in good reasons. (1954: 5663, 5665; 1955: 1618; 1961: 2041; 1962: 1456, 1457, 1493)

Those interested in seeing the age reduced argued on several occasions that any such reasons were archaic and not applicable to the current situation (1954: 5666; 1962: 1454; 1964: 5042; 1967: 3894; 1969: 5934; 1970: 7398), but, as J.W. Pickersgill noted with regard to a discrepancy between an enlistment age of 17½ and the proposed reduction in the voting age, the choice of 18 as the new age of suffrage was not immune to the charge of arbitrariness. (1954: 5663)

In fact, several of those arguing for a reduction in the age appeared to be cognizant of the discretionary nature of the choice of 18 years. A. MacInnis, after asking, "Who said that [21] was the age when men came to the point where they could choose right from wrong or when they should have the right to take part in government as mature human beings," remarked that the person who set the age at 21 was no doubt "just as ill-advised as I would be if I said the age should be 17." (1954: 5666-7) D. Lewis argued that, "there is nothing particularly sacred about the age of 21 any more than there is anything particularly sacred about the age of 18 [...but that] developments in recent years in Canada, as in many other democracies, have been such as to justify, indeed to require, that the voting age be reduced from 21 to 18." (1962: 1490) Further, while G.J. Serré argued, in contradiction to those who felt youth did not attain political maturity until at least the age of 21, that "today's youth is much more mature and better informed about politics than previous generations and, in many cases, in a much better position to exercise its right to vote than a certain class of adults" (1969: 153), others agreed with their opponents on this point.

F. Howard, for example, pointed out that "most of us have run into individuals who are 25, 30, 35 or 40 years of age who have cast doubts on the maturity of individuals in those age groups," and while he commented that "if we talk about young people aged 9, 10 or 11 years then there is some validity to the argument about their ability to express a mature judgment on matters such as this," he then stated that "I am not particularly tied

to the age of 18 but selected it arbitrarily, the same as the age of 21 was selected arbitrarily and is now a sort of arbitrary determination.” (1962: 1453) R.R. Knight, observing that “many of our older people are not considered to be very mature after years of experience with the general field of politics,” suggested that “it takes from 2 to 10 years after the age of 21 has been reached before most people become politically mature.” (1955: 1623) He further suggested that political participation was a means by which people learn about politics. Two weeks later, Argue reiterated Knight’s contention that most people do not become politically mature until they are between the ages of 23 to 31, expounding that:

in relation to public affairs, as in relation to any other aspect of life, people learn by doing and that the way for young Canadians to acquire a better knowledge of public affairs is to have an earlier opportunity to develop such an interest [...] and that since that length of time was necessary for people to reach political maturity he felt it would be a good thing for them to have the opportunity to vote at an earlier age, as they would therefore become politically mature at an earlier age. (1955: 2048)

How strongly individual representatives advocating a reduction in the voting age were committed to the age of 18, and how many simply chose 18 because, for all of the reasons listed above, it was the age which politically had the greatest chance of gaining acceptance in the House, is impossible to determine from the debates. The response of one member, whose bill set the age at 18, to a question on this subject was: “If the hon. member has the authority of the government to say that he will accept my bill if 19 is stipulated instead of 18, he might be able to get my concurrence.” (1962: 1492) Another, following positive comments about the military service of people under the age of 18, remarked that, “no matter at what age we give the vote to our young people, the vote will give them a responsibility. Since this bill talks of 18 year olds I will confine my remarks to that age group.” (1967: 1910) At least two representatives indicated their belief that one can only determine what people are capable of after they have been given the opportunity to prove themselves. (1954: 5537; 1969: 5934) A great many more, in citing reasons concerned with providing the conditions under which young people might learn about democracy, have provided a reason that explains why the voting age should be lowered to encompass those who are able to learn far more than it does to validate the specific age of 18.⁴² Specifically, it was suggested: that the age be lowered because people learn values by exercising them (1954: 5536; 1955: 1622, 2048; 1962: 1490; 1964: 5042, 5049; 1967: 3894, 4965-6); that interest in the political process will be generated by participation in the electoral process. (1955: 1623, 2047; 1961: 2038; 1962: 1493, 1495; 1964: 5044, 5049; 1969: 152)

Those against lowering the voting age countered these suggestions by claiming that a lower voting age wouldn’t bring greater awareness of public affairs (1962: 1456), that society is more complex today (1962: 1493, 1496; 1964: 5050), and that young people need practical education in addition to theoretical education, which the three years

⁴² This appears to have been Pugh’s intent when stating: “no matter at what age we give the vote to our young people, the vote will give them a responsibility” (1967: 1908).

between the ages of 18 and 21 provide. (1954: 5534, 5537; 1955: 1622; 1961: 2040)

The difference in perspective between these two groups is important. The latter sees voting essentially as a technical task the end result of which is good government. The emphasis, here, is on government which privileges economic viability over democratic freedom, the freedom of the members of the polity being essentially bestowed in order to facilitate this economic development. In other words, what constitutes the good life has already been determined a priori, with justice consisting of that which facilitates that good life. Under the conception of democracy outlined in chapter 1, this is clearly back to front. The former perspective, in which the learning arising from participation in democracy is deemed a good thing in and of itself simply because it strengthens that democracy is obviously more congruent with the conception of democracy set out in chapter 1. Under this perspective, democracy constitutes an end in itself, with further elements of the good life only being intersubjectively determined by the members of the polity.

This brings us to the question of what the members of parliament, in the course of these debates, conceived democracy to be. In other words, is there a basis for the conclusions I have drawn above based on the perspectives these two sides held on the matter of education for democratic participation. It should be noted that those in favour of lowering the age certainly, also, held a technocratic perspective to the extent that they argued that the age should be lowered on the basis of improved education and increased opportunity to partake in that education. It needs to be recognized, though, that to the extent that that was the type of language their opposition understood, it would have been strategically necessary to take such an approach. For this reason it is important to look for further indications of the conceptions of democracy held by the representatives.

First I will present those comments made by members opposed to lowering the age as their substance, to some extent, is then addressed by the remarks of those in support of the measure. One stated that lowering the age would not lead to better administration. (1962: 1456) A few mentioned the extra cost the enumeration of additional voters would incur. (1954: 5663; 1955: 1622; 1961: 2039) Pickersgill argued that this increased cost could not be justified since he doubted "very much whether the results of elections would be changed to any material degree [...] we do in fact in a general election get an adequate and a fair cross-section of the whole population, and that after all is what the purpose of elections is" (1954: 5664)⁴³. This contention that the inclusion of younger voters would make little difference found support in the remarks that a number of members made to the effect that this group did not show much interest in politics and did not therefore require the vote. (1954: 5534, 5565, 5667; 1961: 2040; 1962: 1456, 1493; 1964: 5046; 1969: 5937, 149)

However, an even larger number of those supporting a lower voting age indicated that they *had* found support for the measure among young people. (1954: 5532; 1955: 1616, 1622, 2046; 1961: 2037; 1962: 1454, 1493, 1495; 1964: 5043, 5044; 1967: 1907, 1908, 1912, 3900, 3894, 4970; 1969: 5932, 5935, 5936, 389) Not surprisingly, those interested in lowering the age, like their opponents, were *also* able to support their

⁴³ Disenfranchisement on the basis of expense is so clearly unjust that I have not dealt with it in the body of the text. However, Argue provided objections to this line of thinking on a couple of occasions (1955: 1617, 2048).

position with the claim that a lower voting age would make little or no difference to election outcomes. At least one argued this on the basis that statistically the lower age would make no difference (1967: 3898), one stated that because youth are non-partisan, no one party would benefit (1967: 1907), and some argued that the impact would be negligible since, because some older people are not more mature or politically aware than young people, the results would balance out. (1955: 1967: 1911, 1912; 1969: 5934)

That the extension of suffrage to the young would make no difference to election results could be contended by both sides in the debate because, simply, it is beside the point. The irrelevance of the matter was set out forcefully by Argue after he had also made this point. Garson, in response to a postulation by Argue that, "if the ballot were not secret it would be found that the opinions of the people in the younger voting group, on balance, are not too different from the opinions of other persons in different age groups," pointed out that, "If the result were the same for the lower age group as for the higher age group it would not affect the result of the election." Argue replied, somewhat caustically:

I doubt whether it would. That is really a brilliant comment by the Minister of Justice. If he followed that logic perhaps he would take away from people who are under 30 or under 40 the right to vote. He might just let the old age pensioners vote, or he might do it on a statistical sampling basis, or let us not have an election at all. Let us have a Gallup poll to find out what Canadians are thinking. (1955: 1617)

A few members did argue that a lower age would make a difference. B. Mather stated:

I want to draw to the attention of members one other fact which seems to me to be relevant, and that is that 50 per cent of Canadians are now under 25 years of age. Another fact which struck me as interesting is that the average age of members of parliament is 50 years and six months. I suggest that there is a disparity between those two age groups which this bill, if it were endorsed, would lessen. (1967: 4969; see also 1967: 3897; 1969: 5934, 5935, 5936)

What is interesting here is that the concern is not with the effect that the extension of the franchise would have on government policies in terms either of maintenance of or change to the status quo. The sole concern of this member was that a portion of the Canadian population be more accurately represented. It could, of course, be argued that the disparity between the age of the majority of the population and the members of the House did not necessarily indicate inadequate representation, but this would miss the point that, without the inclusion of that population in the process, there was really no way of determining whether the representation was adequate or not.

That representation in a democracy is important in and of itself⁴⁴ was overtly recognized by only a few members, such as those, mentioned earlier, who noted that people should have the opportunity to consent to the bodies that govern them. This view

⁴⁴ Chapter 1, of course, argues that representation is not just important but crucial.

was implicitly endorsed by those who noted that people under 21 were criminally liable for their actions (1967: 1907; 1969: 5932, 5936), and subject to taxation. (1961: 2035, 2037; 1962: 1451, 1455, 1492, 1495⁴⁵; 1964: 5042, 5049, 5050; 1967: 1907, 1911, 1912; 1969: 5932, 5934)

More overtly, Argue stated his belief that “in a democracy we should have the widest possible basis for our franchise” (1954: 5532), citing the need to ensure that, “the greatest number of persons possible who are eligible to vote do have the right and opportunity to vote on election day.” (1955: 2049) R. Scott thought that, “the real basis of our concept of democratic government is that the greatest possible number of people who are going to be governed ought to participate in the method of choosing that government, as long as they are able to do so intelligently.” (1964: 5043) Yet, while each of these views emphasizes representation, the need for people to consent to their governance is subordinated to notions of “intelligence” and, more obliquely, “eligibility”. The constitution of eligibility is, of course, what these debates, and the court judgements of the previous chapter, were about. Logically, though, 18 appears to be no less arbitrary an age for the franchise than the age of 21. The problem remains that if an adult has the “right to be wrong,” (1962: 1492)⁴⁶ why those below the age of suffrage do not also have this right.

The obvious reason for this is to ensure the continuance of the democratic way of life. In doing this, the age requirement protects the self-interest of those who already have the franchise, by preventing people from voting in ways that will destroy that way of life that grants them the right to vote. It also prevents them from voting in ways that run contrary to the conceptions of the good life that those with the franchise hold. The difficulty here, of course, is in determining how the line between the right and the good can be drawn for it could easily be the case that the former is claimed when, in hindsight, it was the latter that was being protected, as appears to have been the case with the restriction of the franchise to men prior to 1920. The requirement is also, depending on the individual, either paternalistic or oppressive. It is paternalistic to those not yet fully autonomous beings who vote in ways that are detrimental to the polity as a whole, as they also harm themselves either now, or in the future, when the consequences of those electoral choices become apparent. It is oppressive to those people who are able to vote autonomously, but who wish to do so in ways that oppose those who hold the franchise. Arguments for the exclusion of this group of people encounter the problem cited above of determining the line between the right and the good. The difficulty of the problem is such that the vote has been extended by the courts to all adults. With respect to the setting of an age limit, to the extent that these people are voting autonomously there is little to distinguish them from the adults for whom no test has been found by which they might be justly disenfranchised.

A number of arguments for the extension of the franchise appear to have been made on the basis of self-interest, although, again, this may have been strategically necessary in addressing the concerns of those opposed to the measure. For example, contending that an extended franchise would help in the emancipation of French

⁴⁵ Explicit reference is made to representation here.

⁴⁶ This remark was made with regard to the non-partisan nature of the extension of suffrage. For other acknowledgements of this, see 1962: 1491, 1493.

Canadians (1964: 5050), that youth are more in tune with a rapidly changing world, and that therefore their voice is needed (1967: 3896), or that youth will bring in new ideas (1970: 7440), place particular conceptions of the good life, as envisioned by only a portion of the population, before the requirement that all of those affected be represented. Further, such comments deny representation as the first requirement even though there is no question that those being referred to are considered to be competent speakers. The citations included with the quotation of Mather more closely approach the idea of representation, although these, too, are problematic in that, by contending that youth should be granted the franchise because they represent a sizable interest group rather than because they are entitled to representation as moral beings, they imply that if that group did not represent a potential divergence from the status quo, that there would then be no reason to extend the franchise.

A need to address the increasing student activism of the late 1960's appears to underlie the arguments of quite a few representatives in favour of a reduced age, with most appearing to reflect a belief that those who wanted representation were entitled to it, rather than searching for the best way to quell dangerous dissent. For example, a speech from the throne stated that, "Such demands, insofar as they do not conflict with the general welfare, are the expression of a truly democratic ideal. They must be satisfied if our society is to attain its goals of peace and justice." (1969: 2) Remarks by several others held a similar sentiment. (1966: 240; 1967: 1910, 1912; 1969: 5932, 5936, 54, 152, 207)

The extent to which an expression of a desire for suffrage entitles one to suffrage raises an interesting problem similar to one produced by the suffragette movement. Early in the debate, Jutras, in arguing against extending the franchise to 18 year olds, stated, "I am quite convinced that they are fully qualified and capable of casting an intelligent vote at that age. The question that I have in mind is whether these heavy responsibilities should be placed on their shoulders at that early age." (1954: 5536) A year later, Weselak quoted an essay published in a student journal that presented an argument that people under the age of 21 lack the "capacity for reaching wise mental conclusions." (1955: 1620) One can only assume that the writer, if under 21, would exclude himself from this category, although it is difficult to see upon what basis sie could do this. J. Macaluso appears to have been aware of a similar irony when he noted, "that the young Progressive Conservatives and the Progressive Conservative student federation voted against lowering the voting age." (1964: 5044) The antisuffragists embraced a similar contradiction:

The movement was organized, led, and staffed by women who went to lengths inconsistent with their goals in order to prevent the extension of suffrage to women. Common to all antisuffragists was the belief that the entry of women into public life (which was considered the inevitable consequence of the ballot) would bring in its wake disaster not only for women themselves but for all society. Despite this belief, the antisuffragists were so intent on resisting the coming of woman suffrage that they leaped midstream into the battle, adopting all of the techniques they were so eager for womankind to avoid, including campaigning and even lobbying. (Camhi 1994: 2)

The dilemma posed for those who want to argue that they should continue to be denied a

basic right such as voting is that the more convincing their argument, the greater the contradiction inherent within that argument. They must do one of three things: argue for their right to be subject to a paternalism that they clearly do not need; argue for the protection of the greater society on the basis of an incompetence that, to the extent that they present a coherent argument, paradoxically they do not possess; or argue for the purposes of protecting interests that they, as individuals have, but that other members of that larger group being denied the right do not⁴⁷.

In 1990, N.A. Riis tabled a bill to reduce the voting age to 16. (1990: 13775) The following year the Royal Commission on Electoral Reform presented their report recommending that the age remain at 18 years. The recommendation is curious for a couple of reasons.

After asserting in an earlier section four criteria for determining who should have the vote (32-35), they state that the first three constituted the arguments put forward in the legislature at the time the age was reduced from 21 years. These, according to the Commission were that the enfranchised should: have a stake in the community; exercise a mature and informed vote; and be responsible citizens. (47) Making reference to input from the Canadian Bar Association, and other interveners, they stated that 16 year olds met the first criteria through their participation in the work force, paying taxes, and ability to obtain a driver's permit, among other rights and responsibilities. The second criteria, on the basis of psychological data and ready access to information, was also found to be met by 16 year olds. This age group was also considered to act responsibly, be less cynical about the political process, and "be more likely than older persons to have a sense of political efficacy." (49) Further, the Commission pointed out that the standard that must be met under the Charter for any restriction on the franchise is considerably more onerous than was the case when the age was last lowered. "In 1969, a case had to be made to extend the franchise. Now a case must be made to restrict the franchise." (47) Yet despite the Charter, and despite the criteria they asserted as being "the cornerstones of electoral law" (35), they find that the arguments for reducing the voting age to 16 "are not sufficiently compelling." (49) The reason they give for this abrupt dismissal of both the Constitution, and of what they believe to be foundational to this "most basic of democratic rights" (1), is that "any decision on the voting age involves the judgement of a society about when individuals reach maturity as citizens." (49) They support their implication that those under 18 lack the requisite maturity by citing the fact that under most statutes "a person is not considered an adult until age 18." (49) The injustice of the double-bind into which this conclusion places those under 18 cannot be overstated. Simply, they are rendered incapable of proving their maturity because they have been determined to be immature, a priori, by laws in the creation of which they were not permitted to participate. The nature of this double-bind will be explored through the discussions of paternalism and state interests in the following two chapters.

The Commission concluded that since the voting age is not specified in the Constitution it is relatively easy to change, and should be revisited by Parliament periodically. Riis continued to do this, taking the bill to second reading in December of

⁴⁷ This last appears to have been the position of the antisuffragists (Camhi 1994; Marshall 1997).

1990, introducing a similar bill in 1991, presenting a petition in 1993 from youth requesting that the voting age be lowered to 16, and introducing another bill in 1996 seeking a 16 year voting age.

The arguments made during second reading, both for and against the 1990 bill, were, with one exception, similar to those made in the debates of the 1950's and 1960's. The problems with these arguments are therefore similar to those previously discussed and so will not be repeated here. The exception resulted from a difficulty A. Malone had with the contention that there are people at the age of 16 who are capable of voting. He argued that similar contentions could be made for those of lesser and lesser ages, but with fewer and fewer people in those age groups actually having the capability. By conflating arbitrary decisions such as which side of the street people are to drive on, with arbitrary decisions about age limits for fundamental rights, he was able to contend that in Canadian society the right exists to set an arbitrary voting age. The option to doing this, he noted, would be to allow everybody from birth to vote, which would be untenable because then "the adult in that family would bear more influence if they had more children because they would exercise their vote through their children." (1990: 16794) He unfortunately did not then explain why such actions on the part of the adult would be antithetical to democracy. In order to do so, he would have had to have explicated his own understanding of democracy in some detail, which he did not, beyond stating that the "most important reason why we assemble here is to control the expenditures of Parliament." (1990: 16794) How such actions accord with democratic principles will be considered in the next two chapters.

CHAPTER 5 - *THE VOTING AGE AND PATERNALISM*

Although many reasons were given by representatives of the Canadian people in Parliament, and by appointed commissioners on the Royal Commission, as to why the voting age should be lowered or left alone, virtually all of these reasons were concerned with setting out the type and level of maturity needed for voting, and the extent to which young Canadians of a given age met this criteria. While the Commission did distinguish the need to be informed and mature from the need to have a stake in the community and to be a responsible citizen, the latter two are essentially subsets of maturity. Acknowledging that a young person has demonstrated responsibility, for instance, indicates that the actions of a young person have met some public standard of maturity, with the assumption of a stake in the community being one form that an assumption of responsibility could take. Despite the assertions made by the Royal Commission, nothing approaching consensus was reached concerning the nature of the criteria for determining voting maturity. Before considering the relationship of maturity to voting, I will briefly discuss how maturity is understood in the literature.

Gubrium and Buckholdt (1977), take what they describe as a social phenomenological approach to understanding life change. Despite using the term "maturity" in the title of their text, their emphasis on the negotiated nature of what constitutes maturity precludes use of this term throughout the work. In distinguishing their approach from a number of others concerned with the conceptualization of maturity, they indicate the limitations inherent in behavioural, psychoanalytic, cognitive, covert personality, symbolic interactionist, and functional approaches. Each of these, they argue, "takes for granted the reality of some extrasubjective entity in the world of everyday life." (28) Behaviourism, for example, focusing as it does on behaviour modification, takes the assumptions on which it bases the direction of that modification from outside its field of study. Psychoanalysis assumes a normal pattern of development from which abnormalities can be determined, leaving open the question of how this assumption is initially arrived at. The cognitivist view that "certain ways of thinking [are] sequentially ordered", presents a similar problem in that the delineation of those ways of thinking must rest also rest on constructed premises. The phenomenological approach, by contrast, focuses on the ways in which identities and deviancies are generated through "practical politics or negotiation." (30) Here, the assumptions are procedural in nature, relying on notions that treat social life as constructed, as "organizing or disorganizing but never as organized or disorganized." (35) The development of an understanding of how life change occurs requires the researcher "to systematically document the practical procedures by which all people (laypersons and human scientists) make sense of and accomplish its existence in talk and deed." (37) In a discussion on the maturity needed for voting, this approach would not seek to determine what maturity in that context would be like. Rather, it would entail treating the discussion "as an arena of competing practical theories of maturity in order to describe how its reality arises out of negotiations" between those involved." (38)⁴⁸

⁴⁸ The original context of this quotation referred to an example created by the authors of a family discussion. I believe the substitution of the above example is in keeping with their meaning.

To an extent, a phenomenological approach was taken in the analysis of Parliamentary debates and court rulings. Yet as I am also making a moral claim about a structured aspect of my society, and in doing so am, in a sense, entering into those debates, I must do more than simply describe the prevailing conceptions of maturity held by Canadian representatives and judges. Having set out what I take to be a conception of democracy that is more rigorous and defensible than other conceptions, and against which I am holding up the current voting age for comparison in terms of its justice, and of the implications for democracy education which are bound into the understanding of justice on which the voting age rests, I must set out what, if any, conception of maturity that notion of democracy implies, and whether or not it has any relevance to a voting age restriction.

The connection of discourse theory to empirical cognitive studies of maturity has been explored by Habermas in his essay "Moral consciousness and communicative action." (1990) A review of his analysis will help to illustrate both how a theory of democracy might be connected to a theory of maturity, and the difficulties inherent in establishing such a relationship. Habermas's intention in this investigation was to seek indirect validation of his theory through other theories such as Kohlberg's developmental theory, in acknowledgement of the need for his theory to be defensible not only against competing moral theories, but empirically as well. While his intention was somewhat different than ours, I believe that the difficulties inherent in the one reflect the difficulties inherent in the other.

Reminding us that practical discourse "is a procedure for testing the validity of hypothetical norms, not for producing justified norms" (1990: 122), Habermas notes that this procedure:

reflects the very operations Kohlberg postulates for moral judgments at the postconventional level: complete *reversibility* of the perspectives from which participants produce their arguments; *universality*, understood as the inclusion of all concerned; and the *reciprocity* of equal recognition of the claims of each participant by all others. (1990: 122)

Kohlberg specifies two postconventional levels. Stage 5 includes those people who uphold "the basic rights, values, and legal contracts of a society, even when they conflict with the concrete rules and laws of the group," so that "nonrelative values and rights such as life, and liberty" are upheld regardless of majority opinion. Beyond upholding these principles, the laws are based on the "rational calculation of overall utility: 'the greatest good for the greatest number.'" (1990: 124) Stage 6 includes those people who recognize not only values but universal principles of justice such as "the equality of human rights and respect for the dignity of human beings as individuals," and who use these principles to generate particular decisions. In other words, "as a rational person, one has seen the validity of principles and has become committed to them." (1990: 125)

These represent the culmination of human moral learning, which, Kohlberg has argued and supported empirically, moves through four prior stages. Those at the first stage of morality - usually very young children - do what they believe is right out of

obedience and to avoid punishment. At stage 2, one believes that the right consists in meeting one's own interests while recognising that others have interests that must also be met. The principle is one of fair exchange. These he refers to as pre-conventional stages. Those at stage 3 are concerned with "other people and their feelings, keeping loyalty and trust with partners, and being motivated to follow rules and expectations." (1990: 123) At stage 4 the right consists of "doing one's duty in society, upholding the social order, and maintaining the welfare of society or the group." (1990: 124) These are known as the conventional stages.

Habermas argues that the reciprocity that underlies the justificatory power of discourse theory permeates each of these stages.

This reciprocity first appears in the form of authority-governed complementarity and interest-governed symmetry. Later it manifests itself in the reciprocity of behavioural expectations that are linked together in social roles and in the reciprocity of rights and obligations that are linked together in norms. Finally, it shows up as ideal role taking in discourse and insures that the right to universal access to, and equal opportunity for participation in argumentation is enjoyed equally and freely. At this third stage of interaction, then, an idealized form of reciprocity becomes the defining characteristic of a cooperative search for truth on the part of a potentially unlimited communication community. To that extent morality as grounded by discourse ethics is based on a pattern inherent in mutual understanding in language from the beginning. (1990: 163)

This does not mean, however, that he rejects the hierarchical structure of Kohlberg's moral stages.

At the pre-conventional stage we cannot speak of conceptions of justice in the same sense as at later stages of interaction. Here no social world in my sense of the term has yet been constituted. The sociocognitive concepts available to the child lack a clear-cut dimension of deontological validity. For perspectives with socially binding force, the child must look to an inventory that interprets reciprocally interlocking action perspectives in terms of authority relations or external influence. Hence, *pre-conventional notions of bonds and loyalties* are based either on the complementarity of command and obedience or on the symmetry of compensation. These two types of reciprocity represent the natural embryonic form of justice conceptions inherent in the structure of action as such. Only at the conventional stage, however, are conceptions of justice conceived as conceptions of justice. And only at the post-conventional stage is the truth about the world of pre-conventional conceptions revealed, namely that the idea of justice can be gleaned only from the idealized form of reciprocity that underlies discourse. (1990: 165)

In this cognitive sense, then, there is a logical point at which a person could be considered mature, and that point would be when she attains the post-conventional autonomy necessary for participation in discourse. Further, Kohlberg gathered a

considerable amount of empirical data that indicated that these stages are not merely philosophical constructs, but are also firmly rooted in human psychology. (Berman 1997: 82) In other words, it would appear that the critique leveled by the phenomenologists against a cognitive theory of maturity is insupportable. Although they claim that such a theory must rest on constructed premises, it would appear, given the connection between Habermas's foundational discourse theory and Kohlberg's moral stage theory, coupled with empirical support for the existence of these stages, that a theory of cognitive maturity is more than a social construction.

However, there are problems with this cognitive theory of maturity in several senses. There are problems internal to the theory itself. Also, to the extent that it does give a necessary account of moral justification, it does not provide a sufficient account of moral motivation. There are also problems in terms of the application of such a theory to the activity of voting.

Internally, two difficulties that have received much critical attention are those of stage regression, and an apparent gap between argumentation skills and moral reasoning.

The observation of regressions "in early adulthood of some subjects from Stage 4 or higher to Stage 2 or 3, and an apparent leap by some from Stage 3 to Stage 5," was surprising within the context of a hierarchical structure in which justifications at a higher stage should, logically, account for the reasoning evidenced in any preceding stage. The result, according to Kohlberg, was due to "the admission of too much content into assessment and from inadequacies in the definition of stage 4." (Crittenden 1990: 76) As Habermas points out, the type of interpretation required by the assessment of responses "is certainly not susceptible of being operationalized in a foolproof way, that is, in such a way as to neutralize highly complex preunderstandings." (1990: 172) In other words, the researchers would need to make assumptions regarding the substantive ethical constitution of moral principles, while the logical framework within which those principles are derived requires, instead, that ethical content be determined intersubjectively by the researchers and the research subjects.

A further stage problem, first indicated by Carol Gilligan's gender based analysis of Kohlberg's data, is that women disproportionately score at stage 3 "despite a presumption of greater moral maturity on their part." (1990: 175; Gilligan 1987: 19) An additional problem arises with experimental subjects who present arguments that demonstrate the complexity of post-conventional thought while displaying a relativistic moral reasoning that requires their classification at 4½ on Kohlberg's revised scale. (1990: 175) Although the extent to which Kohlberg's theory results in a statistically significant gender bias is in question (Crittenden 1990: 88), by some estimates, according to Kohlberg's criteria, "more than half of the population of the United States [is] at some level below the postconventional in terms of their moral consciousness." (Habermas 1990: 175)

Crittenden points out that ultimately Gilligan does not overtly emphasize the gendered aspects of stage 3 argumentation so much as she attempts "to highlight a distinction between two modes of thought and to focus a problem of interpretation." (1990: 89) The contrast she draws is between a *justice perspective* that emphasizes "autonomy, individual rights, equality, and the authoritatively rational resolution of

conflict,” and an *ethic of care* that emphasizes “nurturance, concern for the other, equity, and the recognition of different points of view.” (1990: 89-90)

Habermas argues that this contrast in perspectives results not from a deficiency in the cognitive stages of morality set out by Kohlberg, but because although Kohlberg’s theory may adequately describe the cognitive stages necessary for a coherent *justification* of moral norms, it does not, at the postconventional level, adequately explain what *motivates* people to behave in a manner congruent with that justification. Moral issues, he writes, “are never raised for their own sake, people raise them seeking a guide for action. For this reason the *demotivated solutions that postconventional morality finds for decontextualized issues must be reinserted into practical life.*” (1990: 179) Conversely, the attributes that Gilligan’s theory privileges do themselves imply the presence of justice. As Crittenden points out, “care for others would exclude unjust action in their regard in any serious way.” (1990: 92) Essentially, it is personal, contextualized, interactions between people acting autonomously that create the bonds which give justice meaning not only within the personal domain but through extrapolation of that experience to wider communities such as that comprised of humans, and, in some cases, other living creatures. Kohlberg himself eventually noted the motivational requirement, as Kiefer notes:

In order to develop principled moral reasoning (Stage Five), he noticed that a child “must undergo ... experiences that lead him to transform his modes of judgement” and that “often, the experiences that promote such change have a fairly strong emotional component.” Apparently, he concluded, “It is ... the emotion that triggers and accompanies the rethinking” and principled thought itself is not merely cognitive, but includes an ability to “see a basis for commitment.” (Kiefer 1988: 164)

Even when the need to include motivational factors has been acknowledged, the observation that some people exhibit a cognitive regress from the postconventional level remains troubling. In attempting to explain this result from the presuppositions of discourse theory, Habermas postulates that “the sociocognitive inventory of the conventional stage of interaction can be said to have been only partly reorganized in the sense that while the adolescent has learned how to reason theoretically, he stops short of moral argumentation.” (1990: 186) This may be a valid reason, but the fact that moral justification described by the cognitive stages does not appear to be structured precisely as the theory indicates means that any reliance on the theory, even simply as a tool for indicating moral reasoning rather than moral action, must be qualified.

Other research indicates that even children in kindergarten can “identify ‘an impressive array of public needs.’” (Berman 1997: 27) Berman continues by noting the findings of the researchers that the

children not only knew about public needs but showed a surprising degree of compassion and concern in their answers. These were comfortable, suburban children, protected from many of the harsh realities experienced by the children

Coles interviewed. Yet some of these five-year-olds were aware of hunger, homelessness, war, and ecological damage. (1997: 27)

Although the level of reasoning that these children would exhibit in justifying their concerns for people to whom they have no connection other than their common humanity might not be particularly complex, Berman notes that the researchers found the responses of the children to display consistency. On Kohlberg's scale the non-self-serving nature of the impulse displayed by these children would place them, in terms of content, at least at stage 3. Whether or not that impulse would be of sufficient strength for action to be taken is a different question, but I do not see why they would be less likely to act simply because they lack the ability to cogently articulate their reasons for doing so against the objections of others. I have no doubt that ongoing instruction, especially from those with authority over them, as to why they should not be concerned for others who are separated from them by geography or culture or one of the other reasons people use to exclude other people from the borders of their compassion, would serve to mitigate or destroy this impulse in many of these children. I would also agree that people who have lived longer are more likely to have developed the cognitive resources to combat amoral and immoral arguments. Yet there currently appears to be no evidence of a sharp line dividing these groups, nor any guarantee, when a line of any kind is evident, that because any given individual is able to display moral reasoning that they will always, or even frequently, act in accordance with that reasoning.

The crucial question for us, however, concerns the implications of the above discussion for determining the maturity required for voting. First, though, it will be helpful to consider the implications of this discussion for democratic participation more generally.

Habermas noted that the operations of reversibility, universality, and reciprocity that are reflected in the discursive procedure which underlies democratic interaction are also evident in each of the six stages postulated by Kohlberg. However, it is only at the postconventional level that these operations are completely assumed by the participants in a moral conversation. It is at this level that Habermas considers the participants to be engaged in argument that is oriented toward reaching understanding. Stage 6 essentially involves recognition of the procedural nature of morality, which contains presuppositions from which the discourse principle that *every valid norm would meet with the approval of all concerned if they could take part in a practical discourse* can be derived. Empirical data proving the existence of stage 6 does not exist, let alone data that would indicate the proportion of a given population operating at this stage. Yet a truly democratic society would presumably require that everyone be functioning at this level in order that this principle to be observed. It could be hypothesized that the reason even the most democratic nations are termed, in the democratic theory literature, to be polyarchies rather than true democracies, is a result of large portions of the populations of those nations having attained a moral stage at which the operations of reversibility, universality, and reciprocity, are only approximately realized.

The implications of this are interesting. One response to this logic might be that psychological instruments should be created so that only those who have reached the postconventional level are permitted to engage in public life. However, given the logic of

these stages, I do not see how such an argument could originate with someone who was functioning at the postconventional level of development since such an approach effectively controverts the principles of stage 5, and is certainly not based on discursive procedure. Such an approach seems to take the point of view that the moral content of these stages could be determined *prior* to the engagement of a person in discourse, which would effectively deny that person the right to speak for himself. This content also cannot be determined in advance for the further reason that those at the postconventional level would be at the same level as those qualified to determine the content. When encountering this content in an assessment situation, those who were truly at the level which this content was intended to indicate would be the same people who might dispute that content, and who would be, given the logic from which that content was derived, qualified to do so.⁴⁹ In other words, this response to the logic of stages is incoherent.

In order to be coherent, the focus cannot be on excluding people from public life. Everyone affected already has a right to participation regardless of their level of functioning. The focus, instead, must be on participation in rational discourse, with the understanding that, to the extent that the participants in a discussion are not being rational - with "reason" ultimately entailing the observation of basic rights, - the discussion needs also to be oriented to explaining viewpoints so that the goal of mutual understanding can be attained. In other words, while the attainment of greater maturity, as it has been defined in this context, means the attainment of a greater capacity for democratic interaction, this fact is not a basis for the exclusion of the immature, but instead indicates the need for the greater inclusion of all people regardless of their level of maturity.

Voting, of course, is different than argumentation. It is, in effect, a mechanism for resolving matters of dispute when the ideal of consensus through argumentation has not been achieved. The reason for such failure may be because the parties debating the matter hold equally reasonable but ultimately irreconcilable views, or because the time within which a decision is required is limited. This latter possibility could be the case whether what is being decided is a matter of substance, or instead involves the choice of a representative who will meet with other representatives to decide matters of substance. The election of representatives is, in general, what voters in Canadian federal elections are concerned with, and it is the representatives who will argue issues of substance, although decisions on these issues will usually result from a vote.

So, given that voting is, in effect, a secondary option resorted to when conflict resolution through democratic discourse is not possible, the question remains as to what can be said about the maturity required for voting under the conception of maturity discussed above. The problem posed by voting is that it permits decisions to be made that may not be the result of reasoned debate. There are several implications from this. First, it means that there is no way of determining whether those voting are doing so in the general public interest, or out of narrow self-interest. Second, in those cases in which people are voting for a decision that they perceive is simply in their personal interest rather than in the communal interest, the potential for a decision that will adversely affect people must be mitigated through the exercise of opposing votes rather than through a dialogue in which the greater interest comes to be understood by all. The implication of

⁴⁹ People who level critiques such as that set out by Gilligan may be examples of such people.

this is that the potential for people to learn about each other and to be part of a morally oriented community rather than one that is strategically oriented is diminished.

Here, then, it would appear that a stronger case exists for a restriction of the vote to those who are already morally mature since the potential for an extension of the moral understandings on which democratic thought is founded - i.e. the possibility of learning from the act of argumentation - will not occur from the act of voting in and of itself. Yet because voting *is* different from discourse, it cannot be assumed that what constitutes maturity with respect to discourse is the same as what constitutes maturity with respect to voting. In fact, to the extent that one could successfully argue that the requirements for voting and discourse *are* the same, the objections raised with regard to a restriction on who could participate in democratic discourse would also hold for restrictions on voting. What needs to be considered in order to determine whether or not a maturity restriction is justifiable for voting are the ways in which voting differs from discourse.

As noted above, the central distinction between voting and discourse is that while discourse is oriented to reaching consensus, voting is a tool for resolving disputes when discourse, for whatever reason, has not been successful. Ultimately, a decision resulting from voting does not depend on the force of the better argument, although the arguments that precede a vote may affect how people will cast their ballots. Instead, the decision depends on enough people casting their ballots on one side of an issue, for whatever reason. Here, however, although arguments usually precede a vote, they are not necessarily going to be of the same quality as those found in discourse oriented toward consensus. The knowledge that the arguments do not need to convince everyone, but only need to convince as many people as the procedural rules state are required for a favourable decision, means that the arguments may only be oriented to achieving understanding up to a point. In fact, to convince the crucial number of people necessary for a favourable decision, it may be in the interests of those presenting an argument to accentuate differences between people in order to create a minority against which opinion can be solidified. In Canada, the function of the Charter is to prevent arguments of this nature from abrogating such fundamental principles respecting persons as are found, for example, in Kohlberg's postconventional stages. Yet, the fact remains that there remain strategic reasons for appealing to the self-interest of some at the expense of others in any argumentation leading to a vote.

This is not to deny that in many instances there might be more subtle arguments on a given issue that more completely encompass the public good. The question of appropriate levels of personal taxation provides an example of this. On the one hand, an appeal to those with higher incomes to vote for lower taxes could be made on the basis of their self-interest. Yet, to the extent that people with specialized skills that are beneficial, for example, to the least well off, might leave the country if taxes are raised, the appeal could be made on the basis of more broadly justifiable reasons. Presumably, given sufficient time, broadly moral arguments could result in consensus. However, given time constraints, it strikes me that appeals to self-interest that will divide people in order that a majority vote might be obtained will remain a possibility in any argumentation that is leading to a vote.

It is difficult to determine, given this, whether those who would advocate the retention of a voting age would do so on the grounds that those under a certain age are

incapable of adequately defending their self-interest, or are, instead incapable of promoting policies that are in the public interest. Obviously, arguments can be made, particularly in relation to the young, that in the long term the defense of the public interest is in their self-interest, and that what is in their self-interest is also in the public interest. However, at this point it will be helpful to separately examine the maturity of the young with respect to these two approaches to policy determination through voting. The relationship of maturity to voting age when the concern is with the meeting of public interest will be examined in chapter 6. The remainder of this chapter will examine this relationship with respect to the concern that a voting age is required in order to protect the self-interest of the young.

As noted in chapter 4, a connection between paternalism and suffrage is rooted in historical fact. The decision by those in power, in the Lower Canada of 1834, that voting was too dangerous for women, was no doubt, at least on one level, motivated by a sincere concern for the physical well-being of those members of the weaker sex who may have wished to exercise their franchise. By most accounts, voting at that time *was* physically dangerous, and in a number of instances, men had been injured while attempting to cast their ballots. That this reasoning could be used to restrict suffrage to women but not to men likely seemed incoherent to far fewer people then than it would today. Arguments to the effect that security arrangements ought to be tightened at polling stations for the protection of *both* sexes would almost certainly have been disregarded as beside the point since other, more pertinent reasons, underlay the restriction. To the extent that these reasons centered on what was understood to be the emotional, non-rational, nature of women, those women who wanted to vote were in a double bind. Their location in society largely prevented them from exercising those skills that would prove this presumption of irrationality wrong, and the presumption itself barred them from changing their social position. Strident assertions that they could prove their abilities if given a chance were apt to be seen as hysterical tantrums serving as further proof of their irrational, emotional nature. Any cogent arguments that they expressed could be discounted as merely the parroting of arguments formulated by seditious men. Today, the assumption of such arguments against equal participation rights for women would, in an ever widening social ambit, be cause for ostracism.

Children, of course, present a different case, and a comparison between the historical treatment of women, and those people who are under the age of 18, is spurious for a large number of people below this age. However, it appears, at least to myself, that it is also an apt comparison for many people in this range. For those such as myself, to ignore the pleas of minors for greater legal autonomy is unjust, while to others, those pleas are simply the ignorant cries of youths still too callow to know what is truly in their interests. To resolve this controversy, we need to look at the extent to which paternalism can be justified.

Although we are using the term in a specific context, it will be helpful to set out how the term is more widely used. The following definition, created by Culver and Gert (1976), used by Palmeri (1980) with a slight modification, and reinterpreted by Archand (1990), generally encompasses other definitions found in the literature. They state that a person is acting paternally toward a subject if sie believes that: (a) hir actions are for the

good of the subject; (b) sie is qualified to act on behalf of the subject by superior knowledge or ability to act; (c) sie is violating a moral rule with regard to the subject, or will be required to do so; (d) there has been and will be no past, present, or immediately forthcoming free, informed consent by the subject; and (e) the subject believes sie generally knows (perhaps falsely) what is for hir own good.

Parts (c) and (e) of this definition exclude those situations in which the subject is content to be in a relationship which would otherwise be considered paternalistic. Such relationships might, perhaps, be considered maternalistic, or, at least, "caring" in the sense indicated by Gilligan (1987), and Nel Noddings (1984). The extent to which education toward autonomy is justified and necessary was addressed in chapter 2, and will also be considered in chapters 6 and 7. At this point, I will simply address those situations in which the above criteria are met.

It should be noted, with respect to the above paragraph, that certain assumptions are present regarding the constitution and role of autonomy. A definition of autonomy provided by Gerald Dworkin considers it to be "a second-order capacity to reflect critically upon one's first-order preferences and desires, and the ability either to identify with these or to change them in light of higher-order preferences and values." (1988: 108) This understanding of autonomy might be interpreted as implicit in section (d)'s requirement of informed *consent*, in the sense that one cannot truly consent unless one has assessed hir desires in light of other options. Likewise, section (e)'s stipulation that the subject believe sie *know* what is in hir interest, implies the ability to give reasons for choosing a particular course of action. The difficulties inherent in actually determining the exact constitution of a second-order capacity, and of when a person has attained such capacity, are similar to those made apparent in the discussion of how the attainment of post-conventional morality might be determined.

Roland Case highlights some of these difficulties in his analysis of the use of irrationality and immaturity as justificatory grounds for paternalistic behaviour toward children.

In considering the charge that children are irrational, he distinguishes ideal-regarding interests from want-regarding interests. Identifying ideal-regarding interests as those that "perfectly rational persons would choose", he notes that "no one is going to argue for this as the minimal standard of entitlement to liberty" (Case 1985: 448), presumably because this standard would leave few people capable of being paternal for any duration. Since want-regarding interests, by referring "to what a person really wants when all of his/her desires, interests, ambitions and so on have been considered" (1985: 447), provide a more attainable standard, Case takes this to be the rationality criterion. Under this standard, however, if one is merely referring to the *capacity* of a person to be rational in a want-regarding sense, then even very young children can be considered rational. Quoting D.G. Brown, he notes that:

Even a five-year old is a master of a complex language, has a personality structure and an awareness of his own identity, and is quite capable of implicitly invoking a generalization principle to protest unfair treatment by a parent or teacher. (1985: 448)

On the other hand, if one is referring to a *disposition* to be rational in this sense, then those, many, adults who are disposed to act on such impulses, habits, and compulsions as “smoking, overeating, getting drunk, wasting money, procrastinating, [and] whimsical risk-taking,” would not meet the standard. (1985: 448) The upshot of this, as Case succinctly states it, “is that either the ‘average’ child is not irrational enough or the ‘average’ adult is not rational enough” for a distinction to be made between adults and children on the basis of rationality.

On the argument that paternalism is justified for children because they are immature, Case first considers what might be meant by this term. Having noted problems inherent in using an ideal of maturity similar to those discussed above in reference to Kohlberg’s work, he suggests

three plausible candidates representative of the concerns lurking behind the immaturity appeal:

(i) children are weak-willed (i.e., they are uniquely impressionable and vulnerable because they have little or no will of their own);

(ii) children are blind-willed (i.e., they do not have a “free” will but are driven by whatever desire/want is strongest);

(iii) children are impermanent willed (i.e., while they have wills of their own, their ambitions/aims are likely to change significantly as they grow up). (1985: 449)

With respect to the first, he points out that many children are quite strong willed in the sense that, “Often they are perfectly clear about what they want and are determined to persevere in the face of opposition.” (1985: 450) Regarding the second, he makes the interesting argument that:

If children’s behavior was always the product of unassessed urges, then we could not hold them responsible for their behavior. It is because we believe they often ‘know better’ or ‘should have known better’ that we can punish them for their actions. The salient difference between conditioning and disciplining rests upon the ability of the recipient to see the rightness and wrongness of acting on certain desires. In short, if we are prepared to discipline children, we have already recognized the freedom of their will. (1985: 450)

The third concern, that children are impermanently willed, he finds unconvincing because the concern implies that adults are “stable and have relatively set aims and aspirations,” which, as he points out, is quite possibly not “an adequate portrait of the average adult.” (1985: 449) Even those in middle age, whose desires, Hart states, “are relatively fixed, not liable to be artificially stimulated by external influences; who knows what he wants and what gives him satisfaction” (1985: 449) are not, I would hazard, entirely self-contained, immune to all efforts of the world to surprise and appeal. In other words, to some extent we are all impermanently willed. A person may be able to critically

assess his interests in a manner that an advocate of paternalism considers sufficient to meet a given criteria for second-order capacity, yet find that the a priori used in those arguments are not held for a sufficient duration to assure that advocate that the person is truly acting in his best interests. What is pertinent, here, with regard to paternalism, is the degree of stability a person must show before we are justified in not acting paternalistically toward him.

In setting out his argument, Case takes an essentially Rawlsian view of justice as fairness. Under this, to the extent that we do not feel that paternalism is justified for adults, then, because the traits used to separate children from adults are not categorically true, but at most might be more pronounced in younger populations, we cannot justifiably support paternalism toward children. The arguments, as set out by John Stuart Mill, that legally inscribed paternalism toward adults is unjust, continue to withstand scrutiny. As Rolf Sartorius notes, arguments by G. Dworkin and J. Feinberg that Mill's arguments "establish only a presumption in any particular case," are correct, but miss the central point that "they are sufficient [...] to establish an absolute prohibition upon paternalism at the level of law and institutional practice." (Sartorius 1983: 99) In this context, the arguments against paternalizing those who are autonomous have essentially been addressed in the arguments regarding the justifiability of liberal democracy, and need not be repeated here.

Two questions regarding the justifiability of paternalism remain: one, with respect to autonomous people at levels other than that of law; the other with respect to legal paternalism toward non-autonomous people. As the question of the provision of voting rights is a legal matter, we do not need to be concerned with the justifiability of the types of paternalism indicated by the first question, except to the extent that these questions are joined by the problems of how it might be determined that a person is not autonomous, and therefore in need of protections that infringe his liberty, and who might legitimately make such a determination.

The concern as outlined in this thesis is that there are people who are unjustly being deprived of their right to vote. It is unjust because they are autonomous, but due to the difficulty of determining when a person reaches autonomy, it is thought to be better to deprive some people of the right to vote even though they are qualified to vote, than to include some people who are not qualified. It could be argued that this is done for reasons of expediency in the sense that we could determine who was competent to vote, but that this would require an unjustifiable amount of resources. However, for reasons already discussed it is not at all clear that we could develop the tools necessary to sufficiently, consistently determine when someone is competent. If it was possible to do so, the onus in a democracy would be on those people who were competent to make sure those tests were in place so that this fundamental injustice would no longer happen. If it is not possible, as seems to be the case, then it appears that some age limit must be drawn that will always result in two different things simultaneously happening. The extent to which one or the other will happen is contingent on where that limit is set. On the one hand, the higher that those with the power to set a limit do so, the fewer the number of people who might harm themselves who will be able to do so. Yet, the higher the limit, the greater the number of autonomous people who will suffer injustice through being deprived of a fundamental right. On the other hand, the lower the line is set, the greater the number of

people who will be in a position to harm themselves by participating in the creation of legislation that is against their interests which they are also not competent to assess. Further, some of the legislation over which they would then have influence would be that concerned with systems designed to educate them toward becoming autonomous individuals capable of achieving self-fulfillment, and with the capacity to be just and democratic. The dilemma that arises is that while principles of justice appear to indicate that the vote must be extended to everyone in order that no one who is capable of voting is excluded from doing so, this universal extension may actually result in those who are not capable of voting from ever becoming capable, if they chose to vote against receiving such education.

It is at this point that the constitution of a viable and justifiable form of democracy education becomes pertinent, for while there might be deleterious educational consequences in extending the vote universally, the injustice of excluding capable people from voting, if not sufficiently supported by reasons, will teach those who are not autonomous lessons that are antithetical to democracy. What is crucial, then, is to examine the reasons that exist both for and against universal suffrage, to determine, in balance, whether the deleterious effects of having a voting age outweigh the deleterious effects of not having a voting age with respect to meeting the interests of those non-autonomous members in our democracy.

To this point I have discussed some of the problems inherent in having a voting age. In short, to do so is always going to be unjust to some people. This is a reason in and of itself not to have a voting age, but there is also an educational consequence attendant to a voting age. To the extent that democracy rests on rational underpinnings, the lack of rationale applied to a central aspect of participation in contemporary democracies teaches the acceptability of an unreasonable, arbitrary approach to the organization of democratic institutions that undermines the very grounds upon which they are founded. To the extent that it is in the interests of people to be treated justly, and to grow up with the skills and motivation to live justly and democratically, then, in the absence of any other considerations, it is in their interests for there to be no voting age.

A discussion of the problems inherent in not having a voting age requires a somewhat different approach in that the analysis must shift from what is theoretically right with respect to those who are autonomous, to what is feasible given that the act of voting is, in effect, the result of a failure, by those involved, to reach consensus through the discursive process on which democracy is itself founded. One result of this shift is that, if we are agreed that we cannot test for autonomy but must, through the absence of a voting age, simply allow individuals to use their autonomy when they are ready, the number of people who are not autonomous will have a direct effect on the rationality of the vote. The difficulty this presents for this discussion is that arguments then become contingent on the age based demographics of the population in question, and assume the structure of a risk based analysis. For example, if only five percent of the population was below the age of 18, the risk of decisions being made irrationally as a result of voters who were too young to be autonomous would be small. Yet if 95 percent of the population was below this age, that risk would increase dramatically. Under this approach, it is conceivable that we might decide, given current Canadian demographics, that the risk to Canadian democracy of removing the voting age would be minimal, and that in balance

more harm would be done by having the restriction than doing away with it. However, the possibility would exist of the demographics changing in such a way that the risk inherent in having universal suffrage would be seen as too great, resulting in the reinstatement of a voting age.

The obvious problem with attempting to do such an analysis is that, given the nature of the activity involved, it is difficult to see how one could actually assess this risk. For one thing, the assessment would have to take into account how many people would be likely to be incapable of casting a rational vote, yet as we have seen, pinning down precisely what constitutes autonomy is problematic. One would then have to determine how to correlate a given aggregate level of irrationality in the population with the likelihood of the democratic nature of the polity, from which those non-autonomous members will eventually benefit, being endangered. At any rate, in any polity with a voting age, the power to make such determinations, whether bestowed on politicians, judges, academics, or the voting population as a whole, would be a non-democratic power since not all of the autonomous individuals affected would be involved in that bestowal. Conversely, in a polity without a voting age, if a decision was then made to bestow this power, with a restriction of the franchise resulting if it was found that the numbers indicated there to be a high risk of an irrational electorate, that decision itself would be called into question as a result of that finding of risk. In effect, any attempt to apply statistical analysis to risk factors relating to voting will be either non-democratic, or irrational.

Yet, I do not think that the question of risk needs to be addressed in this way. A crucial aspect of the risk inherent in removing the voting age is that these children have come from somewhere. They are not simply irrational beings, dropped into our polity from some decontextualized universe, who will act in random, and thus potentially self-harmful, ways without the guidance of the state. They are, instead, anchored to various communities through their presumably autonomous, generally enfranchised, primary caregivers. One of the communities to which they are connected by their caregivers is the state. The actual nature of that connection is as diverse as the voting population itself, and is no less a connection because of that diversity than the connection implicit in the possession of the franchise. The essential question is concerned with who can best represent those children.

The difficulty posed by children is that, just as they cannot consent to actions taken on their behalf by the state, they also cannot consent to other paternalistic actions, such as those undertaken by their caregivers. With respect to this, a paper by Ellen Fox in which she discusses the role of consent in paternalistic actions between friends is helpful. In this paper, she contends that it is not consent "of any variety" that justifies intervention between friends. Instead, "Intimate friendship involves a partial meshing of identities [which...] manifests itself in part by the liberties that one friend takes in guiding the life of the other." (Fox 1993: 575)

In making her argument, Fox presents a scenario in which one friend, Elizabeth, did "lie to Cathy, violate her property rights, and provide her with drugs without really obtaining her informed consent." (1993: 178) Yet, given the story Fox relates, in which Cathy stood to lose a job that was important to her in an attempt to salvage a doomed relationship, and in which the reader is led to believe that Elizabeth knows and cares

about her friend, it seems reasonable to expect Cathy, following her crisis, to consider the actions of her friend to have been justified. Fox points out that this expectation does not result from the epistemologically privileged position of her friend. In doing this she postulates a reclusive stranger in a neighbouring apartment who, through the thin wall separating the apartments, learns as much about Cathy's circumstances as Elizabeth herself knows. Yet the reader, Fox assumes, would expect Cathy to find the interference by Elizabeth to be justified, but not the interference by the equally well-informed stranger.

In constructing her argument that paternalism between friends does not require consent, she examines how friendships develop, using examples to show that definitions of consent do not fit with those nebulous relationships - for which "there are no legal norms and very few social ones" (1993: 586) - that are generally understood to be friendships. She concludes:

I have argued that the justification for paternalistic interference does not rest entirely on respect for the autonomy of the individual nor on utilitarian considerations of the individual's welfare. Instead, certain kinds of interference are justified by the bonds of friendship and intimacy which connect particular people. Focusing on autonomy can blind one to the fact that, in some cases, vitiated autonomy is insufficient to justify paternalistic intervention; and that in other cases, autonomy need not be vitiated for the justification to hold. The value of intimacy must also play a role in moral deliberation; and if we are honest, we will admit that there is no easy formula for determining the relative weights of autonomy and intimacy. (1993: 594)

I believe that while this analysis is correct as far as it goes, it neglects to account for a crucial factor. It seems to me that while it is true that in some friendships a level of intimacy is developed in which one feels justified in acting on behalf of the other, that such intimacy also requires a level of trust, on the part of the person taking the paternal action, that his understanding of the level of that intimacy is essentially correct. It could be argued that a person in such a relationship is not aware that trust is involved in his belief that she is acting in the best interests of his friend. In fact, Lagerspetz (1998) has argued that once a person raises the question of whether or not she trusts a particular person, the relationship involves a rational calculation that cannot be described by using the term 'trust'. When a person decides in this rational calculation in favour of a person, this does not indicate trust but rather a willingness to take a chance. In this sense, trust is actually a term used by, or with, third parties to describe a relationship. It is, at any rate, from this third person perspective that a consideration of the role of trust in a friendship in which there is paternalism must be undertaken.

In order to understand how trust is involved in a paternalistic relationship between friends, it is necessary to consider that friendship in relation to the state. Fox notes that writers on the role of the public sphere have concluded that few governmental or legal infringements of our right of autonomy are justified (1993: 577), but does not explore the role of government beyond this acknowledgement of the limits of the actions that it can justifiably take. As explicated in chapter 1, the basis of democratic interaction can be

found in the rights mutually accorded by participants in a discourse. In complex modern societies in which intersubjective discourse between all those affected by a particular action is no longer possible, these rights become entrenched in law. These rights also form the basis for legal protections against those whom one encounters on an interpersonal level. One might object that, in the case of an interpersonal encounter, it ought to be possible to resolve any dispute through discourse, and that the reason, in some cases, why it cannot be thus resolved is because one of the parties is irrational and in need of a curtailment of his liberties for his own protection. This objection makes an assumption, however, that may not be correct. It assumes that the person being subjected to paternalistic treatment is irrational. This assumption may be true, so that later, when the person gains, or regains, his reason, he will consider the coercion to be justified. However, if the assumption is false, and the person is, in fact, expressing his true desires, then the paternalist, in refusing to accept his reasons as valid, is acting in an unjustified manner.

To return to Fox's example, it is possible that Elizabeth did not know Cathy as well as she thought. Although Cathy's job was important to her, and although the relationship appeared to be doomed anyway, there may have been other factors in play of which Elizabeth was unaware. It is possible that Cathy was both more deeply in love, and valued her autonomy more highly, than Elizabeth realized. Let us modify the scenario slightly so that after Elizabeth has hidden in the trunk of her own car the purse containing Cathy's credit cards and car keys, Cathy does not eventually accept a valium and go to sleep. Instead, Cathy realizes that although the loss of the job would be upsetting to her, the loss of her lover would be devastating. She also feels, in light of the betrayal of her rights by Elizabeth, that she is no longer in danger of losing a *friend* by taking action against this person who is depriving her of her liberty. Realizing that Elizabeth is irrational and will not acknowledge her arguments regarding what she values, and afraid that Elizabeth will attempt to physically restrain her if she threatens to summon help, Cathy takes a portable phone into the bathroom and calls the police. At no point in the future does Cathy think that she acted unjustly.

Regardless of any feelings the reader may have regarding the justness of either of the protagonists' actions, the point is that Elizabeth is displaying trust in her, perhaps largely unconscious, assessment of Cathy's needs. In a situation existing outside the rule of law, she is trusting that Cathy will not react violently. Within the rule of law, she is trusting that criminal or civil actions will not be taken against her. In other words, we are free to be paternalistic, but only on an interpersonal level. In doing so, we are trusting that the person whose liberty we are infringing will not seek recourse through the law, for when action is taken at the level of law, the participants become engaged in an interaction that is mediated by the same mechanism that mediates the interactions between government and citizen. In adjudicating disputes, the law must turn to the discourse based principles from which it has emerged. These principles remain the same regardless whether the dispute being adjudicated involves the government, or private citizens. What may differ is the interpretation of these principles in light of the presumption of rationality held by the court with respect to the parties before it.

This presumption of rationality is different for adults than for children, but as we have seen, there is no clear line dividing these two groups. Currently, children are subject

to paternalism by both their caregivers and the government, yet while the caregivers are in a position, presumably, to assess the needs and interests of the individual child, the government has no way of doing this. The best the government can do in this respect is to generalize on available information, and pass statutes that will always be arbitrary with respect to the individual. In neither case is consent present on the part of the children, although, with respect to those who are the primary caregivers of a child, it is not, to the extent that the analysis by Fox is applicable to children, necessary. The obvious question here is, to what extent is the above analysis regarding consent and the role of trust between friends applicable to children?

The observation made by Fox that friendships develop in ways that preclude the active, and even the tacit, consent of those who become friends, can be applied only in a qualified sense to the relationship between children and their primary caregivers. Fox argues that, although consent is not a factor, friendships are nonetheless largely voluntary, although it is difficult to be more specific about what friendship is since "there are no legal norms and very few social ones structuring what friendship is." (1993: 586) Such notions as the cognitive equality of those who become friends are not entertained by Fox, who instead talks of a "partial meshing of identities" and "union." (1993: 575) The extent to which the primary caregivers of a child accept that role voluntarily is problematic. Although initially the relationship between child and parent may not always appear to be voluntary since many pregnancies are unexpected, the option exists to give unwanted children up for adoption. Yet, in many cases it may be more accurate to talk of people *consenting* to the raising of their children⁵⁰ in the face of social expectations that they do so. In such cases the "union" to which Fox refers may not develop. The children, on the other hand, neither consent to the relationship, nor enter it voluntarily. Born into this world as subjects of the vicissitudes of fate⁵¹, they must take whatever approximation of a "meshing of identities" is afforded to them.

In other words, in the case of children we have two distinct possibilities. On the one hand the relationship may very much involve the intimate bond that exists between friends when one of those friends is temporarily deprived of his reason. As with an incapacitated friend, the expectation is that at some point, perhaps a little later than sooner in the case of a child, the person will at some point emerge from his incapacitation. On the other hand, caregiver and child may more closely resemble cell mates in a social prison. In the same way that the bonds of friendship are difficult to define, so are the distinctions which result in a child being born only to be mistreated or killed by his caregivers. In reality, the relationship between child and caregiver, constituted through an almost infinite variety of personal and social forces, must generally fall between these polarities. It is from the difficulties posed by the ground between these polarities that the debate on the limits of the public and private spheres emerges.

We can now see more clearly one interpretation of where the interest of the state in the protection of a child emerges. Essentially, because the child, unlike the adult, cannot voluntarily enter into a relationship in which paternalism without consent can be

⁵⁰ Or their childrens' or friends' children in those cases where a parent is unwilling or unable to care for his child.

⁵¹ However it is that the individual understands the constitution of fate.

justified, the potential for abuse in that relationship is increased. The response of the state is to provide its own paternalistic protections of the child. Yet, under this interpretation, this is not a coherent response. It may be a coherent response if the object of paternalistic law is to provide parents with statutory power to enforce their interventions in the liberty of their children, but if this is the case it is suspect as to whether it is the interests of the children that are being protected, or instead interests that are more properly those of the primary caregivers and of the state. The interests of the state are the subject of the following chapter. Here, we are interested in the extent to which the state is justified in protecting, without consent, what are perceived to be the interests of the young. As mentioned, the difficulty that the state faces, that primary caregivers do not, is that it does not know the individuals, and so cannot attain the type of "union" required to justify non-consensual paternalism of the sort discussed by Fox. It is, in effect, impossible to see how, by providing its own paternal protections, it is alleviating rather than compounding the injustice perpetrated by caregivers who are not acting in the best interests of their children.

As with the story related by Fox, in which it appears much more likely that Cathy will consider the intervention to be justified, so too it seems likely that most children will consider most actions taken by their caregivers to be in their interests. In instances where this is not the case, there does not appear to be any good reason why the role of the state should not afford the same liberal protections to people of all ages. There also appears to be no reason why levels of care cannot be stipulated for caregivers, just as there are protections of various types in place for workers in various fields, for example, and why these should infringe on basic autonomy rights. Cases in which an adult is deprived by the law for his own good are decided on an individual basis, and there is no reason why such process cannot be extended to all people on the grounds that generally people, or their caregivers, do know what is in their interests, and can meet them more adequately than the blunt instrument of a statute.

Having said all of this, it is important to reiterate that the argument being made here is that there ought to be universal suffrage. In order to make this argument it has been necessary to examine the justification for paternalistic laws. However, I am not arguing, here, for the abolition of these laws. I am simply arguing that those who are affected by them have a right to consent to them. There are many people under the age of eighteen who, even if they had the franchise, would not, technically, be consenting to those laws even though they cast a ballot in favour of representatives who supported those laws. Rather, they would be voting in favour of laws to which their caretakers consented in the interests of themselves and their children.⁵² This contention is, of course, open to the charge that children taken to vote by their caregivers, and instructed to vote in a particular way, might disobey their guardians and vote in some other way entirely. This could happen if a child was ready to vote, and had a different opinion than his guardian, yet found the atmosphere at home not to be conducive to discussion. It could also happen if a child was not ready to vote either his conscience, or that of his guardian, but was simply incapable of casting a meaningful ballot. If this was the case, it would indicate a lack of awareness on the part of the guardian regarding the capacity of the child.

⁵² In light of the above argument, those interests are, to the extent that they are truly paternalistic, inseparable. To the extent that they are not paternalistic, they are the subject of chapter 6.

This result would be unfortunate, but it is still preferable to the option. That the caregiver of a child, the person who is in most intimate contact with that child, the person who is not only in an epistemologically privileged position, but who also has the greatest stake in the well-being of that child, cannot adequately assess the capacity of his child, does not mean that the state would be in a better position to do so. This is certainly true when the voting restriction is based on an age limit. While it might not always be true if the state, instead, created a mechanism for assessing children, I believe the onus would still be very much on the part of the state to not only provide such an assessment, but to prove beyond a reasonable doubt, for each child, that it was in a better position to make the assessment.

One final concern is that without state mandated education, children will not progress toward becoming capable of casting a ballot that is in their own interests. This could be an example of state paternalism which is justified in the sense that unless children learn the skills necessary to exercise autonomy, they will not become capable of participating in democratic discourse, or of voting. Unlike the other examples of paternalism in which the constitution of the future interests of the child is something that is best determined by the caregivers of the child, it can be argued that in the case of education, it is the education itself that provides the skills that allow one to participate in, and to maintain, a society that allows all other versions of the good life to coexist. In other words, this is one area in which the state can presumably know as well as anyone else what is in the best interests of the child.

The argument can then be raised for interpreting education broadly, so that anything that might impede a child from gaining autonomy will legitimately come under the right of the state to ensure the education of its citizens. Construed in this way, the interests of the individual and the interests of the state are one and the same, in which case, although paternalistic measures toward children by the state may not be justified with respect to any substantial version of the good life, it is possible that such measures might be justified at that point at which justice and the good life simultaneously emerge from the preconditions of discourse. In this way, the interests of the state, the role of the state in the education of its citizens, and the fundamental rights of those citizens, become inseparable from questions regarding the educational implications of a voting age. In this sense, although the following chapter will be explicitly considering the implications of the removal of the voting age for the interests of the state, it will also implicitly be furthering the analysis of these implications for the interests of children.

CHAPTER 6 - THE VOTING AGE AND THE PUBLIC GOOD

The discussion in chapter 5 indicates that paternalistic concerns are not sufficient to justify an age based voting restriction. Further, from the perspective of the public interest, it appears that the primary, and possibly the only defensible, reason for a voting age restriction is to help ensure that those voting have a sufficient level of education for participation in a democracy such that the democracy itself does not become endangered. We will turn to this concern after a consideration of the extent to which other reasons for this restriction can be justified in the public interest.

In chapter 3 I noted a number of possible concerns that those with the vote might have with respect to a reduction or elimination of the voting age. These were: 1) that people with more children would have a greater influence on national and provincial politics as a result; 2) that people might begin to have more children in order to have a greater political influence; 3) that the sanctity of the vote might be undermined by extending it to minors; 4) that minors might vote against their parents; 5) that minors might vote for candidates who represent a threat to the social order, and in great enough numbers to bring such people to power; 6) that a reduced or abolished voting age might have an undesirable impact on existing laws; or 7) that the combination of some or all of these concerns together provide sufficient reason for worry. With the exception of the fourth reason, all of these were broached in either the debates between 1954 and 1970, or the debate in 1990. The fourth is mentioned here because, unlike in the debates, in which it was assumed that those to whom an extension of the vote was being considered were potentially adults, the assumption here is that some of those to whom the vote should be extended are clearly not adults in any recognized sense of the word. The concern might be harboured either by citizens who felt that parents were capable of acting democratically, but that the children of those parents might not be, or by parents who felt that their child might vote in ways contrary to their wishes, whether those wishes were in the service of democracy or not. Through reference to the understanding of democracy that has been developed thus far, I will address these concerns in order.

1) The first, that people with more children would have a greater influence on national and provincial politics (expressed by Malone, for example; see Hansard December 1990: 16794) has some weight in that some of the children in a given family will not be autonomous. However, most will eventually become autonomous, and decisions made now will affect them later. The greater influence possessed by a family with a larger number of children would only be a problem if one supposes that the people in those families would be predisposed to see their interests and the interests of their children as being antithetical to democracy, and that they will educate their children accordingly. It seems to me that the onus would be on those who believe large families are so disposed to prove this, rather than deprive people of a basic right on the basis of an unfounded supposition.

2) There are several ways of looking at the concern that people might begin to have more children in order to have a greater political influence. On the one hand, we could

say that this is done already in the sense that people who have many children gain additional voting power when their progeny reach voting age. This point ignores the distinction that we have been making between autonomous and non-autonomous voters. The concern under this distinction is that those who are not yet autonomous because of their young age could be instructed on how to vote. However, although this is true, this scenario raises questions regarding the reasons parents have children. It strikes me as possible that someone would have a child in order to gain additional political power, but this seems unlikely as there are many easier, and far more efficacious, ways of gaining political power than bearing and raising a child. Admittedly, the range of human behaviour is wide, and I would not want to rule out the possibility, but because, with regard to those who actually care enough about political outcomes in any given situation, those who would find it preferable and simpler to gain half a dozen votes through the acquisition of children, over convincing a half dozen uncommitted voters through argument, must be very few in number, it does not strike me as a great concern. On balance, it seems to me the concern should be with those children who will grow into a future which has been shaped by decisions made without benefit of the weight of their votes, rather than with the potential for abuse by an extremely select group of parents.

3) The concern that an extension of suffrage might undermine the sanctity of the vote found expression in the objections of some MPs in the debates preceding the Elections Act revisions of 1970. More specifically, those Members were troubled by the idea of changing a provision that had such historically longevity. That the provision was rooted in practices which are, in virtually all important respects, completely alien to contemporary Canadian society, was either not realized or ignored by these Members. I mention it here as a concern because the idea that there is something of worth in and of itself in such a restriction, so that people will value that which is being restricted all the more when they do finally gain access, is almost certainly held by some of the people whom those MPs represented. The notion that the vote should be earned, even if just by waiting a while, as one Member stated the matter (Hansard, 1962: 1497), holds some weight if one believes that without having had to cross any barriers, people would not value their franchise.

This position, though, makes no sense of the arbitrary nature of the age. The need for an arbitrary distinction at some age was raised by a number of Members, most recently by Malone in 1990, who stated that despite its arbitrariness the distinction none the less has to be made, and that precedents for doing so exist in law. Yet this contention is insupportable. While the Supreme Court has ruled that arbitrary distinctions are properly left to the legislature, the age at which one may rightly vote is not arbitrary. It is, I have been contending, determined by an individual on the basis of that individual's personal criteria. Unlike such laws as those which set the ages at which one may drink and smoke, the laws pertaining to voting affect the ability of an individual to have influence over all of the other laws which affect him. The selection of an arbitrary age at which people are to be excluded from discussions, by a group that claims to be democratic while already excluding from its discussions those who are being discussed, is neither democratic, nor just. It strikes me that the irrational and undemocratic nature of such an age demarcation would do more harm to the educating of people to participate

meaningfully in a rational democracy than any good that could come from attempting to give the vote value in this way. Further, the lives of individual people are affected by the decisions made by those who are chosen to represent them, and this is true regardless of the age of a person. It seems to me that children would see the value in being able to influence the forces that shape their lives as much as any adult. This assumption is perhaps properly the subject of empirical study. However, it is generally easier to teach people values when they are younger, with the greater the overall coherence of those early taught values increasing the likelihood that those people will retain them as they become progressively more able to critically access those values.

4, 5, 6) Although I have listed the fourth, fifth and sixth concerns separately, I believe they are essentially similar in the sense that they pertain to the degree to which young people might vote in ways contrary to the interests of democracy. With respect to the fourth concern, I referred above to the possibility of parents being concerned that their children might vote in ways contrary to their wishes. This, of course, only concerns us to the extent that their wishes are supportive of democracy, with their children appearing to be in danger of voting in ways that are harmful to democracy. If the parents are concerned that their children will vote in ways that might simply be detrimental to themselves, their stance is despotic, while concerns with the well-being of their children were dealt with in the previous chapter. For this reason the fourth concern can be conflated with the fifth and sixth, which pertain to the potential for the election of anti-democratic representatives, or for candidates inept enough to allow to be passed into law legislation which is anti-democratic.

Given the structure of government, and the current demographic makeup of Canada, these possibilities may appear to be unlikely. However, the current demographic situation cannot be taken for granted. Malone's rhetorical question in the House of Commons, asking, "Is there not also to be viewed a notion that democracy itself is to be so cherished and so privileged that there may well be a benefit from the waiting period and that we come to a level of maturity, understanding, experience, and economic relationships before we are able to exercise our right to vote and to influence our country?" (Hansard 1990: 16795), must be taken seriously. If the extension of the vote does more than provide the young with a learning opportunity and a personal sense of efficacy, and instead also endows them with sufficient political weight to undermine the consensual rights inherent in democracy⁵³, then just cause may exist for setting an arbitrary voting age. If the possibility exists that, by having the vote, youth might vote in ways that will impair the democratic nature of society, and impair the opportunity for them to learn what is necessary to not be unjust and antidemocratic, then any possible educational benefits inherent in having the vote and of being treated democratically are moot.

It is necessary, however, to be clear that it is only this fundamental threat to a democratic state with which we are here concerned. A number of concerns that fall into the categories under discussion here were raised in the House, but as serious objections to

⁵³ I suspect the intent of Malone's reference to "cherished" and "privileged" was more elitist than the democratic privilege of living as free and equal consociates under the law would entail. However, for our purposes, we will assume the latter.

an extension of the voting age, they are as problematic as those arguments raised in favour of an extension. Some members, for example, were concerned that if the voting age was lowered, other ages, such as the drinking age, would follow. Yet, this leaves unexamined why those members were concerned that this would happen.⁵⁴

Democratically, if youth felt strongly enough, in conjunction with the rest of the population, to change these laws through the vote, then the law should, by rights, be changed. It might only be justifiable if the free and equal nature of the polity itself were at stake.

Malone (Hansard 1990: 16795) argued that the purpose of parliament is to control expenditure, which is an activity that the young should not be involved in as they do not know enough, and it is not their money about which they would be making decisions. As I have argued in the previous chapter, though, it is in part their money since they will inherit the results of financial decisions made in the present.⁵⁵ While they may not know as much as those who care for them about the impact various financial decisions will have on their lives, they can certainly listen to those they trust when casting their ballots. Furthermore, participation in such matters might provide effective experiential lessons in finance that would serve them throughout their lives. However, these objections take for granted that the central concern of a democracy is economic. Yet the theorists discussed in chapter 1 were not able to reach nearly so specific a conclusion. The best they could do was argue that the purpose of democracy was to enable democracy, the specific content of which could only be intersubjectively determined by the members of the polity. The nearest they came to stipulating content was to assert that procedures were required to enable discourse between all of those potentially affected by decisions and laws.

Other stated concerns regarding youth voting, such as, that they lack the requisite political maturity, that certain (unspecified) criteria need to be met, that they are not mature enough to vote consistent with public opinion, that they cannot see the future consequences of their actions, and that they will be subject to partisan electioneering, can essentially be interpreted as various ways of saying that the young are not sufficiently educated to participate in a democracy democratically, pose a threat to democracy, and should be barred from participating until they are so educated. This concern, and the solution presented to it in the form of a voting age, requires consideration.

In chapter 2 it was argued that education that has as its intent the creation of democratically minded citizens must have as its focus the development of autonomous people who have an understanding and sense of justice. The task before us now is to consider the extent to which the existence of a voting age contributes to education of this form, and to assess, where it does not contribute in this way, the degree to which the undemocratic message is outweighed by these concerns.

Generally speaking, we teach people either by providing them with experiences of things, or by telling them how to do things. These two approaches tend to go hand in hand during early childhood. Then, as children build a vocabulary and sense of meaning, the

⁵⁴ As noted in chapter 3, in Ontario the drinking age actually rose, ten years after the voting age had been lowered.

⁵⁵ All of this is aside from the fact that people legally work in some industries at ages as low as fourteen, and pay tax on what they earn.

quality of the experiences to which they are introduced changes to allow demonstrations of more abstract concepts. The quality of experience in schools, as children progress through the curriculum, becomes increasingly abstracted or imaginary, with the tangible experience becoming increasingly focused on the acts of reading, writing, listening, talking, and watching. Other forms of action are an integral part of most provincial curriculums, but these comprise a decreasing part of the experience for children as they advance through those curriculums.

Which lessons children learn from the existence of a voting age as they move toward maturity will vary from person to person. Those lessons that people most commonly learn is a subject for empirical study beyond the scope of this thesis. However, we have already discussed what it is that a democratic society requires its citizens to learn, and from this can hypothesize what a voting age might in fact be teaching.

Those rearing children, and those entrusted with educating them, no doubt generally attempt to instill a sense of fairness, and teach reasons for treating people fairly, for example by asking children such questions as, "How would you like someone to do that to you?" The requirements of formal participation in the political process is likely not high on the list of the elements of justice that need to be taught to young children. Whatever children are taught about the vote at a very young age would appear likely to be of little consequence to them. The abstract nature of a process involving enumeration, voting booths, and the election of a political candidate, coupled with the even more abstract nature of the work that that candidate would do on behalf of those children, renders the idea of instructing young children about such a process laughable.

This, though, is only true if one thinks in terms of instructing children about a process into which they will have no input for a dozen or so years.⁵⁶ If, instead, we imagine that there is no voting age, a different picture emerges. Even young children, when they are part of a group and are confronted with two options between which they must choose, generally understand the idea of doing the activity in which most of them are interested. This type of behaviour can be learned because it has immediate relevance in the environment of the child. A decision of import to the child is made with the help of that child within a context organized and protected by an adult who cares for that child. The degree of importance of such a decision in the overall context of the life of that child would necessarily be small. No one who cared for a young child would let him make a choice that would have real bearing on his life without considerable guidance. Decisions of consequence are likely almost always made by the adult without the knowledge of the child or, for example when the child is to be given an injection, generally with the acquiescence of the child. If there was no voting age, not all parents, perhaps very few, would take their young children to vote in elections. Even for those who did not, there would be some, albeit more subtle, implications regarding the education of their children that would not exist if there was a voting age. We will address these in a moment. For those who would take their children to vote, the implications are overt.

⁵⁶ I cannot strictly define what I mean by "young children," since abilities at any given age vary from person to person, and the subject under discussion requires skill sets so much broader than, for example, those required in the Piagetian conservation of water, that great specificity in age references would not be particularly useful. Very roughly, I have in mind children of around the age of six - about the time most Canadian children begin grade one.

On the most cynical level parents might take their children to vote for a candidate who promised to reduce taxes by removing funding from schools, universities, and job creation programs. From the point of view of these self-interested and cynical parents, as long as the schools would not be reducing the amount of time spent on daily supervision of their child, then a reduction in the actual effectiveness of the education their children received would not matter since, by the time those children actually needed their education in an economic sense, the parents would no longer be legally responsible for them. In the meantime, they would have the advantage of additional voting power with a very small investment of time and energy since all they would have to do would be to teach those children the relatively simple task of recognising a given name on a ballot and marking an "X". This description, of course, requires that these parents display a total disinterest both in the welfare of their own children, and in the greater public good, while cynically taking rights that the society has offered them and turning those rights against that public. In combination with this, they have undertaken the myriad responsibilities of child rearing, including educating them at least to the minimal standard necessary to cast a ballot, and taken enough interest in politics to go to the polling station with their family and participate in a very abstract process. All of this is possible, but it seems to me unlikely that such people would comprise a large portion of the population. Furthermore, the socially dangerous lessons that the children of such parents might learn would far more likely result from the social and personal antipathy present in the general orientation of the parents to other people than in the extension by society of a right such as voting to the children. Even given the negative moral dispositions that one might expect the parents to instill in their offspring the moral potential of voting rights remains knife edged. While those children might learn to regard the vote as just one more tool available for the maximization of their personal advantage, they may equally over the course of their lives have a greater chance of grasping the reciprocal nature of their legal community as a result of a system of rights that from birth conferred upon them the rights of personhood which that society in turn expected from them. In short, it seems likely that the absence of a voting age would be neutral in terms of what it could teach children in a worst case scenario.

Most parents who were committed enough to the political system to bother voting themselves and to teach their children to vote, would more plausibly educate them, to varying degrees, in the reasons they have for voting as they do and encouraging their children to vote as they do. The distribution of parents who operate from a basis of a self-interest so narrow that even their children do not fall within its purview, through to those who consider all of their actions from a Rawlsian original position, is an empirical question that cannot be, and I believe does not need to be, answered here. If there is anything to my argument that in a worst case scenario the absence of a voting age would be educationally neutral, it stands to reason that discussions with children of the reasons why they should vote in a particular way would at least work toward improving their cognitive reasoning abilities. Implicit in any reasons, though, are moral and ethical presuppositions that provide an affective education quite apart from those which hone the reasoning skills of a person. Of potential concern to those of us who form the state is the degree to which those presuppositions teach a person to be reasonable.

The jury is still out on what exactly it is that holds an electorate together in such a way that the system self-perpetuates, although the view that it is simply a mechanism by which people are able to advance their own interests does not strike me as realistic. Callan begins Creating Citizens by broaching the possibility of a state in which,

although citizens respect each other's legal rights, they shun contact with those who are different so far as possible because they despise them. When transactions across cultural divisions are unavoidable, everyone tries to extract as much benefit from the other (or cause as much harm as possible) within the limits imposed by law (Callan 1997: 2),

and from this vision argues for his conception of democracy education. Callan does not believe this is where we have come from, or where we are currently, but his book is predicated on the possibility that a sustained emphasis on individual legal rights that is divorced from the ideals of freedom and equality from which those legal rights developed will lead us to interact in the manner set out above. The continuation of a political structure capable of sustaining legal rights in such a society would be in serious doubt. Historically, though, at least in Canada, democratic rights have steadily expanded from the days of colonial rule by the British monarchy, while simultaneously becoming more entrenched, as exemplified by the patriation of the Charter in 1982. I expect that the extent to which this expansion rests on either, to use Rawls' terms, an altruistic impartiality, or the idea of mutual advantage (1993: 16-17), must depend on the individual.

The question of whether or not people do act altruistically, or simply act in altruistic ways only when to do so is of benefit to them, has been a matter of debate. In the context of my present argument I do not believe that an extensive defense of the notion that many people have the capacity for varying degrees of altruism is warranted, and will confine myself to indicating a few sources of evidence that altruism not only exists, but is not as endangered a quality as pessimists might believe. Morton Hunt (1990), for instance, lists numerous examples of altruistic behaviour which cover some of the many ways in which people volunteer their time, donate goods, provide charitable contributions, and help others at tremendous risk to their personal well being. Oliner and Oliner (1988) provide an in-depth look at this latter form of altruism through an analysis of the motivations of those individuals "who helped out of humanitarian considerations alone - without material rewards of any kind" - to rescue Jews in Nazi Germany. Sober and Wilson (1998) have examined altruism from biological, psychological and philosophical perspectives, and concluded that, "The case against evolutionary altruism has already crumbled when judged by normal scientific criteria," and that "the case against psychological altruism was never strong; it relied on an intellectual pecking order in which proponents of altruism had to *prove* their case, while proponents of egoism merely had to *imagine* conceivable explanations." (1998: 330) Wonderly (1996) presents a thesis that supports the conclusions drawn by Sober and Wilson.

Obviously these references only touch in the most cursory way on the dimensions of altruistic behaviour, but for our purposes all that is required in terms of altruistic behaviour is that the members of the polity are prepared to reciprocate to all other

members the same rights to which they have been entitled. The motives they have for doing so are certainly important if we are to avoid the scenario described by Callan, but on this point two things can be said. First, evidence indicates that most people act altruistically in varying degrees dependent on their relationship to the person being helped and the degree of cost to the person performing the act. (Hunt 1990: 36-40) Second, and more importantly, there is no good reason why an extension of the right to vote, to those of all ages, would teach values to either the newly enfranchised, or their guardians, that were contrary to a reciprocal understanding of rights. Regardless of the extent to which a person was truly acting altruistically, the impartial, non-arbitrary, extension of voting rights would teach to both groups, through demonstration, what is meant by an impartial, non-arbitrary extension of rights better than an arbitrarily exclusionary system. Such a conclusion does not mitigate Callan's concerns regarding the need for citizenship education, but it is likewise not undermined by his conclusions.

In those cases in which parents involved their children in voting, the process of initiating those children into the ethical way of life of those parents would become inextricably tied also to notions of universal morality. This universality is not, of course, to be found in the act of voting itself, but in the general agreement of those affected by the outcome of an election to be bound by the results of that vote. By contrast, when there is a voting age in place, children are still likely to be initiated into the ethical beliefs of the local community, yet they are provided with no direct ties to the larger community that embodies those universalistic rights which are enforceable by law.

The extent to which children might be able to understand the issues on which they voted would depend on their parents. It certainly would not be difficult to frame the question of who one should vote for in terms of concepts simple and concrete enough for a child to understand. It could, for example, be explained to the child that if she voted for a certain person then, "we will have more money and be able to buy you" such and such, or that "grandma will be looked after better by the doctors." The level of self-interest contained in such directions would of course vary between families.

Another way of looking at the situation is to consider the concern of those who note that while families currently vote from varying positions of self-interest, they only represent two votes regardless of the number of children they have. While allowing the children of large nuclear families to vote would not present a problem for society if the parents were committed to the general public good, if a strong empirical link could be made between large families and self-interest, then as a polity, given a sufficient number of large families, we might have cause for concern. By self-interest, of course, I do not refer to a stance that still respects the core societal values that permit one to operate from this standpoint, which would still permit children to be raised as good citizens in essential ways, but instead to a self-interest that does not encompass even the essential elements of reciprocity. However, even if this was the case, it strikes me that the argument for allowing the children of such families to vote is still stronger than that for a voting age.

Consider that some people currently have large families, and that some of those families are quite possibly self-interested in the sense indicated above. Given the existence of a voting age, the children in those families are still acculturated into that self-interested belief system. They will also eventually reach an age at which they will be able to vote. In contrast to the scenario outlined above, though, these grown children will not

have matured with any mitigating influence aside from that of the schools to which they were sent. If they attended school in the public system they would have had exposure to the greater society, and would therein have been exposed to the notion, both through the curriculum, and through the very fact that everyone legally has a right to an education, that people ought to be treated as equals. However, the notion of freedom, which is so central to our rights to believe what we want, to express those beliefs, and to gather with like minded people, is not experientially supported by public schooling. The notion may be supported by the curriculum, and as students progress through school they have more freedom to choose that curriculum, but the context within which these nods to freedom occur tends to be highly restrictive. Attendance, for example, is compulsory until the age of sixteen, a fact which has very broad implications for the movement of students and the choices they are allowed to make in schools. The justifiability of compulsory attendance is not at issue here, neither with respect to the necessity of it in a country that has a voting age, nor in one that does not. What is being contended is that schools in important ways do not teach the notion of freedom which is inherent in the autonomous reciprocal granting of the right to freely participate in the creation of the laws governing the society in which those participants are citizens. This freedom has at its core the idea that all citizens are equally deserving of this right, yet public schooling only teaches its students that they are equally deserving of a prescribed education, not that they are equally free to choose the nature of their education. As stated, I am not arguing here that this is unjust, but simply that people in some families may well grow to the age of eighteen without ever truly experiencing the type of freedom inherent in autonomous reciprocation. The impartiality inherent in equality would also not have been taught since any given voting age is going to be arbitrary in terms of its justifiability with respect to any given individual. In this light, I find it difficult to see how the existence of a voting age serves the public interest even if it could be empirically proven that large families tend to be self-interested in ways that threaten the liberal democratic values of Canadian society.

If altruism and self-interest can be thought of as occupying opposite poles on a continuum, then those who would be educating children for citizenship in a state that did not have a voting age would have at one end altruistic parents, with the state at the other end potentially providing a focused education through schools, and at the least providing an attenuated education in the form of the provision of an experience that matched the values it claimed for itself.

I'll briefly turn now to the implications for the democratic education of children in families in which the parents did not involve their children politically. Here, the ramifications would depend on the reasons held by the parents for this lack of involvement. They may be doing so out of a personal lack of political interest. They may be trying to instill ethical servility in their offspring and feel that the opportunity to shape the preferences of their children in this manner is outweighed by the possibility that the process of casting a ballot is too obviously structured toward the exercise of individual will for them to take the chance of exposing their children in this way. They may feel that the act of voting would place too great a burden on their young. Tracing the differing implications of these and other possibilities in detail is beyond the scope of a thesis focused on the educational implications of having a voting age. However, some general

comments can be made that apply to all cases, whether the parents involve their children or not.

Regardless of the position of the parents, legally children in this scenario would be able to vote when they were ready. The values inherent in the equal freedom to participate in society would thus always be present, simply awaiting the readiness of the child to exercise them. It must be remembered that the removal of the voting age would constitute a change to the legal code of sufficient magnitude that tremendous public discussion would have preceded, accompanied and followed the act, whether this alteration occurred as the result of a court challenge, or through the agency of parliament. In either case, such a wealth of justification would have been articulated in the public sphere that, at the very least, some of our current commonsense notions would be open to question in the popular discourse, and our understanding of other notions deepened. More specifically, I do not see how such a change could occur without a deeper examination by the general population of what we mean by democracy. In so doing, the current commonly held view that people under the age of eighteen are not full persons legally, and that their opinions are not generally worthy of serious consideration until they reach that age, would require reassessment. Such an outcome has implications both for the education of adults who passed through their first eighteen years under the auspices of a benevolent autocratic paternalism, and for those who are beneath that age. This latter category encompasses those who are truly dependent on others for all things, to those who, while potentially still developing, are more mature than some others will ever be, either cognitively or affectively. The positive effects of such a dialogue can perhaps best be understood by looking at the current situation in which we have a voting age, and at another continuum that is of interest to us: that which reaches from non-differentiation through to autonomy, along which human beings move from the time of conception until the end of the maturation process.

What people learn from the existence of a voting age changes as they progress along this continuum. Initially, as discussed above, the lessons the state is teaching are rendered passively, through omission. People are not initially aware in one way or another of either the averred or actual position of the state on the right to self-determine through participation in society. What exists at this stage is not so much lessons that are anti-democratic, but the loss of an opportunity to lay the cognitive and affective foundations of democratic understanding at an early stage of human development. However, as people develop an increasing level of autonomy, it becomes increasingly likely that the existence of a voting age will provide to those growing up under that law a lesson in the values held by that society.

Considered carefully, this lesson is not, in fact, a particularly coherent one, which in itself says something about the values of the society. I will not argue here that the lesson is one that is consciously perceived by those under the age of eighteen. While as these people increase in age they may begin to take an increasingly objective and self-aware stance in relation to what they are taught and toward their social and political position in society, the extent to which this position will encompass a critique of the voting age is, until rigorous empirical research has been conducted specifically on this topic, a matter of conjecture.

For many youth the existence of a voting age for which there is no rigorous defense will simply help to perpetuate in them the unconsidered positions on the issue that we saw in our reading of Hansard. The reasons given by the members of parliament for maintaining or lowering the voting age tended to be founded on commonplace notions that had not been subjected to serious critical scrutiny. Taken together these formed a jumble of often conflicting ideas that could generally only be properly defended if considered in isolation. These ideas, in many instances, were taken by the members from the world outside parliament, whereupon they were filtered through the house prior to reinsertion into the discourse at large through the media, and ultimately, through the creation of new law. The progression in thought that occurred from this process was that the voting age should generally match other age based laws, in particular the age of military service. The most one might expect such youth to learn from the existence of the voting age is the "commonsense" notion that adulthood begins at eighteen, and that laws tend toward internal coherence. I do not see how they might learn anything about the principles of democracy.

The above appears to be a benign depiction of what this law teaches. However, the extent to which it actually is benign, given the theory of democracy underlying my discussion of the voting age, must very much depend on the individual. To clarify this contention it will be helpful to consider what lessons those who think seriously about the meaning of a voting age must learn. In doing so I will describe the positions with the intent of drawing stark contrasts, rather than achieving verisimilitude, in the belief, in the absence of empirical evidence, that individuals would in fact be found to occupy these positions in degrees varying in accordance with their personalities and the depth of thought they have given to the matter.

Those who have thought about the matter must, to greater or lesser degrees, take the irrational, arbitrary nature of the voting age as their cue to how society is actually structured. Whether they decide on the basis of this information to reject society as hypocritical, or to accept that society is essentially founded on power relations that have nothing to do with democratic consensus and thus enter into society as people who will henceforth treat others strategically rather than as persons, will no doubt depend on those unquantifiable variables determined by genetics and upbringing. A further possibility is that they will instead consider their exclusion historically, and decide that democratic society is still so nascent as to be unaware of the contradictions inherent in its position. They might conclude that those with the power to change things are not consciously attempting to exclude them for strategic reasons, but are themselves products of this incoherent system and hence simply participating in the way that they have been taught. Seen in this way, those who were proponents of a voting age might be understood to genuinely believe that they were acting in the best interests of those they were excluding, either directly, or by preserving democratic society so that it would still exist for the young to participate in when they came of age. Having understood in this way the position of those who were excluding them, there might then be some youth who would agree with this view.

In effect, this last position is very similar to that "commonsense" view likely held by those youth who unthinkingly accept the voting age. As I have argued in this and the preceding chapter, however, this understanding of the need for a voting age is not as

defensible as those arguments which can be made in support of a society in which electoral participation is not prohibited on the basis of age. Even if everyone under the age of eighteen accepted that they should not vote until the age of eighteen, it is dubious that the outlook would be justifiable since it contains irrational, anti-democratic lessons that cannot strengthen, and probably serve to weaken, democracy in the myriad ways in which it is practiced in this society. That there are at least some people under the voting age who would not agree that they should not have the franchise only serves to reinforce the argument that the acceptance of the "commonsense" understanding leads to the perpetuation of an outlook that is fundamentally unjust.

Finally, we should consider possible implications of the voting age for participation in democratic life and elections. As we found in chapter 1, healthy democracies require an active and engaged public sphere. A generally autonomous and just population that is not engaged may well be one that finds these values gradually eroded by members of the populace who hold antithetical values. I have argued that the absence of a voting age will not negatively affect the transmission of these values, and will, in all likelihood, have a positive influence. The question, then, is whether the presence of a voting age increases or decreases voter participation.

Of course, given the complete exclusion of those under the age of eighteen from participating, the removal of the age restriction could not possibly exacerbate this situation. Instead, our concern is twofold. In the long term it is one of whether or not the presence of a voting age renders those who reach that age more likely to continue voting and being active in political life than they would be had they had the vote from birth. In the shorter term, which I would here define as being that period wherein there are still members of the population who grew up in a society in which there *was* a voting age, there is also a concern with whether their engagement with the public sphere is enhanced or diminished by the existence of that age.

On average, 73 percent of the population voted in federal elections between 1896 and 1997. (Bakvis 1991: 6; Report of the Chief Electoral Officer 1994 and 1998) Participation dipped below 73 percent in 1896, 1904, 1908, 1911, 1921, 1925, 1926, 1940, 1953, 1974, 1980, 1993, and 1997, with no sustained trend appearing to exist. Using data drawn from Canadian elections occurring from 1945 to 1988, Pammett observes that:

In any given federal election held under the present administrative arrangements, it is likely that 75 percent of eligible voters will cast a ballot. Somewhere around 5 percent, on the other hand, will not vote under any circumstances, because they never do. The remaining 20 percent, however, might vote if some of the circumstances were changed - after all, in some elections they do vote. (1991: 52)

Compared to the United States, which has an average participation rate of around 50 percent, this seems reasonable good. However, out of 24 countries, only Japan, the U.S., and Switzerland, ranked lower⁵⁷. On other rankings, using either a greater number of

⁵⁷ It should also be noted that the U.S. figure was calculated based on voting-age population figures, while those for other countries were based on registration. The reason for this is that, unlike the others, in the U.S.

countries, or different approaches to the data, Canada fared equally poorly. (Black 1991: 86-89) An analysis by Black (1991: 110) indicates that a key factor, when comparisons to countries with compulsory voting are excluded, is Canada's plurality based electoral system when compared to those with proportional representation. Of potential relevance are such structural things as Canada's bicameral rather than unicameral form of government, although the data here is far from conclusive. Finally, increased access to the electoral system through such absentee voting means as advance, postal, proxy, and constituency transfer voting were considered, along with the hours and days on which the polls are open. Changes of this nature could potentially gain the participation of the significant numbers of people who did not vote because they were "busy", "in hospital, sick", on vacation", and "out of town." (Pammett 1991: 37) While increased access appeared to be positively correlated to voting participation, Black notes that, "[t]here always remains the possibility that some other feature of the country (e.g., a participant political culture) is, in effect, responsible for the positive coefficient." (1991: 115)

Of those determinants affecting participation that are perhaps least amenable to change, Eagles cited the most important as being the region of the country in which a person resides, economic affluence, and residential stability. (1991: 25) Pammett adds age to this list, but notes that "none of these relationships is strong in any absolute sense." (1991: 42)

Voting participation by age, for elections from 1965 to 1988 (excluding 1972, when there was no Canadian National Election Survey), breaks down as follows.

Voting turnout rate by age group, Canadian National Election Survey, 1965-88
(percentages)

Age	1965	1968	1974	1979	1980	1984	1988
18-20	-	-	73	79	87	67	82
21-25	81	80	73	88	82	75	79
26-35	82	82	80	90	88	85	87
36-45	90	90	81	94	91	90	91
46-55	88	89	88	92	93	91	93
56-65	90	87	87	93	89	89	95
66+	88	82	84	87	84	90	96

(Pammett and Myles 1991: 99)

Pammett speculates that the young are less likely to vote because:

Younger people are less knowledgeable about the procedures and more likely to be absent from home. Many young people have not had the time, or seen the need, to develop a strong interest in politics. Single people have a less visible stake in many of the programs of government (or believe they do). (Pammett 1991: 42)

the responsibility for voting registration is left to citizens rather than the government.

Those in the 18-20 age group have also voted, at times, in greater numbers than those in the 21-25 year group, and in 1980 exceeded the participation rate of those 66 years and older. Regardless, a large majority of them do vote, which was not the case prior to 1970.

Given the data available, a detailed empirically based analysis of our questions is not feasible. However, it *can* be said the data does not provide any basis for believing that a voting age is necessary to ensure voter participation. Certainly, the lowering of the voting age does not appear to have adversely affected overall voting participation, either among those who were excluded from voting before the age of 21, or among those who could vote at 18 to 20, and are now in one of the older categories. In general, determinants influencing participation rates appear to be sufficiently complex that no one factor is likely to have a drastic impact on participation rates.

Admittedly, it is difficult to imagine such a change as the removal of the voting age qualification from the Elections Act not having some impact on participation, both in elections, and in the discourse preceding them. Whether the effect would be positive or negative can, of course, only be a matter of speculation at this point. However, it seems highly unlikely to me that it would significantly lessen participation in either the short or the long term. For several reasons, I expect the reverse would be true.

In the short term, there would have been political debate leading up to the change. This would have taken the form of people lobbying parliament to change the law, which would have resulted in either a sustained debate in parliament, or a petition to the Supreme Court if legislative action was deemed insufficient. In either case, media coverage, and attendant public discussion, would surround the issue before and after the change to the law.

Consumption of political news is positively correlated to voting. In 1974, 73 percent of those who voted read about politics in the newspapers either sometimes or often, compared to 58 percent of those who did not vote. In 1984, this changed to 77 percent of those who voted to 52 percent of those who did not. (Pammett 1991: 47) Of those who did not, in both 1974 and 1984, the majority were either away, sick, or busy, in contrast to those who were uninterested or unenumerated. (Pammett 1991: 39) Of this majority, in 1974, 66 percent read sometimes or often, as opposed to 49 percent of those who were uninterested or unenumerated. In 1984, 59 percent of those away, sick, or busy read sometimes or often, while only 43 percent of those uninterested or unenumerated did. (calculated from tables in Pammett 1991: 39; 48) In other words, it appears that those who do not vote for circumstantial reasons, rather than because they are disengaged from the electoral process, are more likely to be engaged in at least some forms of the dialogical aspects of the process that precede voting.

This does not mean, of course, that voting activity would increase if an important political event such as a change in the voting age qualification were to occur. It does, though, indicate that the majority of those people who might not vote because of personal circumstances, would be aware of this change, as would a large minority of those who are generally disengaged from the process. The question, then, is whether this knowledge would be more likely to draw them to the ballot boxes, drive them away, or have no effect.

This is, of course, difficult to answer since it is impossible, without collecting empirical data, to know how people would understand the personal ramifications of the

voting law change. If they simply saw the change to be a dilution of their individual voting power they would presumably be less inclined to vote, although given that such dilution would not be huge in contrast to the current weight of a vote, we can by no means conclude that they would now abstain. Some might see the change to be such a corruption of everything that they understand the electoral process to be that they would refrain from voting out of disgust. Others might make an additional effort to vote as a check to the possibility that there might now be a greater number of people voting in a way with which they disagree. There might also be those who would now vote because of the increased voting power the addition of their children would bring to the family. Yet others might believe that children, either their own or others', will draw lessons from the actions of those around them, and vote because they wish to provide a good example to those children, or the parents of those children, or to society more generally. Other possibilities include a combination of these reasons, and reasons that are not included here.

Although it appears that reasons exist both to engage in and abstain from voting if suffrage was extended, it must be remembered that such a change would not occur if the Canadian people, and those who represent the Canadian people, did not believe that good reasons existed for changing the law. These reasons would be available to everyone who read the newspapers, as well as, to varying extents, those who obtain their information through other sources, media and otherwise. Given this, I believe that very few would actually vote more infrequently than now, and expect that there would, in fact, be a net gain in the number of people casting a ballot.

In the long term, I see no reason not to expect the general observation that one is more likely to continue through life those habits that one has learned at a young age, especially those which society endorses, to hold true with respect to voting. In fact, voting is a behaviour that is not only encouraged by society, but is in the interests of the individual. It is, further, one that is tied to political discourse, which in a robust public sphere is the central avenue by which individuals can define what constitutes those interests. If, as I have argued, the extension of suffrage would encourage in the young the type of discourse that would enhance the viability of the public sphere, it seems reasonable to expect that they would be more likely to carry into their adult lives an appreciation of, and desire to engage in, public discourse than is currently found in the adult population. This should lead to greater, and more informed, participation in elections than is currently the case.

If one is ready to accept that the implications of a voting age for democracy education are negative, then the question becomes one of what, given that Canada has a voting age, the implications are for our current educational practices in this country.

CHAPTER 7 - *IMPLICATIONS FOR PRACTICE*

To this point we have discussed what the current voting age potentially teaches people across a range of ages. The learning that I have argued takes place, however, is part of what could be called the unintended curriculum. Ornstein, citing Doll, points out that, “‘Every school has a planned, formal, acknowledged curriculum,’ but it also has ‘an unplanned, informal and hidden one’ that must be considered. The planned, formal curriculum focuses on goals, objectives, subject matter, and organization of instruction; the unplanned, informal curriculum deals with social-psychological interaction among students and teachers, especially their feelings, attitudes, and behaviors.” (Ornstein 1988: 7) The implication here is that even the content of the hidden curriculum is intended on some, albeit unarticulated, level. What the presence of an electoral voting law appears to teach, however, is not something that one might expect any democrat could reasonably intend. A law that, on balance, impairs more than it improves the reason and reasonableness of its citizens, is not something that could be considered of benefit in the education of those who will eventually become full members of that polity. What such a law teaches is not, in fact, part of the curriculum at all, but rather an unintended and unfortunate constraint on the education of the members of the polity. In this sense, then, the voting age law comprises a hidden and unintended part of school curriculums in Canada.⁵⁸ This chapter will first explicate this contention in greater detail, then examine its implication for school curriculums in Canada.

While, as Tanner and Tanner point out, no one school of thought has truly characterized any given era despite the inclination of some observers to simplify history in this way (Tanner 1990: 18), broad aims held by different forces in society can be delineated for any given period. Edwards (1977), and Eggleston (1977), have both identified three main orientations to curriculum, while Eisner (1979) has described five. Although differences exist between their categorizations, each is roughly equivalent to the others. The “[f]our agreed-upon philosophies of education” that Ornstein (1988: 33) asserts have emerged, appear to cover the crucial aspects of these descriptions.

Perennialism, philosophically based in realism, aims to “educate the rational person; to cultivate the intellect,” using the Socrate method and an explicit teaching of traditional values. The curriculum consists of classical subjects and the works of the dominant literary canon. (Ornstein 1988: 47)

Essentialism, based on idealism and realism, is similar to the former in its aim to “promote the intellectual growth of the individual,” with a teacher expert in hir field explicitly teaching traditional values. The curriculum is focused on language, science, history, and math. (Ornstein 1988: 47)

Both of these are centered on the development of technical skills within the frame of a received social order. Progressivism, by contrast, with its foundation in pragmatism, aims to “promote democratic, social living,” and understands knowledge as leading to growth and development. Here, the teacher “is a guide for problem solving and scientific

⁵⁸ Control over school curriculums resides with the provinces.

inquiry" using an interdisciplinary approach based on the interests of the students. (Ornstein 1988: 47)

Reconstruction is similarly based on pragmatism, although the aim of this approach is to "improve and reconstruct society." (47) The focus is on the skills and knowledge that students need in order to identify and ameliorate social problems, with the teacher serving as an agent of change by helping students become aware of problems facing humankind, and then taking the role of research director. The curriculum emphasizes the social sciences and social research methods in an examination of social, economic and political problems.

Each of these perspectives on curriculum have a place within the Canadian educational tradition, although the reconstructive approach, by its very nature, is not one that can be easily embraced by the status quo. The failure of labour, in early twentieth century Manitoba, to implement a socially critical curriculum provides an example of this difficulty.⁵⁹ Which of these views of curriculum should be considered in weighing the implications the current voting age in Canada has for education?

In answering this question it must be remembered that our concern is not with the place of democratic education in schools. There is little disagreement that schools fulfill an important role in educating people both rationally and socially for democratic citizenship. The debates with respect to this tend to focus on what exactly should constitute such an education. I have argued that the reasons for extending the voting age outweigh those for restricting it, and that consequently the existence of the voting age negatively impacts democratic education in Canada. In effect, this issue is larger than the question of what democratic education should consist of, and so cannot be adequately addressed through an examination of the implications of a perennialist, essentialist, or progressivist educational philosophy for a properly democratic curriculum. Such a debate would be necessary if the transition to a society without a voting age restriction had already occurred. In that case, the schools would presumably have a vital role to play in explaining to students what, for example, having the vote means, which would require both the skills and facts of an essentialist approach in terms of gaining an understanding of what having the vote entails, and a progressive curriculum in order to aid students on the voyage of self-discovery necessary if the rational tools of essentialism are to be used by self-aware, autonomous people. This discussion, however, in being concerned with the school based implications for a society that has already extended the franchise, lies beyond the concerns of this thesis.

Here, we are interested in the implications that the current voting age has for education. If we accept the arguments set out in this thesis that there are stronger reasons for extending the voting age than for restricting it, then the implications for the schooling of youth must be considered in the context of a situation in which those students have a

⁵⁹ The historical development of the Canadian education system is relevant to a sociological understanding of the current state of provincial curriculums in Canada. However, our concern is with the curricular implications of a voting age, which is more pertinently addressed through reference to general curriculum trends as seen through the lens of the democracy education theory discussed in chapters 1 and 2. Nonetheless, Appendix 2 contains an historical overview in order to provide a context for understanding the current state of curricular thought in Canada.

right to participation that is currently being denied to them, and of which they may or may not have any knowledge. If they do not have knowledge then an argument may exist for teaching them about this right. If, however, they are aware of their disenfranchisement, then their education should perhaps include information on how they might go about obtaining this right. It is to these possibilities that we shall turn. In order to do this, however, we need examine in greater detail what is meant by reconstructivist education, and what may be considered contentious about this perspective.

Ornstein summarizes the reconstructionist program of education as one that:

(1)critically examines the cultural heritage of a society as well as the entire civilization; (2) is not afraid to examine controversial issues; (3) is deliberately committed to being about social and constructive change; (4) cultivates a future planning attitude that considers the realities of the world; and (5) enlists students and teachers in a definite program to enhance cultural renewal and interculturalism. (1988: 43)

Reconstructionists consider schools to be “an oppressive instrument of society that controls and coerces, even oppresses, students through various customs and mores and teaching-learning practices.” (Ornstein 1988: 44)

It is from this perspective that Michael Apple, also characterized by Ornstein as a reconstructionist, writes that, “a democratic curriculum includes not only what adults think is important, but also the questions and concerns that young people have about themselves and their world. A democratic curriculum invites young people to shed the passive role of knowledge consumers and assume the active role of ‘meaning makers’.” (Apple 1995: 15-16)

Three other writers, Henry Giroux, Peter McLaren, and Roger Simon, advocate a similar, but more activist version, of such a curriculum. Giroux, for example, writes:

As Roger Simon and I have stated elsewhere, “Pedagogy is simultaneously about the practices that students and teachers might engage in together and the cultural politics such practices support. It is in this sense that to propose a pedagogy is to construct a political vision.”

A pedagogy of student experience must also be linked to the notion of learning for empowerment: that is, curriculum practices must be developed that draw upon student experience as both a narrative for agency and a referent for critique. (Giroux 1989: 149)

McLaren and Giroux remark that:

This new perspective has ushered in a view of the school as a terrain of contestation. Groups from dominant and subordinate cultures negotiate on symbolic terms; students and teachers engage, accept, and sometimes resist the

ways school experiences and practices are named and legitimated. (McLaren, P. 1995: 30)

They go on to say that:

Fundamental to the principles that inform critical pedagogy is the conviction that schooling for self- and social empowerment is ethically prior to questions of epistemology or to a mastery of technical or social skills that are primarily tied to the logic of the marketplace. (1995: 30)

In other words, we have a vision of a pedagogy that is engaged in the construction of a politics of self and social empowerment. Yet, the specific curricular ramifications of such a vision with regard to the voting age restriction is not made clear by any of the theorists writing from this perspective. George Wood, for example, argues that

the curriculum should be structured so as to embrace the values of democratic life. These include the essential values of equality, liberty, and community. All of these are best taught through lived experiences as opposed to the disembodied accounts in textbooks of the founding fathers' pronouncements regarding freedom, liberty, justice, and similar concepts. (Wood 1988: 182-3)

With respect to how the value of liberty might be embraced through the curriculum, however, he only suggests, "making and holding oneself to rules that are collectively established, [... and developing] an atmosphere of cooperation between all parties, including the adult teacher who plays the role of facilitator and guide." (Wood 1988: 181) To embrace equality he recommends "eliminating from the curriculum all ability grouping and tracking." (Wood 1988: 183) Landon Beyer writes that, "Pseudo-participation occurs in those cases when people are provided the *feeling* of participation without the reality, usually accompanied by various stylistic or human relations devices offered to help us feel soothed or placated." (Beyer 1988: 230) He also does not suggest, for learning situations that might be considered antidemocratic, solutions that extend beyond the classroom.

The difficulty with reconstructionist critiques is that implementation of their ideas in practice would appear to result either in the substitution of one injustice for another, or the end of public education. Quoting Barrow, Peter Hlebowitsh points out that:

It may be true that school curricula tend to embody a particular cultural stance but it sometimes seems to be forgotten that for better or worse that cultural stance is the one also embodied in the backgrounds of a great many children. If the argument were simply that the individual's cultural background should be taken seriously and provide the basis of the curriculum, the conclusion would seem inescapable that we would need to reject a common system of schooling. (Hlebowitsh 1993: 39)

The need for public education has been addressed in chapter 2. It should be noted, though, that Apple also seems to recognize the need to transmit universal values when he writes:

We must remember, however, that local decision making must still be guided by democratic values. It is one of the contradictions of democracy that local, populist politics do not always serve democratic ends. After all, left entirely to local discretion, we might still have schools characterized by legal racial segregation and denial of access to all but the wealthy. In short, the realization of democratic schools does in part depend on selective intervention of the state[.] (Apple 1995: 9-10)

This proviso notwithstanding, my reading of radical pedagogical literature leads me to agree with Hlebowitsh's conclusion that, "radical commentators have written much about how schools fail to abide by a visionary and enlightened ideal, but they have also left us with little in the way of solutions that might work within the social and political realities of our schools." (Hlebowitsh 1993: 46) The question of what state intervention is required, and how this might dovetail with a curriculum agenda that respects the rights to self-determination of individuals, remains to be answered from a critical theoretical perspective. No comprehensive answer will be considered here, but I believe that an important part of the answer lies in educating youth about their position in society with respect to the franchise.

We shall return to this shortly. First, though, we need to consider the question of when an activist curriculum becomes appropriate for a given student. I believe an answer to this is to be found in a combination of Habermas' requirement of competent argumentation toward consensus, with the argument I have made justifying paternalism by those with an other regarding personal interest in those students. Robert Young (1989) addresses this concern in his critical theory of education based on the work of Habermas. Having defined emancipation as the freeing of subjects from the conditions which limit their rationality (58), and the goal of education as being the development of a classroom communication structure that makes possible the acquisition of the capacity for free and open discussion (59), he points out that

the only relatively reliable interest in an individual's emancipation is that of the individual him- or herself - self-affirmation is the ground of critique. A dogmatic critical method, presenting only its own critique of economy, ideology, etc. can only lead to the kind of left authoritarianism whose solution to the problem of modernity is simply another version of asserting the system imperatives over against the individual's development. (59)

He cautions that because classrooms are characterized by a marked asymmetry of power and knowledge, restraint in the openness and vigorousness of debate is necessary. (78)

The difficulty, of course, lies in distinguishing the extent to which that asymmetry of power results from structural differences, rather than developmental reasons. Young

addresses this to an extent when he describes the research of Miller, one of Habermas' coworkers, into the capacity of children to enter into moral argumentation. This work

suggests that children do have a capacity to engage in moral argumentation from an early age, certainly pre-school age, but that the nature of the problems of moral argumentation that they are able to resolve form a developmental sequence. Provided there are appropriate constraints on the problem situation, a three-year-old child can argue just as validly about a problem of justification (i.e. the relationships between an action and a norm) as you or I. Indeed, Miller's argument details the logical structure of such arguments in such a way as to show there is no formal logical difference between a rational adult and the three-year-old child in this respect. (117)

Young suggests that much more research is required in support of Miller's arguments. However, that the possibility exists raises the question:

If it is possible to devise a curriculum which does not simply ignore the problem levels at which children are capable of operating, but moves approximately with them in their development, allowing for respect for and preservation of children's rational autonomy, can we justify not doing so, or settling for a curriculum based on heteronomy? (118)

With respect to educating youth into an awareness of their exclusion from the franchise, this has interesting implications.

For one, if, as it was suggested in chapter 6 with regard to the platforms of political candidates, the complexity of the arguments supporting the extension of suffrage to people of all ages can be modified so that they are comprehensible to people of differing intellectual capacities without altering the essence of those arguments, then this ought to be done. As with any curriculum content, setting the appropriate difficulty level for a given age group would require both research, and intelligent, empathetic teachers. Such research obviously does not yet exist in this particular subject area, but given the above, if it can be shown that study of the exclusion from suffrage on the basis of age should form a part of the school curriculum, then this lacuna should no longer be neglected. I believe that such a claim is, in fact, defensible if one accepts arguments that reason ought to be taught not simply as a technical exercise, but as something in which one is personally engaged.

The need for personal engagement in the exercise of reason to be exercised in conjunction with a capacity for reasonableness should, by this point, be clear from the discussion in both this and the previous chapter. Also, the grounding of a theory of democracy on the basis of speech oriented to understanding by competent rational speakers implicitly embodies the idea that reason is not something which, in a democratic context, can be employed in abstraction from those employing it. That the education of people into such a use of reason would also require their personal engagement seems to me both reasonable and obvious. Young also presents clear support for this view.

He sets out, first, what an approach to teaching reason for autonomy without personal involvement typically entails.

The teacher tells the students an argument, or reads out an account of the reasoning of say, a great scientist, or sets exercises in logical analysis of arguments, demonstrates a law by conducting a demonstration experiment and so on. The student picks up the skills of logic, of structuring argument, recognizes reasons given by teachers for accepting or rejecting evidence and so on. In short, the practice of skills in set exercises and experience of the arguments held valid by others is supposed to create rational development which can then manifest itself in the actual exercise of rational participation in argumentation when the circumstances are appropriate. (120)

Young then argues that this approach is inadequate for two reasons.

It is monological because it fails to recognize that the resolution of validity claims is ultimately a social (i.e. dialogical) rather than an individual process and that validity only emerges in social engagement, engagement which, in turn, is only made possible by appropriate normative and emotional conditions. One gets the impression that many who learn about argumentation in the way suggested above would never dare to argue. (120)

It is also, he continues, narrow

because it fails to recognize, with Habermas and with modern linguists that each and every utterance, even in the most abstract arguments, is multi-functional. Interpersonal relationships and personal feelings are always communicated at the same time as statements about the world even in primarily constative speech. (120)

He concludes that

A capacity for recognising logical contradictions, conceptual confusions, statements unsupported by evidence and so on, however, valuable, does not add up to a capacity for intellectual autonomy. Whatever the problems with 'capacity' as a concept, it is clear that the idea of a capacity for autonomy is vacuous unless it is a capacity for its exercise in the form of participation in forming validity judgements in actual social situations of unequal power and authority. (121)

All of this, however, simply supports the idea that students ought to be critically engaged with their curriculum. In Young's view, this does not mean that children should be "required to create their own moral principles, or to criticize conventional principles in, say, school meetings, while still at the conventional level of moral development." (121) Rather,

teachers' claims on students' conduct would be strong, but their strength would be drawn partly from students' claims on teachers' conduct. Similarly, parents' and the community's claims on the curriculum, the knowledge considered worth learning, would be respected, but they would have to compete with the growing capacity of children to challenge them critically, that is to challenge them with reasons and reasoning. The very emergence of this capacity, which is not the same as a simple capacity to reject or say no, would be *prima facie* evidence for the view that pedagogy should adapt to it in that particular case. (122)

As Young points out, this conception of education, in which the central aim is to nurture "children's emergent capacity to take responsibility for the truth of their own beliefs, the justice and authenticity of their own relationships with others" (122) is not so different from "the finest ideals of traditional educators and, a fortiori, progressive educators, such as Dewey," except that rather than relying solely on "the intuitions and sensitivities of teachers," critical theory's "development of a concrete, hermeneutic model of pedagogy [...] offers a method for achieving this openness by identifying behaviour that leads away from it." (122)

None of this points the way toward a specific curriculum. Young, in fact, states that critical theory is actually a critical method, which must be remembered if critics are not to unjustly reproach it "for not providing the substantive criticisms and practical reforms which only *situated practitioners* can provide, *after and through* critique." (170) Yet it does not seem to me to be possible to employ a purely critical methodological pedagogy with people under the voting age without, to some extent, being complicit in the very actions that such pedagogists argue are unjustifiable.

Young has, rightly, argued that all affected parties, students, parents, and community, should influence the curriculum, yet the question remains, as students begin to pose questions critical of their social location, what stance should teachers, as providers of democratic state curriculum, take? They would be, in those situations, able to regard their charges as dialogical partners, but there are structural impediments to doing so. As mentioned above, Young has acknowledge the "marked asymmetry of power and knowledge characteristic of the classroom." Ewert (1991), citing Cherryholmes's understanding of Habermas in relation to social studies curricula, writes that "there are no decision rules to indicate when a consensus is reached; there are only procedural rules, norms that specify open, symmetrical communication permitting the discourse to proceed." (364) We have looked briefly at the difficulty of distinguishing between the extent to which the asymmetry in a classroom results from structural or developmental reasons, and I have presented arguments for the position that there remains a place for a critical pedagogical approach in classrooms despite this imbalance. As I have argued elsewhere in this thesis, however, there is no democratically based reason that supports the continuation of the structural inequality resulting from the voting age law over the abolition of this law. This has implications for the stance from which educators can justifiably respond to questions raised by critically engaged students.

It is important, here, to differentiate this law from other laws. Structural differences between teachers and students result from a wide range of age based legislation. At various ages students cannot leave school, work, or live without adult

supervision. Under such laws students do not have the option available to post-secondary students of whether or not to attend school, and by extension the ability to choose what they want to study and who will teach them. I am not arguing here either for or against such laws. The point is that we do not know whether the removal of the voting age would affect such laws, the extent to which it might do so, or over what period of time, since these laws are not, in effect, up for debate by all of those who are affected by them. Certainly those under the voting age can debate them, but the efficacy of their arguments, the seriousness that is accorded to these views, is greatly, perhaps almost entirely, diminished by the fact that it has been decided, a priori, that those under the voting age do not have the capacity to morally engage in such a debate.⁶⁰ In effect those under the voting age have a double burden. They are a priori determined to be incompetent to participate by virtue of a law which deems them as such, and the formal avenues of changing such laws - running for office and voting - are also closed to them. Their only options for altering laws with which they disagree are through such non-formal routes as letter writing, and organizing and participating in demonstrations, yet the efficacy of the former is diminished because of their formal disempowerment. The same is true of the latter, with additional impediments resulting from some of the plethora of laws regulating their freedom of action.

It is precisely the fundamental nature of the electoral law which places it in a unique position with respect to a curriculum oriented to the empowerment of students, a claim that cannot be made for other potential elements of such a curriculum. In essence, the lack of political power afforded students affects each and every social problem they encounter. Many problems might certainly appear, to students, teachers, and parents, to be more immediate and pressing, less conceptually abstract, and with more concrete solutions, but that is beside the point. If our government is seen as possessing legitimate power to levy taxes and redistribute wealth, to make civil and criminal laws which demarcate the public and private spheres, and to do so under the threat of force, then exclusion from formal participation in this government is going to impact every other concern that might arise.

The consequence of this for a critically engaged curriculum is that any effort to address the concerns of students must to some extent make reference to the fact that their position in society allows them no legitimate, formal means of altering their situation. As we have seen, neither rationally nor historically are there any convincing reasons against the adoption of a curriculum that addresses the exclusion of people from the federal franchise on the basis of age. Yet compelling reasons exist for the inclusion of this perspective. It is difficult to see, in fact, how a teacher could engage students in a meaningful dialogue regarding some aspect of their lives which they wished to critically assess without making reference to the social structure under which we all live. To do so implies one of three things. The teacher has a disregard for the truth, which in effect orients hir strategically instead of dialogically toward hir students. The teacher holds a conception of the government as an entity that is irrelevant to the lives of Canadian

⁶⁰ While the voting age implies this, and while this implication has in the past been accepted as fact by some Members of Parliament, as references in chapter 4 make clear, the extent to which this is true for teachers, and for the population in general, is an area that requires empirical study.

citizens. Or the teacher believes that the government effectively operates beyond the control of its citizens, and that we are, in fact, subjects.

The first view, if one is purporting to be critically engaged with students, is obviously hypocritical and unjustifiable. The second view is nonsensical since the government is clearly relevant to us through its passing of enforceable laws.

The third view is problematic in a different way. If one is engaged in critical discussion there must be some presumption of efficacy, otherwise it would be simply a discussion of ideas abstracted and disengaged from the world. Yet the purpose of critical pedagogy, as articulated by Young, Giroux, and others, is to engage students tangibly with the world in which they live. The assumption held by all of these writers is that discourse is a potent tool for bringing about change. If they did not presuppose that their arguments would have an effect within the current political structure, their aim would not be to publish works advocating further discourse, but would instead focus on meeting the requirements necessary for establishing a force to counter that which they see the current political structure as illegitimately holding. They do, then, on an essential level, see the state's monopoly on the use of force as legitimate. While voting may not be as fundamental a part of democracy as discussion, it is nonetheless vital as a tangible method of input into the government of a mass society, and is consequently, at the least, symbolic of governmental legitimacy.

It is necessary, then, when engaged in critically oriented education, for teachers to be cognizant of the formally disempowered status of their students. The application of this awareness would depend on the situation. Initially it might simply involve indicating, in relation to whatever question happens to be under discussion, how their lack of franchise is associated with that problem. If, however, the students wanted to know how they could change this situation, then this could become an area for further study. The extent to which a teacher might prompt students to examine how they might change their status is a question, along with how the initial raising of the subject in relation to various topics might look, that requires further study. By corollary, to the extent that student teachers are taught in teachers' college to use a critically engaged curriculum, it is necessary that they also be aware of the formal political status of school students and the implications of this for instruction.

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APPENDIX 1 - USE OF GENDER NEUTRAL PRONOUNS

It is not entirely unusual these days, when reading academic works, to encounter an explanation of the way in which the problem posed by the gender specific nature of pronouns in the English language had been dealt. William Rehg, for example, in his "Translator's Introduction" to Between Facts and Norms, writes:

In order to avoid sexist language, I have (with Habermas's assent) alternated the use of feminine and masculine pronouns from chapter to chapter.

Writers also, of course, strive to avoid those sentence constructions which require these pronouns. In some cases the non-gender specific, but technically incorrect, plural form is used. These approaches certainly represent an improvement over the implications inherent in the sole use of the masculine pronoun. I would argue that even the sole use of the feminine pronoun, in the context of providing a measure of historical redress, is currently preferable to the traditional usage. Each of these tactics, though, has about it the appearance of a stop-gap measure, a feeling of being forced. While the writing may, in every other respect, flow gracefully on the page, attempts to use the English language in a non-sexist way inevitably loom on the textual landscape like deadheads on a river.

Nonetheless, these approaches are in keeping with the usage prescribed by those style manuals which make an effort to address the issue. The 1994 Publication Manual of the APA (4th ed.), for example, suggests avoidance of bias through use of the following approaches: rephrasing; using plural nouns or plural pronouns; replacing the pronoun with an article; and dropping the pronoun. It concludes by noting that, "Replacing *he* with *he or she* or *she or he* should be done sparingly because the repetition can become tiresome. Combination forms such as *he/she* or *(s)he* are awkward and distracting. Alternating between *he* and *she* also may be distracting and is not ideal; doing so implies that *he* or *she* can in fact be generic, which is not the case. Use of either pronoun unavoidably suggests that specific gender to the reader." (50-1)

The fact remains that by following the APA, at times it will be necessary to use the phrase *he or she*, or *she or he*. Neither is ideal as each privileges one pronoun over the other. Even if one chose to alternate these two phrases consistently throughout the text, the problem (aside from the difficulty of tracking which phrase one was to use next) remains of necessarily beginning with one of these phrases rather than the other.

It should be noted that in addressing this question, UBC's Faculty of Education's 1992, "Guidelines for Non-Sexist Language in the Faculty of Education: Policies, Procedures and Practices", simply cites a version of the APA manual.

Turning to a recent book on non-sexist language (Doyle's 1995 The A-Z of Non-Sexist Language), the solutions offered are, again, essentially the same as those set out by the APA. However, the following is included:

Create or use a new, genderless pronoun.

(This is of more academic than practical use. Although there is a long history of pronoun coinage, none of the suggestions has sufficiently caught on to be readily accepted by a reader. This is largely because they sound like alien language to us -

'hir', 'per', 'hesh', and 'co' are some of the suggestions. A nineteenth-century man in the United States proposed the word 'thon' (a contraction of 'that one') as a common-gender pronoun. Though logical, the term was never widely used, but it could be found in American dictionaries up until the 1950s (Miller and Swift 1989: 60).

Where familiarity is important, this is not the best option. Where creativity and some work by the reader play a part, it can be an interesting and useful alternative.) (82)

Ignoring the irony, in this present context, of her reference to "academic" use, this does not constitute a strong endorsement for the use of gender neutral pronouns. It should be noted, however, that just because an alternative did not gain common acceptance prior to the 1950's, this does not necessarily mean that one would not be accepted today in a society that is, as a whole, more sensitive to gender biased language. Nonetheless, her point that such alternatives have an alien sound to them is well-taken, and in fact is echoed in the text of a web site devoted to this issue.

As of December 15, 2000, a site by John Williams titled "Gender-Neutral Pronoun FAQ" could be found at www.aetherlumina.com/gnp/. This detailed site explores the history of and rationale for gender-neutral pronouns, before setting out a wide range of alternative pronouns (and their declensions) and a scheme for categorizing their positive and negative elements. Positive elements include such things as memorability, simplicity and the existence of precedent, with the negative including such things as non-euphonic pronunciation, and unbalanced treatment of the sexes. If one has made the decision to use gender-neutral pronouns, good arguments can be made for a number of alternatives.⁶¹

While a detailed argument could be presented for the choice of pronouns used in this thesis, ultimately there are two reasons for my choice of the pronouns "hir" and "sie" as the most suitable of the options. The first is that, to me, they sound less alien than virtually all of the alternatives. The other is that, according to Williams, who has indexed a large number of sites, they are presently in wider usage on the Internet than the other alternatives.

Admittedly, although when the words "hir" and "sie" are spoken there is a greater chance of confusing these pronouns with other words already in use in English, it should not be overlooked that the English language already makes wide use of homonyms, and that these are easily understood when used in a context. Furthermore, it is likely that to the extent there is confusion, people will modify the pronunciation slightly to make them recognisable. English is full of words that are not phonetically correct, and while it would be nice if the new pronouns were, I think that the possibility that they actually be used because of their familiarity is more important than phonetic accuracy.

There remains the question of why, in light of the recommendations of the APA, I would want to use such novel constructions at all. Essentially, the reason is rooted in the fact that, regardless how carefully one might structure sentences to avoid the use of

⁶¹ He relies heavily on Baron's (1986) work on the subject for factual information, although his perspective on some of the conclusions drawn by Baron is critical.

gender pronouns, there are times when their use is unavoidable. This is especially true when writing something of book length in which people are the subject of discussion. Given this, a decision must be made as to whether the first time this is done one uses “he or she” or “she or he”. This may seem to be a trivial point, but I believe that the choice sets the tone for what follows. Certainly, the use of “he” to represent both sexes was at one time thought to be unproblematic, yet arguments in recent years have undermined this view. The extent to which the style manuals emphasize that “he” should not be used in this way indicates the strength of those arguments.

The above comments are applicable to any piece of writing. Considering the specific nature of the thesis that I am proposing, however, I believe that there exists additional reason to avoid this difficulty. The central argument of the project speaks against unjustifiable bias, and it seems to me to be contradictory to then continue a form of bias through the language that I use, when a viable alternative exists.

It might be argued that because gender-neutral pronouns are not sanctioned by the APA a viable alternative does not in fact exist. However, the purpose of the APA manual is not to establish new linguistic ground when the need arises, but to reflect established use. It is up to those using the language to define needs through argument, where necessary to create the language to meet those needs, and to defend that creation.

It could be argued that a doctoral thesis is, regardless, not the most appropriate place to introduce such a thing. This, however, raises the question of where the most appropriate place might be. Arguments could be made regarding the weight that readers might assign to different kinds of publications, contrast these with the breadth of readership enjoyed by these publications, and weigh in such factors as the requirements of tradition. I am personally at a loss, though, to know where to begin to find the objective criteria needed for these weightings, and believe it is probably no less valid simply to assert that new language is first legitimately used where its need is most keenly felt. I am uncomfortable with the bias inherent in the personal pronouns of English, and while I will use the options suggested by the APA to minimize their use, when this becomes impossible without resorting to extreme circumlocutions, or to technically incorrect language, then it seems to me that this is the place to employ an alternative. I am aware that doing so may place a further strain on readers who are already working to assimilate what may be new ideas, and hope that the task of reading this thesis is not made excessively onerous as a result.

APPENDIX 2 - HISTORY OF SCHOOLING IN CANADA

The complexity of the history of schooling in Canada prohibits anything remotely approaching a full rendering within this thesis. However, by focusing on the broad democratic and authoritarian influences that underlay the development of school systems⁶² in Canada, we will gain some understanding of what could be considered an approach to curriculum that both educates for, and is democratic in, the Canadian context.

While the British North American colonies each have their respective educational histories, I will, in this brief synopsis, largely focus on that of Upper Canada for a couple of reasons. One is that those in Upper Canada, according to the historian Allan Smith, "already possessed a 'sense of community and self-consciousness' which came 'increasingly to encompass all of British North America in their vision of the national future.'" (Barman in Sheehan 1986: 245⁶³) In part the Canadian tradition can be distinguished from that in the U.S. by its counterrevolutionary tone. (Prentice in Wilson 1970: 56) At any rate, as Mazurek points out, "many of the key educational and political figures in the west were migrants from Ontario." (Mazurek 1986: 32) In effect, Upper Canada to a certain extent led the way in developing the foundation of what was to become the contemporary educational state, and to the degree that it did this is representative of such development elsewhere. The other reason for focusing on Upper Canada is that the development of education in this colony has been more extensively documented and critiqued than in other colonies in British North America.

It should also be noted that the focus of this historical discussion is on the development of compulsory attendance laws. There are two reasons for this. One, the laws which compelled those in Canada to make free education available to everyone either predated, or coincided with, the creation of laws compelling attendance, so that an examination of the latter tends to encompass the development of the whole educational structure. Further, compelled education necessarily has broad curriculum implications since there would be no point in the state compelling education if there was no intent, on some level, to sanction a particular form of curriculum. These laws in a sense represent the culmination of the development of education systems, so that an examination of the complex reasons underlying their inception can be useful in gaining an understanding of the curriculums which developed from this history. In turn, this can inform our understanding of the relationship between these curriculums, which have been approved for those below the voting age, and the state which gave that approval.

Initially the demand for formal education came from those who were to be its consumers. Prior to their move to Canada, the Loyalists of the Thirteen Colonies had had a variety of schools from which to choose, a fact which likely influenced their request of

⁶² My concern here is with school systems, rather than with educational systems more generally, since the school is the main structure through which curriculum is delivered to those under the age of eighteen in Canada.

⁶³ It should be noted that in this article, Barman argues that while eastern influences were present, the isolated nature of British Columbia resulted in the educational consensus in that colony developing more than in other colonies under "its own impetus and direction." (241)

the Governor General of British North America, Lord Dorchester, in 1787, to provide “a school in each district.” (Wilson 1978: 39) Although Simcoe provided some land for schools, little happened until 1807 when the first School Act was passed. The cost associated with attending the schools that came into being as a result of this act assured, in line with Simcoe's thinking on the subject, that only children of the ruling class were able to attend. (Wilson 1978: 15)

The continued efforts of the elected Assembly to change the exclusive nature of the schools resulted, in 1816, in the Common School Act, which provided, in addition to the grammar schools which were already in place, that any village having twenty students could receive from the government £25 to pay for a teacher. Three locally elected trustees made the decisions about the school, but not without approval by the District Board of Education, “comprised of five members appointed by the Lieutenant-Governor.” (Wilson 1978: 24) Further, all teachers were to be loyal subjects of Britain as the more democratic notions held by American teachers were considered dangerous. (Wilson 1978: 24)

In the early 1830's the Assembly was divided over whether to centralize educational control and the financing of the system, or to leave it in local hands. (Wilson 1978: 30-35) This last issue was resolved, essentially, by the Rebellion of 1837. Sullivan, the president of the Executive Council, along with Ryerson, believed the cause of the rebellion to have been the presence of American teachers and textbooks in the schools, while Lieutenant-Governor Arthur, although generally agreeing with these suppositions, asserted that these problems were only part of the larger problem of an “absence of strict surveillance and direction of education resulting from a lack of centralization.” (Wilson 1978: 37) Although Lord Durham's report simply declared that there were not enough schools, the direction in which a system of schools would likely be steered is evident from the ideological positions held by those of influence living in Upper Canada. The Act of 1841 created the post of Superintendent for the control of education for all of Upper Canada, which Ryerson assumed three years later. When Ryerson brought in the Common School Act of 1846, he ensured that education in the province was “much more highly centralized than that of either New York State or Massachusetts.” (Wilson 1978: 40) The foundations of a compulsory system of education had been laid. School Acts passed in 1847, 1849, 1850, and 1853 served to progressively strengthen the school system (Curtis 1988), with the School Act of 1871 finally compelling anyone between the ages of seven and twelve to attend school for four months a year. (West 1984: 27)

Essentially, Ryerson wanted to provide free, universal schooling to the children of Ontario. The move to compulsion, which did not occur elsewhere in the Dominion for several years, was made necessary by a number of factors.

In his 1847 Report on a System of Public Elementary Instruction for Upper Canada, Ryerson comments that, “The first feature then of our Provincial system of Public Instruction, should be *universality*; and that in respect to the poorest classes of society. It is the poor indeed that need the assistance of the Government, and they are proper objects of its special solicitude and care; the rich can take care of themselves.” (Ryerson 1847: 20) It was the relatively new phenomenon of representative government, however, that was largely the reason for this position since, without education, the “lower orders” would be unable to participate responsibly in the political process. Ryerson stated, “if they are to be governed as rational beings, the more rational they are made the better

subjects they will be of such a government.” (Ryerson 1847: 20) He did not believe that the elementary systems of the time universally did this, stating that they tended “as much to prejudice and pervert, not to say corrupt, the popular mind, as to improve and elevate it.” (Ryerson 1847: 21)

The views Ryerson held as to what would “improve and elevate” the popular mind were along three paths, encompassed within what he termed practical education, since, as he put it, “The age in which we live is likewise eminently practical; and the condition and interests, the pursuits and duties of our new country, under our free government, are invested with an almost exclusively practical character.” (Ryerson 1847: 21) The conclusion he drew from this observation of society’s “practical nature” was that both the society and the country, “requires that every youth of the land should be trained to industry and practice.” (Ryerson 1847: 22) The three paths Ryerson delineated within the sphere of practical education were religion and morality, the development of the faculties, and the acquisition of knowledge, although he stated that he felt it unnecessary to treat them as distinct categories.

The contemporary reader may be surprised that religion and morality were considered an integral part of a practical education, but at the time it was accepted that schools should be “conducted by the church.” (Wilson in McDonald 1978: 17) Ryerson, a Methodist minister, strongly asserted the need for Christian education, writing that teaching lacking in Christian values results in, “social disputes and civil contentions, and is inimical alike to good government and public tranquillity.” (Ryerson 1847: 23) The Report is permeated with his contention that Christian values are intrinsic to good education, and it is likely in part because of this that the Education Act currently in force in Ontario lists among the duties of teachers, the charge, “to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues.” (Government of Ontario 1980: section 235(1)c)

Ryerson devotes the remainder of the book to setting out in great detail precisely what should be done to develop the faculties, what knowledge should be taught, where this teaching should take place, who should do the teaching, who should train the teachers and how, which textbooks should be used, and who should oversee this system and how it should be controlled. The transition over three decades of his stewardship, from a voluntary system of schooling to one where attendance was mandatory, clearly occurred, at least conceptually, within rigid boundaries defined not by those receiving the programs, but by the few with the power to create those programs.

That Ryerson’s desire to create a “practical” system of education which “every youth should practice” was not universally shared is made clear by evidence Bruce Curtis found in Ontario’s archives. As far back as 1843, the School Act sought to define the ages between which one could attend school as five and sixteen. In the 1846 Act this was changed by popular pressure to include people up to the age of twenty-one, but this adjustment appears to have been made essentially to quell protest rather than to meet the needs of the populace since, prior to the mandating of age restrictions, “age-specific attendance patterns were quite directly linked to production cycles.” (Curtis 1988: 205) In effect, in rural communities, children under five were sent to school in the summer while

their parents worked, with people in their twenties and thirties attending in the winter. It appears as though the system was practical for those who were in charge of administering it, but not for those who were the recipients of its product.

A question arises as to the specific reasons that an administration that was apparently concerned with meeting the needs of those it was servicing would act in ways so contrary to the desires of its clients. Ryerson himself was opposed to compulsory schooling up through the 1840's, stating as late as 1849 that, "The education of the people through themselves is the vital principle ... Coercion is alien to the spirit of the system," (Prentice 1977: 175) despite the fact, noted by Ryerson in 1846, that European countries compelled schooling on the basis that, "If the parent refused to allow his child to be educated ... it was considered the duty of the state to protect the child against such a parent's 'cupidity and inhumanity.'" (Prentice 1977: 175) The relationship of individual rights to those of the community or state is complex and frequently uneasy, but it is a relationship which is ubiquitous. Ryerson had already shown himself concerned with educating the population in a way that best met his conception of the way people in a democracy should think. An answer to the question of why he moved in the direction of compelling not only the provision of education by the state, but the attendance of its citizens is, as Prentice states, "an extremely complex one, and perhaps can never be more than approximate." (Prentice 1977: 16) Although Ryerson was an undeniably important figure in education, he was also a subject of the rapid change sweeping through the century, so that his thought "does not form a consistent whole." (Prentice 1977: 182) In fact, the basis for compulsory education is best seen as consisting of several dissimilar elements that relate to each other in disparate ways, although the new industrial technologies flowing through all aspects of nineteenth century Upper Canadian life played a crucial role in its inception. As Prentice notes, such changes had already evolved in Europe and the Northeastern United States, and many of the educational initiatives evident in Canada were drawn from these places. (Prentice 1977: 180)

West states that whereas, "during early industrialization, children were grossly exploited for low wages, their partial humanitarian exclusion from the labor market had by the end of the nineteenth century made them an expendable surplus population, a nuisance about which something had to be done." (West 1984: 26) The expedient solution was to educate them. In fact, allowing a child to grow up in "ignorance", or at least, without state run schooling was considered not only a crime against the child, but also, "a flagrant crime against society". (Graff in McDonald 1978: 191)

In this context, "ignorance" was seen as a crime not because it meant that children were being deprived of the opportunity to develop to their potential, but because it was believed to be at the root of crime in general. (Graff 1979: 22) Ryerson reported in the late 1840's that, "the condition of the people and the extent of crime and violence among them follow in like order' from the state of education." (Graff in McDonald 1978: 190) The Globe, in 1851, expressed a similar opinion, stating: "educate your people and your gaols will be abandoned and your police will be disbanded." (Graff in McDonald 1978: 191) The leap from the concept of school to that of prison was one which a number of people involved with education made readily. G. A. Barber, a public school inspector, flatly stated that, "the principle upon which free schools stand is the philanthropic argument that it is easier to prevent the commission of crime than to punish the culprit -

that it is wiser to educate than to coerce - that a staff of schoolmasters is cheaper than a bodyguard of policemen, and that school houses form a better investment than prisons and penitentiaries.” (Houston in McDonald 1978: 256) Ryerson described the school system as “a branch of the national police.” (Prentice 1977: 132) In 1863, Edward Scarlett called common schools the “cheapest form of moral police”. (Prentice 1977: 132)

The link between a lack of education and crime was detailed by school promoters who “marshalled reams of evidence, rhetorical and statistical, to prove the perceived relationship between ignorance or lack of education and criminality.” (Graff in McDonald 1978: 187) However, for several reasons, the arguments put forward by these men, on the basis of illiteracy statistics, were confused. Prentice has noted that prior to 1840, a “mixture of the public and the private, and of the casual and the formal in the education of Upper Canadian children, seems to have produced a basic literacy for the majority of people in the province,” so the concern was not just with literacy in itself. (Prentice 1977: 16) While literacy was seen as necessary (“Morality without literacy was more than ever seen as impossible” (Graff in McDonald 1978: 188)), “literacy alone was potentially dangerous.” (Graff in McDonald 1978: 188)

In this context, morality referred essentially to crime, but also encompassed other elements. Harvey Graff writes:

Ignorance and illiteracy, as Ryerson argued, were the first causes of poverty and crime, which in turn were inextricably linked. Each was seen to cause the other, particularly among immigrants and in cities. The result was a simple causal explanation or model of criminality: ignorance caused idleness, intemperance, and improvidence, which resulted in crime and poverty. (Graff in McDonald 1978: 191)

As we shall see, this linkage between literacy, crime, and poverty, was important for the development of the education system. Yet an analysis by Graff of the contentions made by school promoters for this linkage shows their arguments to be deeply flawed. Drawing on a wide range of statistical data pertaining to school attendance, arrest, and conviction rates in the latter half of the nineteenth century, Graff uncovers social and systemic relationships that contrast strongly with the depictions set forward by those interested in developing the school system. In conclusion, he writes:

Criminal prosecution, and probably apprehension as well, derived from the facts of inequality. Punishment, stratification, and illiteracy too were rooted in the social structure; pervasive structures of inequality which emanated from ethnic and sexual ascription ordered groups and individuals in mid-nineteenth-century urban areas. Achievement of literacy, or education, had little impact upon these structures, and in many cases only reinforced them. Despite the superficial relationship linking literacy and status and illiteracy and criminality, social inequality represented the primary determinant of criminality. Stratification by ethnic or sexual factors influenced the hierarchy of class, status, and wealth; in similar fashion, they turned the wheels of justice. Rather than illiteracy or ignorance leading directly to a life of crime, ethnic affiliation, class, and sex lay

behind and strongly mediated the relationships most commonly drawn. (Graff in McDonald 1978: 216)

Nonetheless, the linking of education to poverty and to crime allowed Ryerson to make the argument that property values would increase for the wealthy landowners if they supported state run schooling through their taxes. While there was a degree of altruism to this proposal in the sense that Ryerson believed this would make the poor "agents in bettering their own condition ... to supply them, not with a temporary stimulus but with a permanent energy," (Prentice 1977: 133-4) he also stated that the "balance of gain financially" in the long run, was on the side of "the wealthier classes of the community." (Prentice 1977: 133) This apparent divergence of intent can perhaps be best understood in light of Prentice's analysis of Ryerson's and other school promoters' attempts to systemize schooling as being an effort by the middle class to bridge the gap between what they saw as the lazy lower class and selfish upper class, thus preventing a class war. (Prentice 1977: 180)

In order for schooling to have this intended stabilizing effect, however, it was necessary that the poor actually send their children to school, and there was great concern that this was not, in fact, happening. The reason for non-attendance was attributed to the laziness of the lower classes (Prentice 1977: 158), for which reason the state had to step in, but in fact there were many far more prevalent reasons for non-attendance.

John Flood, a school superintendent, in 1860 listed six reasons for non-attendance: taking a dislike to the teacher; poor parents keeping children home to work; indifference or drunkenness of parents; a swamp or large wood between home and school; lack of clothes for the children; parents "of a different class of society" worried their children will pick up vulgar habits. (Curtis 1988: 187) Five of these have nothing to do with parental indifference, with the last one standing in direct contrast to the concerns of the educators, for here it is those who are apparently not in the lower classes who are not attending school. Although disliking the teacher may seem a mild reason for absence, Curtis points out that, "Drunkenness, brutality, incompetence, cruelty and sexual assaults were common characteristics of and activities by teachers," (Curtis 1988: 192) a perception that throws the concept of compulsory attendance into a whole new light. Withholding students from school because of a lack of access due to swamps and forests likewise shows not indifference on the part of parents, but concern. The need to keep children home to work or because they lack clothes are both direct results of poverty.

Davey, in his paper, "The Rhythm of Work and the Rhythm of School", notes that in urban areas employment was undergoing rapid changes as a result of industrialization, with artisans finding their employment becoming less secure, and with general unemployment occurring in the winter months. Similar patterns of unemployment occurred in rural areas where crop failure could throw farmers out of work and into poverty. Added to this were the seasonal demands of agriculture which necessitated absence from school. All of these psychologically mitigated against regular school attendance. (Davey in McDonald 1978: 234-7) Unemployment also physically disabled regular attendance, with the poverty resulting to families out of work being shown again as the main reason for lack of attendance by Toronto's truant officer, W.C. Wilkinson, in the 1870's, who in his diaries reveals "clearly that most cases of irregular attendance

involved some personal catastrophe in the home, especially sickness," (Davey in McDonald 1978: 238) wherein the child had to stay home to care for the ill, look after younger siblings or work.

Student illness itself accounted for nearly eighty percent of absences in an 1863 Toronto School Board census (Prentice 1977: 158), although one wonders how much of this illness could be directly attributed to the school. Curtis describes overcrowding in schools so severe that "school supporters complained that students were continually ill." (Curtis 1988: 191) One such classroom fifteen feet square held more than fifty students, and some teachers were charged with up to 85 students at a time. Under such conditions it is reasonable to assume that some parents kept their children from the schools out of regard for their health.

Essentially a wide range of concerns took precedence over attendance at school. The urgency of these concerns is clearly shown by the fact that, after education was made compulsory in 1871, attendance remained irregular. (Davey in McDonald 1978: 247) Enrollments were high, but circumstances both outside the system, such as employment and poverty, and within the system, such as poor conditions and teachers, mitigated against obedience to the law.

It should be noted that, despite the foregoing, attendance rates according to the 1863 Toronto School Board census, were over 80 percent. Further, some critics, "felt that errors in statistics and the transience of the population accounted for most of the so-called non-attenders by the 1860s." (Prentice 1977: 163-4) Given this, and that many legitimate reasons not only existed for non-attendance, but were documented by various sources, including the Toronto School Board census, it is interesting that sufficient pressure existed to bring about the 1871 law. A considerable amount of persuasion came from the teachers, who, being hired by the education office, were under an obligation to meet their employer's requirements before those of the parents. The Education Act set out timelines for the school day, and teachers were instructed in ways of making students adhere to these timelines through the Normal School, at County Board examinations, at school conventions and in the educational press. (Curtis 1988: 199) Employing these methods resulted in frequent conflicts between teachers and parents (Curtis 1988: 200-10) which no doubt contributed to the "swelling chorus of professional support throughout the province for compulsory education measures to reduce irregularity of attendance." (Houston in McDonald 1978: 270) Added to this was the argument put forward by Ryerson, and supported by the local superintendents, that it was inconsistent to have compulsory school taxation without also demanding compulsory attendance. (Davey in McDonald 1978: 227) The logical link between the two may not be evident if one conceives of the school system simply as an altruistic instrument designed to help people achieve their potential. While from this perspective a paternalistic argument for compulsory attendance can be made, such an argument does not tie attendance to taxation. Rather, it rests on what is in the best interests of the child. That the state has an interest in what is best for the child, and thus will financially support this interest, is already assumed in such an argument. However, if one conceives of the school system as an instrument that would accrue financial and social benefits to those social classes that were financially able to support such a system, the link between compulsory attendance and taxation becomes apparent.

For both economic and citizenship reasons, during the early part of the twentieth century the focus on schooling shifted from the implementation of compulsory schooling to extending the age range over which a person could be required to attend. This change is clearly evident in Ontario's School Attendance Act of 1920, which raised the school leaving age from fourteen to sixteen. Robert Stamp describes the motivation behind the proclamation of this legislation.

The latter act reflected the growing view that fourteen-year-old school leavers were no longer prepared for the vocational and social challenges for the post-war urban-industrial world. Industry now demanded more highly trained workers; inadequately prepared school drop-outs, competing for jobs with recently demobilized soldiers, could not hope to find employment during a period of industrial slowdown. But these early teen-age years were equally important in the formation of moral character. Cody [the minister of education for Ontario since 1918] believed that 'it is impossible to teach under the age of fourteen all that a boy or girl ought to learn for effective citizenship.' (Stamp 1982: 107)

What effective citizenship consisted of in the minds of education providers varied from time and place. In the late nineteenth and early twentieth centuries the curriculum was originally based almost solely on the content of the classroom text books, in which, through the notion of character, "'Patriotism', 'citizenship' and 'morality' were inexorably linked." (Stanley 1995: 45) In this context, 'character' "was in fact a metaphor through which the individual stood for the group, and the group could be reduced to an individual." (Stanley 1995: 45) The texts used in British Columbia and Alberta came from Ontario, and although non-sectarian, were written from a specifically Christian-British perspective. (Van Brummelen 1986; Sheehan 1986) Citizenship effectively entailed assimilation to the Anglo Canadian way of life. (Stamp 1970: 303-306)

Kach and Mazurek (1994: 186) describe the growing realization by the Anglo population in the 1920's that "assimilation or absorption of the Ukrainians (and a number of other immigrant groups) was not a social possibility." The impact of this mosaic of cultures was not found in the curriculum prior to the Second World War, but it did influence public and political attitudes toward viewing diversity as a positive aspect of Canadian culture, with the resulting legitimization eventually facilitating "the realization of a 'multicultural Canada'." (Kach and Mazurek 1994: 188)

Other debates over the appropriate curriculum were also being waged in the first half of the twentieth century.⁶⁴ There was, for example, a discussion at the turn of the

⁶⁴ The history of the schooling of native Canadians intersects with this story, but in important respects is altogether different. From Shingwauk's voyage from Garden River to Toronto in 1872, when he expressed his desire to see before he died, "a big teaching wigwam built at Garden River, where children from the Great Chippeway Lake would be received and clothed, and fed, and taught how to read and how to write; and also how to farm and build houses, and make clothing; so that by and bye they might go back and teach their own people," (Miller 1996: 6) through the disastrous and failed attempt to assimilate Canada's First Nations through residential schooling, to the present day politically involved First Nations (which ironically may have acquired some of their political savvy from the schools which attempted to break their connections with their histories), the history of this education involves an additional perspective. Here, the people were not recent arrivals attempting to maintain their cultural heritage in the face of a dominant, only

century about the importance of an economically motivated technical education over one that “develops character, manliness, patriotism.” (Stamp 1970: 294) By the 1920’s vocational schooling itself was being justified “in terms of ‘making useful citizens,’” (Stamp 1982: 114) with the emphasis shifting in the 1930’s from job-training as being the primary focus of these schools to the development of students as “responsible and cultured citizens.” (Stamp 1982: 115) The balance between the need for an economically viable population and the need to produce good citizens changed with the economic fortunes of the country as a whole, with arguments also arising, in the 1920’s, that linked the teaching of “the proper attitude towards work, towards their job, towards their employer” with the teaching of citizenship. (Stamp 1982: 114)

This linkage may in part have arisen from the curriculum debates that occurred in Manitoba in the decade leading up to 1920. While both bourgeois reformers, and labour, agreed that child labour should be ended and that compulsory schooling was needed, they disagreed on the nature of the curriculum. Examples of the former can be found in 1915 and 1916 when

the official organ of the Department of Education and of the Manitoba School Trustees’ Association, the Western School Journal, told teachers that among the desired ‘virtues and habits’ to be created in children, was the ‘right attitude toward work.’ The next year, W.A. McIntyre, principal of the Manitoba Normal School, wrote that the duty of teachers was ‘above all’ to create socially acceptable attitudes and behaviours in children. (Maciejko 1986: 221)

The latter position, following requests for free textbooks, supplies and eyeglasses so that the children of the poor could attend school, swimming lessons “because of the many drownings in the Red River”, and drinking fountains to reduce disease, (Maciejko 1986: 220), was summed up by William Ivens,

the radical social gospel preacher, [who] only months before he was imprisoned for supporting the workers during the General Strike in 1919, referred to the workers’ ‘demanding greater educational facilities for their children’ as an intellectual upheaval’ necessary to realize the radicals’ vision of society. (Maciejko 1986: 221)

In the 1930’s another curriculum approach was in ascendance. Although it had its roots in the work of Friedrich Froebel in the early part of the nineteenth century, it was

slightly less recently arrived society, but were instead essentially original inhabitants seeking to share with and learn from technologically advanced newcomers. This distinction was explicitly recognized by the federal government in its creation of a ministry to deal with Canada’s aboriginal population. Placing this history in a discussion of debates over curriculum would misrepresent the nature of the issues surrounding the curriculum presented to First Nations. On the one hand, the schooling these peoples were subjected to differed drastically in both scope and form from the vision held by Augustine Shingwauk. On the other hand, the opportunity to enter into debate about the nature of curriculum was not available to them, and while to a degree this could be said of other minority groups in Canada, the latter had both historical experience with European methods and systems of education, and freedom from such coercive and disempowering tactics as the forcible removal of their children to a residential school system.

not until John Dewey published The School and Society in 1899, that the ideas of what would come to be known as “progressive education” began to gain currency in North America. Essentially these consisted of the insight that “learning is related to a person’s needs”, a respect for “active as opposed to passive learning and for the value of real problems as a basis for learning”, and a recognition of the social nature of people with a consequent emphasis “on learning as a cooperative venture.” (Patterson 1970: 373) Alberta was at the forefront of this movement, redesigning the curriculum into one in which activities were “intended to promote for the student an understanding of human relationships, and attitudes of inquiry, critical mindedness, tolerance, responsibility, creative self-expression, self-cultivation, and a willingness to co-operate.” (Patterson 1970: 376) The ideas and terminology of this new approach to education gained some popularity, but serious implementation of these ideas did not occur for another thirty years. In fact, those parts of the new education that were put into effect may well have been largely responsible for this delay. By 1938, Dewey had written Experience and Education in response to misinterpretations of his ideas in schools in the United States which he felt had resulted in excessive individualism and unorganized curricula. (Patterson 1970: 374) With the coming of the Second World War the ineffective and incorrect application of his theories was exacerbated in Canadian schools due to inexperienced teachers being brought in to replace those sent overseas. (Patterson 1970: 378) The 1950’s were a time of burgeoning school populations and a consequent reorganization of school systems. (Patterson 1970: 390) It was not until the 1960’s that a serious effort was made to implement the “radical” child-centered ideas of the 1930’s, although in this decade it was also true, as Stevenson writes, that “changes occurred so rapidly that educational innovations sometimes became obsolete before they could be implemented.” (Stevenson 1970: 471)

The point of this brief history has been to set out the extent to which schooling in Canada has been focused on the development of democratic citizens. Certainly the aim has always been to create good citizens in both an economic and social sense, although the emphasis on educating people to be good *democratic* citizens really appears to have begun sometime around the 1920’s. The 1925 British Columbia Putman-Weir schools survey, for example, stated that, “The development of a united and intelligent Canadian citizenship actuated by the British ideals of justice, tolerance, and fair play should be accepted without question as a fundamental aim of the provincial school system.” (McLaren, J.P.S. 1995: 148) These ideals, from what we have discussed so far, appear to be crucial aspects of our notions of democracy. Yet we have also seen that in practice these ideals, by current standards, were far from being met from the point of view of many people. Callan talks about the need for emotional generosity and historical imagination, by which he means the ability and willingness to separate the worthwhile ideals of a historical tradition from the beliefs and practices in that tradition that are not justifiable. (Callan 1997: 115-121) In doing this, he contends, we become able to find ground between an unquestioning acceptance of an often unjust history, and a nihilistic discarding of the entire tradition. In doing this, we may then remain anchored in an historical tradition upon which we can build, without necessarily repeating the mistakes

of the past. It is in this spirit, perhaps, that a statement such as that found in the Putman-Weir survey, and the work of other school reformers, should be regarded.