



Liberalism and Pluralism

Towards a politics of compromise



Richard Bellamy

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Pluralism permeates modern societies, dividing the loyalties of their members. Richard Bellamy suggests standard liberal theory cannot resolve the resulting clashes of ideals, interests and identities. Its attempts to construct a consensus by either trading, trimming or segregation, all fail. Trading suggests we can reach mutually advantageous bargains; trimming that we can avoid contentious issues; segregation that different groups try and live as separately as possible. Each of these responses, this book argues, seeks to circumvent the tensions arising out of pluralism, and promotes unjust or unstable settlements.

Bellamy advocates a fourth solution: negotiated compromise. He links this approach to a neo-republican political system, which guards against the domination of any values, ideals or concerns over others by dispersing power. The result is a democratic liberalism, which employs the resources of politics to produce mutually acceptable, fair solutions to pluralist dilemmas.

Liberalism and Pluralism critically examines the ways the main schools of contemporary liberal thought tackle the problem of pluralism. Part I analyses the views of libertarian traders, such as Hayek, liberal trimmers, such as Rawls, and communitarian liberal segregators, such as Walzer. Part II defends democratic liberalism, and proposes the political negotiation of compromises as a way of resolving plural conflicts. Part III moves from the ideal to the real, examining three attempts to reform British liberal democracy so as to meet the pluralist challenge: the Citizen's Charter programme, the Human Rights Act and the European Union citizenship. He associates these policies with trading, trimming and segregation respectively, noting how their practical weaknesses mirror their theoretical failings. In each case, alternative proposals of a democratic liberal character show the approach of negotiated compromise to be empirically plausible as well as normatively attractive.

Richard Bellamy is Professor of Politics at the University of Reading. He has written extensively on this topic. Recent works include *Liberalism and Modern Society*, *Rethinking Liberalism* and (as co-editor) *Constitutionalism in Transformation and Pluralism and Liberal Neutrality*.

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For Amy

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Preface and acknowledgements

This book is a sequel to my *Liberalism and Modern Society: An Historical Argument* (Cambridge: Polity Press, 1992), extending the historical argument of that work into the contemporary era. The introduction outlines the main thesis: namely, that liberalism assumes a homogeneous community devoted to promoting a certain pattern of individual development, and that this model is implausible in modern complex and plural societies. Historically liberalism's origins lie in the process of state-building of the nineteenth century and the attempt to create a national political community with shared interests and values. However, pluralism within and without are weakening the coherence and competence of the nation state, forcing it to come to terms with conflicting interests and values. Whereas liberalism has traditionally sought to exclude diversity and difference from the political sphere, we now need to reconstruct the liberal constitutional consensus in terms of a fair compromise achieved through new forms of democratic politics.

I am grateful to colleagues past and present for reading various drafts of the manuscript. John Greenaway, Timothy O'Hagan, John Street and John Zvesper at UEA all offered comments on and criticisms of various chapters or ideas. To the late Martin Hollis I owe a special debt. I learnt a tremendous amount from co-teaching, conversation and co-authorship with him. The central thesis emerged from a piece we wrote together, though he thought I had an excessive faith in politics. At Reading Jonathan Dancy, Barry Holden and especially Andrew Mason have offered similar stimulus and critical advice. Chapters 5 and 8 of the book issue from an ESRC research project on 'Sovereignty and Citizenship in a Mixed Polity' (R000222446) undertaken with Dario Castiglione of Exeter University, discussion with whom has informed and improved much of the argument. Further afield, Peter Jones, Philip Pettit, Quentin Skinner, James Tully, Richard Vernon and four anonymous referees offered encouraging and helpful remarks. I have tried to meet the objections and fill the lacunas raised by these friends and critics, though the inevitable failure to satisfy them remains my responsibility alone.

Once again Louise Dominian has provided invaluable intellectual and emotional

support. Authorship has sometimes meant that I'm as distant when three flights of stairs away as I was when 300 miles separated us, but at least we can now save on the telephone bills. Amy's arrival delayed the finish by adding to the pluralism of her parents' lives and occasionally testing their liberalism. The book is dedicated to her.

Some of the arguments were developed in various articles and chapters. I am indebted to editors, publishers and co-authors for allowing me to draw on the following pieces: "Dethroning Politics": Constitutionalism, Liberalism and Democracy in the Political Thought of F. A. Hayek', *British Journal of Political Science* 24 (1994), pp. 419–41; 'The Constitution of Europe: Rights or Democracy?', in R. Bellamy, V. Bufacchi and D. Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation, 1995), pp. 153–76; (with John Greenaway), 'The New Right Conception of Citizenship and the Citizen's Charter', *Government and Opposition* 30 (1995), pp. 469–91; 'Pluralism, Liberal Constitutionalism and Democracy: A Critique of Rawls's (Meta)political Liberalism', in J. Meadowcroft (ed.), *The Liberal Political Tradition: Contemporary Reappraisals* (Edward Elgar, 1995), pp. 77–100; (with Dario Castiglione) 'The Normative Challenge of a European Polity: Cosmopolitanism and Communitarianism Compared, Criticised and Combined', in A. Føllesdal and P. Koslowski (eds), *Democracy and the EU* (Springer, 1998), pp. 254–84; 'Justice in the Community: Walzer on Pluralism, Equality and Democracy', in D. Boucher and Paul Kelly (eds) *Social Justice from Hume to Hayek* (Routledge, 1998), pp. 157–80; and (with Martin Hollis) 'Compromise, Consensus and Neutrality', in *Pluralism and Liberal Neutrality*, Special Issue of *Critical Review of International Social and Political Philosophy* 1, 3 (1998), pp. 54–78.

Introduction: the challenge of pluralism

Plural societies mean divided loyalties. Different social spheres, attachments, goods and moral codes subject us to competing values and commitments. We recognise these tensions in the rival claims of ideology, ethnicity, gender, religion and locality. We face it in dealing with people and institutions whose outlook differs from ours. We feel it in ourselves, when duties to friends and fellow citizens, family and work, God and Mammon, pull us apart.

Such pluralism permeates modern societies, the mixed blessing of their differentiation and openness. If the accompanying diversity contributes to life's richness, it also produces many of its woes – compelling us to choose between rival obligations, goals, principles and virtues. Growing social and value pluralism also unsettles the theory and practice of politics. Modern states become increasingly heterogeneous as their citizens hold ever more divergent and often incompatible identities, ideals and interests. Public, no less than private, life confronts problematic, and occasionally tragic, choices.

These circumstances place contemporary polities in a dilemma: can they respect plurality yet produce collective agreements that command an uncoerced allegiance? Liberalism has offered the standard solution for western democracies.¹ A response to the religious wars of the sixteenth and seventeenth centuries, it was further refined by the class conflicts of the eighteenth, nineteenth and twentieth. Liberalism accommodates difference by protecting each person's capacity to pursue his own good in his own way to the extent that is compatible with the similar pursuits of others.² Equal rights to liberty are secured through universal, general laws produced by a constitutional framework, democratic institutions and an economic market embodying the requisite balance between freedom and equality.³ Within this basic pattern, rival liberalisms dispute where that balance lies and which institutional mix best achieves it.

Liberalism's philosophical commitment to individual autonomy draws support from an historicist faith in the progress of society. This argument holds that the very complexity of modern societies sustains the liberal account of human agency and flourishing. It supplies the plurality of options needed for an ethos of self-

2 Introduction

definition through choice. Meanwhile, an invisible hand combines the heterogeneous ends pursued by different autonomous agents in mutually supportive ways. In the economic market and the market of ideas alike, competition enriches both participants and the collectivity, albeit to varying degrees. Liberalism and pluralism go hand in hand, therefore. Liberal political and economic forms foster not only the social diversity pluralism entails, but also the type of person capable of exploiting the opportunities this environment offers.⁴

Critics raise three broad objections to this optimistic scenario, suggesting in each case that liberalism's view of pluralism is highly selective and their match less happy than liberals suppose. First, liberalism is accused of an imperialist, Eurocentric bias.⁵ A militantly modern doctrine, liberalism attacked the plurality of local customs and social ranks found in traditional societies.⁶ Such practices appeared to offend liberal justice, with its requirement for uniform laws that fall equally and impartially on all, and were frequently inimical to liberal notions of individuality. An attack aimed at feudalism in Europe, it was also employed against the native cultures of colonised countries. Long-oppressed aboriginal peoples and immigrant victims of racial prejudice, amongst others, argue that multiculturalism remains a liberal blindspot.

Second, past liberals tended to equate the non- or anti-liberal with the pre-modern, a view that often persists implicitly and occasionally even explicitly today.⁷ As we observed, liberals assumed historical progress had inscribed their favoured form of autonomous agency into the very fabric of modern society. Thus Joseph Raz writes, 'personal autonomy ... is an ideal particularly suited to the conditions of the industrial age and its aftermath with their fast changing technologies and free movement of labour'. 'Since we live in a society whose social forms are to a considerable extent based on individual choice, and since our options are limited by what is available in our society, we can prosper in it only if we can be successfully autonomous.'⁸ This belief proves to be misplaced. Non-liberal cultures have been remarkably resilient and in many cases, notably amongst Asian peoples, well adapted to the fast pace of technological and economic change characteristic of modernity, whilst stubbornly resisting liberal conceptions of human flourishing.⁹ Not all the roles and values created by the modern division of labour involve autonomous behaviour. Many spheres of life need discipline, obedience to authority, devotion to duty and so on. Some theorists even suggest the central liberal institutions of democracy and capitalism call upon habits and virtues, such as loyalty, trust and reciprocity, that are threatened by, and involve some moderation of, liberal individualism and its related antipathy to convention and collectives.¹⁰

Finally, the pluralism of values poses the greatest challenge to liberalism, providing much of the rationale for the previous two criticisms. This doctrine argues diverse, possibly incommensurable, and not always practically compatible values are an integral part of all conceptions of the good. Different cultures, ideologies or ways

of life may combine these values and offer valuations of them that depart systematically from those favoured by liberals. Worse, liberal values can also collide when applied to specific cases, and may themselves be incommensurable. I explore this thesis further below. If true, the liberal project is in crisis. Liberalism cannot offer a regulative framework for pluralism. Unless liberty, rights, equality and justice are insulatable from practical incompatibility and value incommensurability, then liberalism cannot hold the ring for groups and individuals and neutrally arbitrate between their competing demands and ideals. Liberalism will be in, not above, the fray. Likewise, an individual's autonomous choices may clash with each other and with those of other people, rather than proving either mutually enhancing or rationally rankable.

This book focuses on this third pluralist critique of liberalism and to a lesser extent the second, referring to the first only in passing and as a parallel instance of these same phenomena. Not only is there a burgeoning literature on multiculturalism and liberalism that I have not wished to replicate, the multicultural perspective unwittingly reinforces a widespread liberal prejudice that pluralist objections to liberalism derive solely from illiberal throwbacks miraculously marooned in the modern world. By showing how the pluralist challenge arises within liberalism and modernity, I hope to correct this false picture.¹¹ In liberal democracies, struggles for recognition by multicultural groups usually follow a similar pattern to those of new social movements.¹² Both desire plural forms of politics that respect their diverse interests, ideals and identities. Their central demand is for modes of citizenship and governance that allow their equitable participation in framing the laws that govern their lives. They seek a politics of mutual respect rather than separatism and the chance to impose illiberal practices on their members or others – not least because they confront pluralism within their own ranks.¹³ Though pluralism *per se* is not necessarily amenable to liberalism,¹⁴ the pluralist phenomena of western societies usually are. However, a genuinely pluralist liberalism must change from being a meta-political doctrine of liberal values to become a democratic politics of compromise.

The rest of the introduction sets the scene for a fuller argument towards this conclusion in the body of the book. I start with a brief exposition of the nature of pluralism – the levels, types and modes of conflict it engenders, their social sources and political manifestations. Then I lay out the book's subsequent exploration of pluralism's consequences for liberal theory and practice.

1 The nature of pluralism

Pluralism has various sources and comes in many guises. It characterises the nature of values and the relations between them.¹⁵ The basic pluralist belief affirms there

are many moral and non-moral values and that in practice they may prove either inherently or contingently incompatible. Strong pluralists add these values are incommensurable too. So conceived, pluralism is not relativism. Different values are matters of knowledge for us: they and their conflicts have objective worth. The plurality of values yields numerous ways of living well, both morally and in the sense of achieving a high degree of personal satisfaction. A good life draws upon and orders various types of value but no one person or society can hope to exhaust or harmonise them all. Different cultural traditions employ the range of human values in diverse and sometimes conflicting ways to construct a wide variety of good lives of a social and individual nature. Even if some ways are better than others, there may be more than one way of equal (or incommensurable) value left to arbitrate between. These conceptions of the good can inform but are distinct from the plurality of moral claims that affect how we relate to these different values. Thus, ties to particular persons and objects collide and divide both groups and individuals. To complicate things further, we also identify values and their conflicts from a plurality of interpretative standpoints. These reflect cognitive and conceptual indeterminacy, and the difficulties of judging which values and claims are in play in specific situations. Pluralism operates at many levels, therefore: between values, between the valuable ways of life that embody and express different valuations of them, between different moral claims and interpretative standpoints. The crux comes when this plurality motivates contrary courses of action, generating conflicts within and between individuals, groups, societies and cultures. Between incommensurable and occasionally contested values and valuations, no choice appears the only reasonable one.

A great deal needs to be unpacked in this summary statement. What are values, when and why do they conflict, what is meant by incommensurability and incompatibility, and how does all of this impact on politics? What follows takes up each of these questions in turn.

Sources of plural conflict

Within the pluralist literature, values range from mere preferences, through interests, goals and goods, to ideals, virtues, conceptions of the good, entire cultures, moral codes, ideas and assumptions. Some refer to objective values, others to the particular combinations and valuations of them found in different forms of life, others still to the ways we relate to, interpret and identify them. Each generates its own type of plural conflict, many of which overlap and are further complicated by conflicts stemming from other sources. Though not offering an exhaustive analysis, I shall indicate how pluralism operates amongst basic goods and conceptions of the good, and between cultures, different sorts of moral claim, values spheres and divergent judgements and interpretations.

At its most basic level, pluralism refers to the diversity of human goods. Whilst there are a limited number of generic human goods and evils, these underdetermine the possible forms of human flourishing. Though some societies pursue a single goal, such as monastic orders dedicated to the service of God, human beings who have conquered the struggle for subsistence generally engage in a range of activities. These involve a wide variety of goods and call upon different sorts of skills and virtues. Some goods are primary, securing basic benefits valued by most individuals and societies, from an adequate food supply to security from certain kinds of physical or emotional harm, such as torture and exploitation. Others are secondary goods that go beyond the bare minimum and are more socially and culturally specific. They reflect the various roles we take on in the home, at work and in other public settings; our personal goals and preferences; the particular intrinsic goods, such as religious values, that we recognise, and so on.¹⁶

Most societies realise the primary goods in some form or another and give them priority over, as preconditions for, the attainment of secondary goods. However, in given circumstances even basic goods clash. Their associated benefits and harms are of diverse and not always compatible kinds. Moreover, they are combined and interpreted in a wide variety of ways within very different and occasionally conflicting forms of human flourishing. Food may be a universal good, yet its meaning and enjoyment varies according to context. When bread represents the body of Christ we treat its distribution and consumption rather differently to when it is the staff of life.¹⁷

No individual can reach perfection in all of the spheres of human endeavour. Quite apart from the unlikelihood that any one person would possess the natural aptitude to be, say, a world class sculptor, a pianist, a footballer, a physicist, a cook and a poet, it is contingently impossible for any individual to develop and exercise all these talents to the full. As a result, we shall face choices as to which human goods we should give priority to. Moreover, proficiency in one sphere may well compete with our ability to perform well or even participate in some other human good. Nor can any society cater for the full range of goods. The benefits of one good may militate against the satisfaction of another, or limited resources mean more social support for some goods is less for others. Thus, the good of democracy gets balanced against security, individual liberty against welfare, health care against the arts, education against defence and so on.

Conceptions of the good and ways of life offer us guidance when making these choices. They prioritise certain ultimate values as deserving special protection or respect. However, pluralists maintain no conception is so complete that the values it contains produce no conflicts. For example, liberals are exercised by conflicts between their fundamental values of liberty and equality. Less formalised 'ways of living well' experience similar problems. Virtuous characters cannot avoid hard choices. All good qualities prove uncombinable in any individual, society or act.

Unfortunately and sometimes tragically, peace cannot be gained with honour, justice tempered with mercy, or love mixed with friendship.

At the same time, these values are themselves internally complex. Thus, liberty can be broken down into numerous liberties that may themselves collide. Negative liberties often conflict with positive liberties, and even negative liberties, such as privacy and free speech, clash on occasion. Libertarians try and avoid these dilemmas by sticking to the bare minimum. However, the most minimalist libertarian will have to adjudicate between rival negative liberties or conflicting property rights.

World views, conceptions of the good and ways of living conflict with each other as well as internally. They often incorporate not only different sets of goods and values, but also value them for different reasons. They can invoke contrasting virtues, views of human nature, moral ideals and basic interests, and involve different perceptions of what counts as good or evil. Isaiah Berlin famously saw such a clash in Machiavelli's juxtaposition of the Christian with the Pagan life as mutually exclusive yet ultimate moral visions.¹⁸ As Machiavelli's twentieth-century heir, Max Weber, put it: the Christian ethic of turning the other cheek is often, 'in mundane perspective':

an ethic of undignified conduct: one has to choose between the religious dignity that this ethic confers and the dignity of manly conduct that preaches something quite different: 'resist evil – lest you be co-responsible for an overpowering evil'. According to our ultimate standpoint, the one is the devil and the other God, and the individual has to decide which is God for him and which is the devil. And so it goes throughout all the orders of life.¹⁹

More prosaically, if no less anguished and fierce, there are the ideologically and religiously motivated battles over issues such as abortion, the role of women in society, the function and justice of welfare and capital punishment, to name but a few examples.

Disagreements between conceptions of the good overlap with, but are distinguishable from, conflicts emanating from different sorts of moral claim: a phenomenon Charles Larmore attributes to the 'heterogeneity of morality' and Thomas Nagel to the 'fragmentation of value'.²⁰ The most cited instance involves potential conflicts between the consequentialist demand that agents maximise the overall good and the deontologist's concern that we abide by certain side constraints forbidding doing some kinds of acts to others, with utilitarians and Kantians the main exemplars of these respective schools. Machiavelli again offers the classic political case in the problem of 'dirty hands'. As he memorably put it 'while the act accuses, the result excuses'.²¹ The tension consists in the deontological accusation remaining notwithstanding the consequential justification, with both positions presenting valid moral reasons. Not surprisingly, utilitarians and Kantians vainly struggle to defuse the conflict by trying to include the insights of the other. H. L. A.

Hart perceptively described contemporary liberal theory as poised uncomfortably ‘between utility and rights’,²² for example, a dilemma we shall encounter in Part I below.

Larmore and Nagel identify a further source of tension in the claims of particular duties. We acquire such obligations through involvement in specific institutions and practices: from the ties of friendship, family and community, to colleagues and fellow citizens, to more abstract commitments stemming from a personal activity, such as an artist’s duty to his or her art. These both constrain the scope of the universal and categorical obligations coming from consequentialism and deontology, and create special duties that can collide more directly with them. Thus friendship can clash with the consequentialist commitment that we always do what is best overall for everyone concerned, because friends by definition care more for each other than those outside their circle. Likewise, spouses need not testify against each other because marriage can conflict with deontological requirements. As we shall see in Chapters 3 and 8, communitarian liberals employ such reasoning to defend the state’s limiting their foreign aid budgets, thereby outraging many utilitarian and Kantian liberals. Of course particular attachments may also collide, and are a potent source of plurality in themselves.

So far we’ve treated morality as a relatively well-defined domain. But its boundaries may be contested and clash with other value domains. The true, the beautiful, the good and the useful do not always go together. Thus, Weber observes how ‘something can be beautiful, not only in spite of the aspect in which it is not good, but rather in that very aspect’, as in Baudelaire’s evocative title *Fleurs du Mal*. He continues:

It is commonplace to observe that something may be true although it is not beautiful and not holy and not good. Indeed it may be true in precisely those aspects. But all these are only the most elementary cases of the struggle that the gods of the various orders and values are engaged in.²³

Life requires non-moral as well as moral goods to go well. Aesthetic enjoyment, health, humour, and job satisfaction are as important to us as justice, friendship, or loyalty. Pluralists question the reasonableness of prioritising the latter over the former.

Judgements, too, fail to form a unitary scheme. Indeed, John Rawls locates ‘the fact of pluralism’ within what he calls ‘the burdens of judgement’. Alongside the impossibility of accommodating all values in any social space, he includes the complex nature of much factual information and uncertainty over its bearing on any case; disagreement about the weighting of values; the vagueness of people’s concepts; the different backgrounds and experiences of different people; and the variety of normative considerations involved in any issue and the difficulty of

making an overall assessment of their relative weight.²⁴ Rawls tries to be agnostic on the issue of whether pluralism is real or simply an appearance beyond which we are unlikely ever to go. Whether such fence-sitting is more or less contentious than straight value-pluralism is unclear to me. I suspect it leads him to take the moral and political conflicts pluralism creates less seriously than he might otherwise have done. Differences of outlook, assumptions and interpretative schema can be conflictual but may also be dropped, adopted or mutually modified. The plurality of judgements fuels much political disagreement none the less. In the form of essential contestability, it can produce disputes about the identity of values and their worth.²⁵ Differing social and normative assumptions, for example, lead libertarians and social liberals to differ over what liberties are genuine and when they clash amongst themselves or with other values. Thus, there can be a plurality of views over what values are in conflict or whether there is any conflict at all.

The character of plural conflict

Plural conflicts possess a singularly intractable character. Some conflicts reflect inherent incompatibilities of a logical nature. Thus, the active and the contemplative life are non-combinable because they invoke incompatible qualities. Other conflicts arise between logically compatible values that prove contingently incompatible for purely practical reasons to do with the way of the world or a given set of circumstances. A happy family life is not intrinsically incompatible with artistic fulfilment, but many artists have found them contingently so.

Logical and practical incompatibilities arise from the moral scarcity, finite resources and limited powers that characterise the human condition. With the exception of Panglossian theists, such as William Paley or Bishop Butler, who contend all has been arranged for the best, albeit inscrutably, and what Steven Lukes calls moral Utopians, who believe it possible to create a perfect world in which the conditions productive of incompatibility have been removed,²⁶ most monists accept that incompatibilities will arise. But so long as the various alternatives can be ranked employing some common measure, principle or general procedure, then such conflicts are resolvable in monistic terms. Pluralism denies this possibility on the grounds that values are incommensurable.

Incommensurability holds that values are neither better nor equal to any other. Incommensurability suggests no common currency, such as happiness, exists in terms of which all values might be expressed and weighed. It also implies that there is no greatest good towards which all human projects should contribute or tend, and against which they might be evaluated. Nor does any other mechanism exist, such as a lexical priority rule, that can provide a weighting of values. Incommensurability issues in a failure of transitivity. Improvements in one value need not make it better or worse than another, and there can be another value better

than the one but not the other. Some theorists even hold that incommensurability makes all comparison – ordinal as well as cardinal – impossible.

Commensuration demonstrates an obtuse misunderstanding of the values in play: at best senseless, at worst inappropriate and even condemnable. Asking if Shakespeare is better than Beethoven, say, is simply meaningless. Treating friends as ways to influence people, to be placed in some cost–benefit analysis against career advancement or simple monetary gain, shows a corrupt and objectionable understanding of friendship. In this case, to commensurate the incommensurable is not so much pointless as to have missed the point. As Raz observes, certain relationships depend on a belief in incommensurability: ‘only those who hold the view that friendship is neither better nor worse than money ... or other commodities are *capable* of having friends’.²⁷

Not all goods or values are incommensurable: we regularly choose items at restaurants on the basis of the quantity of pleasure we derive from eating different things. Nor need all incommensurable goods and values conflict. If I inherit a substantial amount of money, I need never weigh the pursuit of wealth against the enjoyment of those goods and values most other people must reserve to their leisure. Incommensurability only becomes problematic when linked to either logical or practical incompatibility, so that choosing some good or value partially or totally excludes others. Much of the time, the dilemmas so created are relatively trivial. Serious cases involve values that are in some sense urgent and ultimate. Such values are constitutive of or (as with primary goods) necessary for certain objectively valuable ways of life.²⁸ These are claimed either to be good for everyone or intrinsically valuable rather than mere subjective preferences. That you like coffee and your partner tea provides a source of variety and perhaps the occasional domestic quarrel. Antigone’s dilemma of obeying Creon’s law or family loyalty is a tragic choice. Between these two extremes, we face numerous situations where we are conscious of a clash of rights or valuable goals that make doing a wrong or sacrificing some worthwhile good inevitable. Choosing between incommensurable values always involves some loss. As Raz notes, ‘what one gains is of a different kind from what one loses ... and quite commonly there is no meaning to the judgement that one gains more than one loses’.²⁹

In any conflict the clash of incommensurable values usually involves more than one source. Say saving the local library means the swimming pool has to close or not be improved. This conflict may involve not just a choice between the goods of education and health, but also a clash amongst the different ways and viewpoints from which they are evaluated. Indeed, differences of valuation may create the clash in the first place. Whether implementing policies supportive of equal rights for women entails reducing the autonomy of certain associations or communities to organise their own affairs, for example, turns to a large degree on what conception of liberty and equality we hold.

Some pluralists argue that choices between incompatible and incommensurable values can never be rational, though reason may help whittle down the acceptable options. Choice is not meaningless, it can be self-defining and hence of tremendous significance. Weber took this view and in a less flamboyantly Nietzschean way so does Raz.³⁰ However, sometimes concrete reasons emerge from the particular circumstances of a conflict that guide choice without employing a common unit of value. It is to the context of collective choice – the political sphere – that we finally turn.

Pluralist politics

Societies of any complexity will contain diverse social roles, practices, spheres and forms of life, each with their associated conception of the good, virtues and excellences. Particularist ties and identities will multiply and individuals be forced to juggle the obligations and duties of being parents, colleagues, neighbours, citizens, believers and so on. Meanwhile, war, colonisation and immigration have made most societies pluriethnic and multicultural too. Many past societies contained similar kinds of diversity if rarely to the same degree. However, this was usually accompanied by a belief in the natural ordering of different spheres and goods, and the racial superiority of certain cultures over others. The lord was in his castle, the beggar at the gate, each with the duties appropriate to his estate; barbarians were at the borders, civilisation within them. What Weber evocatively called ‘the disenchantment of the world’ has undermined notions of ascribed status suggesting a ‘natural’ fit between individuals or classes of people and given social functions, and undercut racist arguments for moral inferiority.

Pluralism is in many respects both a product of and a problem for liberalism. The liberal commitment to liberty allows the proliferation of particular attachments and a plurality of views and ways of life, whilst belief in fundamental human equality makes pluralism problematic by suggesting we respect different values and allegiances. Modern liberal societies contain numerous sources of plurality, therefore. These produce conflicts between and within diverse groups, individuals, social spheres and types of relationship. It is this highly complicated interaction between the particular ties that bind us and the various other sources of plural conflict, that explains the peculiar difficulties experienced by contemporary politics. Any political issue is likely to involve a whole range of conflicting values, conceptions of the good, judgements and so on that are further reinforced by our divided allegiances to family, party, work, church and community.

Four main responses have attracted liberals. The first proposes we treat different views and values as subjective preferences. We can then reach agreement by trading the resources needed to satisfy them. Values are at best personal opinions, at worst emotive statements designed to give a spurious legitimacy to our inordinate demands

on others. Since politics cannot be freed from such distortions, it must be kept to a minimum by a strong constitution. The market, by contrast, offers a purer medium for social exchange. It responds to the plurality of consumer preferences and allows them to be traded in a fair and free manner. Unfortunately, it is no respecter of the intrinsic value of goods or of their incommensurability to money. Like Oscar Wilde's cynic, market traders know the price of everything and the value of nothing. Their pluralist credentials are suspect, therefore.

A second response seeks a politics of interests beyond ideology and identity. Value differences allegedly make politics impossible. So we must trim them away when debating in public, reserving their expression to private occasions. This strategy also looks to a liberal framework of rights to regulate market and forum and police their boundaries. Most interests, however, are nested within a complex network of goods and values. Neither whims nor detachable from a broader value context, they are either constitutive of or contributory to a certain conception of the good, and embedded in a network of particular relationships. The politics of interests cannot be isolated from the plurality of values and their role within different ideologies and identities. When people pursue their interests, they look not only for resources but also rights and recognition, possibly disputing the adequacy of the liberal framework to provide either.

The third response is segregation, and makes a parallel mistake. This view focuses on the ways particular attachments and conceptions of the good can align themselves in systematic ways so as to bind a group of people around a given culture. Liberal nationalists adopt this approach when using the doctrine of the self-determination of peoples to try and parcel out cultures between states or territorially distinct regions. Where that has not proved possible, similar arguments have underlain consociational systems allowing for segmental autonomy and coalition government within a state for certain ethnic, religious or linguistic groups. Proposals for group representation rights have much the same rationale, whilst corporatist arguments extend the segregationist argument to include identities centred on class, function and gender. These devices enable liberal and non-liberal conceptions of the good to live side by side, and different value spheres peacefully to coexist. Once again, political interaction is fiercely circumscribed. However, we saw pluralism has many sources, some of which operate within cultures. Cultures are unlikely to be homogeneous units, with all their members sharing a coherent and consistent collective identity. A culture or code of any sophistication contains a space for doctrinal disputes and difficult decisions. Most also interact with other cultures and are always cross-cut by various additional sources of pluralism reflecting the normal range of particular attachments and spheres of social activity. In addition to being Muslims and Catholics, people are men and women, husbands and wives, friends and colleagues, citizens and neighbours. Any attempt to isolate a given line of pluralist conflict misses others no less important. At best, segregation offers

only a partial solution to pluralism, at worst it denies it and opens the door to oppression by the dominant elite.

The fourth response sees pluralism as making radical, existential choices inescapable. Weber famously employed this Machiavellian approach to rethink liberal democracy as a way of selecting a politician with sufficient charisma to carry the people and to choose for them. He believed pluralist politics made the rational deliberation on the common good typical of classical models of liberal democracy impossible. However, competitive party democracy has never approached Weber's heroic vision. More often than not, it too has tried either to aggregate, trade or sideline plural demands, showing scant respect for their intrinsic worth.³¹ Joseph Raz extends the capacity for autonomous choice to all. But that is bad news for cultures disinclined towards autonomy, and leaves the issue of how to reconcile conflicting autonomous choices unaddressed. Moreover, the perfectionist arguments he employs to avoid this dilemma suggest a ranking of values as his commitment to incommensurability undercuts.³²

This book proposes a fifth response – democratic liberalism. Pluralism operates not in a realm of abstract values but between specific bearers of value in given circumstances.³³ People discuss particular acts, objects, or states of affairs in a certain context. Such specificities offer sufficient commonalities for choice to be a collective one, and additional reasons that allow us to give each value its due within a mutually acceptable compromise. Choices are made not by comparing values and claims but by asking what is owed to each for the persons involved and seeking reciprocal solutions. Different values involve different responses not different degrees of the same response, and those responses differ in their turn from case to case. When making choices I look for the appropriate response to each of the values, both in their own terms and in that case. E. M. Forster's notorious choice between his friend and his country or J.-P. Sartre's pupil's choice between staying with his mother or joining the Free French appear so intractable through being underdescribed. We want to know how these obligations interact with each other and what they demand, so that we can appreciate the distinctive force of the reasons involved in the dilemma. Compromise finds the complexity of particular ties and sources of plurality an aid rather than a hindrance, since it allows incommensurable demands to be brought together. Value conflicts need not be avoided or confronted through radical choices, but are susceptible to reasonable negotiation.

Instead of shying away from politics, this approach employs political deliberation to clarify the broader context of reasons and negotiate a path through them. The key to this process lies in a political system that avoids domination. Pluralism renders the authoritarian imposition of solutions on citizens unreasonable. As Steven Lukes puts it, once we accept there are no 'uniquely determinate solutions rationally compelling upon all' it follows that 'for the state to impose any single solution on

some of its citizens is thus (and not only from their standpoint) unreasonable'.³⁴ The politics of compromise avoids domination by searching for reciprocal solutions. Within a pluralist polity, liberalism does not frame democracy, excluding, avoiding or segregating putatively intractable types of value conflict. It informs the democratic spirit through which they are discussed.

2 Plan of the book

I proceed to this proposed solution as follows. Part I surveys the three main replies to pluralism given by contemporary liberals. These correspond to the first three responses outlined above. The views respectively of libertarian traders, liberal trimmers and communitarian liberal segregators will all be found wanting, not least in their exclusion of democratic politics. Part II defends democratic liberalism and proposes the political negotiation of compromises as a way of resolving plural conflicts. Chapter 4 discusses the art and Chapter 5 the practice of compromise. Part III moves from the ideal to the real. It examines three attempts to reform British liberal democracy so as to meet the pluralist challenge. These policies correspond respectively to the three types of liberalism discussed in Part I. Trading, trimming and segregating are revealed to have practical weaknesses linked to their theoretical failings. In each case, alternative proposals of a democratic liberal character show this approach to be not just normatively attractive but empirically plausible as well.

I

**Liberal democracy and
the exclusion of politics**

FOR EDUCATIONAL PURPOSES ONLY

1 Trading values: Hayek and the dethronement of politics by markets

The past two decades has been characterised by a diminishing belief in the capacity of the state to coordinate social life, and a corresponding increased faith in the role of the market. Libertarians justify this shift from politics to markets on grounds not just of efficiency but also of legitimacy. In their view, the trading of values and preferences in a market respects pluralism and individual freedom of choice far better than a democratic state can. Indeed, libertarians charge democracy with encouraging excessive state interference with individual liberty and of being inherently partial towards the values and interests of particular groups. The obverse to the libertarian recommendation of the market, therefore, is the limitation of democratic politics.

The practical consequences of promoting markets and marginalising politics are explored in Chapter 6. This chapter analyses libertarianism's theoretical foundations. Few neo-liberal thinkers have examined the connections between the economic and political dimensions of their programme more fully than F.A. Hayek. His elaborate constitutional scheme turns on a set of antinomies reflecting the differences he drew between a market and a political social order, and the need to defend the first from incursions by the second. Unlike the extreme anarcho-capitalist wing of the libertarian movement, he acknowledged some role for the state in the preservation of the market. Consequently, he had to develop a mode of democratic control that was compatible with a market society whilst ruling out those forms of democracy he judged inimical to it. Drawing on the traditional liberal antipathy to factions, Hayek reworked the separation of powers with the aim of excluding so-called 'sinister' interests from the political sphere.

The first two sections of this chapter describe Hayek's account of law and justice and his constitutional proposals respectively. His theory is organised around a distinction between politics and markets that makes the latter alone compatible with individual freedom and the plurality of goals and values that result from its exercise. He associates these contrasting views of social order with two different conceptions of the democratic process, which his constitutional scheme aims to

keep rigorously apart. The third section questions the possibility of this division, a difficulty related to the incoherence of his attempt to devise largely formal and supposedly neutral principles of justice. The fourth section explores the inadequacies of his view of the market as a spontaneous order immune from moral criticism, and of trading as a response to the plurality of values. The chapter concludes by suggesting the coordination and legal regulation of the market within a pluralist society requires a more complex and differentiated version of democracy than Hayek's: one which allows values to be politically expressed and compromises arranged.

1 Two types of social and political order

Hayek contends the rule of law and justice only prove compatible with individual liberty and pluralism when independent of any particular view of human purposes or ends. As John Gray has shown,¹ this conception emerges from a distinctive epistemological position concerning the limits of human reason and gives rise to a fundamental distinction running through his thought between the notion of society as a spontaneous order embodying evolutionary reason on the one hand, and constructivist rationalist theories of society on the other.² These two social models correspond in their turn to a market and a political ordering of society respectively.

According to the theory of spontaneous order, mind and society have evolved together.³ The rules and social institutions regulating human conduct have developed unconsciously through a process of trial and error arising out of our efforts to adapt to and modify our environment, with the most successful prevailing. In Adam Ferguson's phrase, they are 'the result of human action not of human design'.⁴ Hayek maintains our knowledge is embodied in the particular practices in which we engage. However, this tacit knowledge is corrected and refined through our practices being brought into contact with the activities of others through unplanned exchanges. An invisible hand selects from amongst them those best suited to the future progress of the social system as a whole.

As noted, the most significant example of a spontaneous order is the economic market.⁵ Within a market order, individuals pursue a plurality of ends in ignorance of the activities of the vast majority of their fellow human beings and of the social system as a whole. Nevertheless, they are able to interact with each other in an unplanned yet beneficial way, adapting their activities in response to the demands of unknown others through the price mechanism. Each person works within his or her chosen field, largely unconscious of how they fit into the general pattern of social activity or even of the precise nature of the mechanisms which coordinate their relations with others. However, the exchange of goods and services prompt mutual accommodations, so that everyone benefits from and responds to the

knowledge and innovations of others. Though no particular outcome is intended, the dispersed or local knowledge of the whole society is fully utilised, with resources employed more effectively and for an increasing number of purposes.

According to the theory of constructed order, by contrast, mind lies outside natural and social processes and the institutions of society and culture are seen as the product of a designing intelligence. Hayek regards this constructivist rationalism as deeply flawed. He believes no one agency could plan in advance and deliberately coordinate all the multifarious social activities of human beings without being omniscient and omnipotent. Even then, it would be necessary for us to share common moral ends if conflicts between incompatible and incommensurable goals were not to arise.

The difficulties faced by constructivist theories of social order derive not just from the complexity and plurality of human purposes but equally from their open-ended character. Knowledge, in Hayek's account, is dispersed throughout the different individuals and groups that compose society and is of a largely local and practical nature. It reflects the diversity of people's activities, the variety of their circumstances and the range of their goals. Because human beings continually interact with each other, this knowledge and the purposes to which it is put are constantly revised. No human agency could hope to process all this information. Not only is the sheer volume of data beyond human powers, it would be necessary for the social planner to bring all human activity into line with a single moral and practical vision and control the scope for innovation. Otherwise, conflicts will spring up between competing conceptions of the good and projects generating incompatible duties, values and interpretations. A constructed society would be necessarily totalitarian and stagnant, a belief borne out by the socialist regimes of the former Eastern bloc. Just as Hayek equates a spontaneous order with a market economy, so he identifies a constructed order with socialist economic planning. Indeed, he suggests almost any attempt at political intervention in social processes will ultimately have coercive effects, as well as being highly inefficient.

Hayek employs this contrast between a spontaneous and a constructed order to distinguish 'law' from 'legislation',⁶ both terms of art within his theory. Legislation belongs to what he calls an 'organisation' or constructed order, such as a bureaucracy. It consists of commands directed to the achievement of specific ends. Law belongs to a spontaneous order, such as an economic market. He claims it consists of a set of rules that regulate social interaction in a goal-independent manner. These rules are Kantian in form and Humean in substance.⁷ In other words, they are universal, general and abstract, applying equally to all; but reflect the conventions emerging unconsciously from the multifarious practices of agents, most particularly those relating to the making and keeping of contracts and the recognition of entitlements to private property.⁸ These rules have the sole purpose of providing a protected

domain within which individuals can pursue their self-chosen activities with a minimum of conflict with and interference from others. By separating the principles of law from any specific notion of the good, individuals are supposedly left as free as possible to follow a diversity of ends in their own way.

Hayek maintains the small-scale agricultural societies of the past may have corresponded to the model of an organisation and possessed a well-defined hierarchy of purposes and a shared set of values. However, the 'Great Society' of modern times has evolved beyond this stage. A vast and complex international network of freely contracting individuals, contemporary society has the characteristics of a spontaneous order, in which there are no common purposes or possibility of a plan capable of successfully coordinating the multiplicity of individual actions. Such a social system, or *cosmos* in Hayek's terminology, requires a quite different conception of legal regulation to sustain it, one which is independent of any particular ends and simply serves as a framework within which a plurality of agents and agencies can pursue their various unknown purposes. Law alone, in other words, can regulate the modern social world. Attempts to control it through legislation inevitably lead to economic and political disaster. A liberal and plural society has two basic components, then: a free market economy, and a neutral state committed to upholding the rule of law.

Hayek links the gradual subversion of law, which he believes has characterised even the liberal democratic and capitalist states of the west since the end of the nineteenth century, to the pursuit of the 'mirage' of social justice.⁹ Justice, as Hayek conceives it, consists solely of formal rules designed to ensure commercial and other exchanges are free from any intentional and direct physical coercion. It focuses on the procedures governing social interactions, not their results. Social justice aims at achieving a certain end state by promoting a given pattern of distribution. It tries to weigh up various interests and values within a given social context. Whereas commutative justice and negative liberty are consistent with the universal, equal, abstract, goal- and agent-independent character of law, therefore, social justice shares the particularist, partial, concrete and goal-dependent features of legislation. These qualities supposedly make social justice inimical to pluralism by leading it to prioritise certain sets of goods over others.

Hayek regards all attempts to institute social justice as misguided, impossible and illegitimate. They are misguided because social outcomes within a spontaneous order are not matters of justice. They are the unintended and unforeseeable product of millions of human actions. All persons seek to achieve their personal goals, but none can know or aspire to control the ultimate goal of society as a whole. People may buy more of product A than they do of B, with the consequence that the makers of B go out of business and various individuals lose their jobs. That result, however, could not have been determined or potentially foreseen by any single buyer or

seller – they simply followed their personal preference for a given good. So long as all transactions are formally just, any poverty or unemployment that might arise are matters of misfortune rather than injustice. Like natural disasters, no one is responsible for them.¹⁰

Attempts to rectify such bad luck by producing an ideal distribution of resources fail for the same reasons that economic planning fails. They require the central coordination of all social and economic activity. That is only possible by reducing the scope of individuals to act on their subjective preferences, to innovate and to employ their tacit knowledge. It also severs the connection between rewards and services rendered essential to the market's efficiency, replacing it with a set of inevitably distorted incentives that have more to do with the whims of bureaucrats than what people want or might have desired in a world where entrepreneurs could invent new products. Likewise, just as centralised economic planning is not only inefficient but also illegitimate, so is social planning. It, too, requires the closure of society through massive and truly unjust interferences with individual freedom of choice.

Most important, social justice involves the arbitrary imposition of a particular understanding of morality upon people. Hayek maintains there can be no consensus on principles of distribution in a pluralist society. Needs and desert, to take two of the main candidates, relate to different moral outlooks involving incommensurable and, at times, incompatible accounts of human nature and purposes. Each, in addition, can be interpreted in a variety of plausible ways.¹¹ If the state chooses to employ a certain understanding of justice in a given field of social policy, such as health care or income tax, then it necessarily acts arbitrarily, imposing upon people a given rank order of values for which there can be no rational basis.¹² How, for example, do we decide who is most in need of health care – is it the elderly pensioner, with a short life expectancy, or the young child; a single chronic sufferer, or a large number of people with minor but persistent complaints? Similarly, how do we decide who deserves the highest wages? If it is contribution that counts, then how do we work out who has contributed the most to the success of a given product – the inventor, the workers or managers in the factory, the sellers or the advertisers? It is a bit like calculating the relative contributions of members of a tug of war team. Or are effort or merit the relevant criteria? But these, too, are hard to identify and can be understood in diverse ways. These difficulties, Hayek concludes, mean social justice can be secured only at the cost of suppressing the social and moral pluralism that arises within a free society and substituting a contestable ideal set of values for the diversity of ends people actually pursue. Moreover, there will be considerable imprecision about what these values actually entail in practice, so that those in charge of implementing the policy will be given a high degree of discretionary power.

In spite of social justice's incoherence, Hayek considers democracy encourages governments to pursue it. The ideal of social justice legitimises the attempts by various well-organised groups to exploit the democratic system in order to get governments to intervene to protect or promote their concerns. Once the state assumes responsibility for social justice, groups and individuals will call upon it to intervene to secure their supposed deserts or needs. However, given the lack of any objective principles of social justice, these demands will simply reflect the partial interests and values of the petitioners. In order to get elected, however, politicians will seek to gratify as many of these requests as possible. Government commitments will escalate and so will its intervention in economic and social life. Taxes will rise so as to meet these increasingly costly programmes, overburdening an economy that state interference renders ever more inefficient. Thus, democracy risks setting a society on the 'road to serfdom'.¹³ For the corollary of pursuing the mirage of social justice is the transformation of 'law' into 'legislation' as the state gets driven towards the vain attempt to directly coordinate all social and economic life. This development 'necessarily leads to a gradual transformation of the spontaneous order of a free society into a totalitarian system conducted in the service of some coalition of interests'.¹⁴

Moral pluralism, according to Hayek, entails a move away from the political allocation of resources to acceptance of the free market. As an impersonal and non-teleocratic institution, the market is immune from moral criticism and allows individuals to define the good for themselves. We shall explore this contention in the fourth section of this chapter, concentrating for the moment on its political implications – namely Hayek's constitutional recommendations for preventing what he believes are illegitimate incursions by governments into society, and the resulting confusion of law with legislation.

2 The constitution of liberty

Hayek observes that governments possess a dual function. In one respect, they are organisations charged with providing essential public services. Legislation in the form of directives aimed at achieving a hierarchy of ends are well suited to these tasks, and may even encompass the pursuit of a limited policy of positive liberty and social justice – for example, in designing pay scales and promotional criteria in the army. In another respect, however, governments exist to uphold the rule of law by articulating and applying the just rules of conduct necessary for a spontaneous order. Hayek's fear is that to charge the same representative body with both these tasks leads to their gradual confusion and the attempt by government to treat the Great Society as part of its organisation. His constitutional proposals attempt to separate these two powers and to find democratic procedures suited to each of

them.

Hayek's understanding of the relationship between democracy and liberalism is central to his scheme. That 'equality before the law leads to the demand that all men should also have the same share in making the law' is, for Hayek, 'the point where traditional liberalism and the democratic movement meet.'¹⁵ However, the concerns of the two are not the same and liberals and democrats have different views of the function and character of democracy.

The liberal regards democracy as a protective device for guaranteeing the rule of law. It offers a procedure for the peaceful change of government and a check on arbitrary rule by ensuring the coercive power of the state is only employed to secure 'obedience to rules of just conduct approved by most, or at least by a majority'.¹⁶ The democrat sees democracy as a form of popular rule. It offers a mechanism for the aggregation of interests and the imposition of the will of the majority. Though both models involve a majoritarian decision process, they appeal to the majority in very different ways.

In the liberal conception of democracy, the majority do not make law, they 'discover' it in the internalised general rules that underpin the spontaneous order of a Great Society. Democracy is a means for consulting majority opinion. In Hayek's terminology, opinion consists of a set of diffused beliefs about what is right, which reflect unconscious social norms. Opinion is counterposed to interests, which reflect concrete desires for particular policies. Consulting opinion offers a mechanism for updating law in tune with the evolving needs of the social system. This innovation does not involve remodelling the law according to some pre-formed rational schema. Instead, it takes the form of an 'immanent criticism that moves within a given system of rules and judges particular rules in terms of their consistency or compatibility with all other recognised rules' in order to prevent conflicts both internally between rules and externally between particular rules and the facts to which they are supposed to apply.¹⁷ Hayek equates this process to the activity of judges in a common law system, who apply the known and certain principles embodied in case law to new sorts of problems as they arise. The main reason for allowing this function to pass from judges to a popular body is to prevent the legal profession itself becoming the monopoly of a particular interest group or developing partial interests of its own that might subvert the neutrality of law.

By contrast, what Hayek calls 'dogmatic' or 'doctrinaire' democrats see democracy as a system of majority rule in which the will of the people determines the law.¹⁸ He associates this notion with constructivist rationalism and the belief that all law is the product of some will, a perspective, he argues, that underlies legal positivism and its identification of laws with commands. On this account, there can be no superior law to that promulgated by the people or its representatives without setting another will over the popular will. As a result, the democrat regards the rule of law

as authoritarian and undemocratic except when law becomes merged with democratically enacted legislation.

Whereas the first version of democracy is compatible with the liberal desire to limit the coercive power of government by subjecting it to the rule of law, the second is not since there can be no law other than that made by the demos. Hayek contends that when this second version of democracy is unrestrained, it necessarily leads to the undermining of the spontaneous order in the attempt to implement a created order by a tyrannous majority. The Great Society gets turned by degrees into a coercive and inefficient totalitarian regime.

Why is this? Hayek believes that any institution that unites executive, legislative and law-making powers and does not admit to being bound in any way either by tradition or even by its own decisions, has no incentive to pass equitable and general rules of universal application. Instead, it will seek to achieve particular results and to direct the whole activities of society – something which we have seen Hayek believes to be impossible. Such a democracy might be worse than an autocracy. For the decisions of a democratic majority are likely to be more inconsistent and incoherent than those of an autocrat or close-knit oligarchy. In complex and pluralistic societies, agreement, even among a majority, will ‘rarely extend beyond some general principles, and can be maintained only on such particular measures as can be known to most of its members’.¹⁹ In order to gain majority support for its legislative programme, therefore, governments will be forced to engage in bargains and deals with a variety of interest groups. Horse trading rather than substantive agreement on the merits of particular policies decides what measures get adopted, so that ‘the fictitious “will of the majority” emerging from this bargaining process is no more than an agreement to assist its supporters at the expense of the rest’.²⁰ Political parties are united not by any principles, but merely operate as shifting coalitions of organised interests that politicians are forced to palliate.²¹ Democracy slowly degenerates into ‘the name for the very process of vote-buying, for placating and remunerating those special interests which in more naive times were described as “sinister interests”’.²²

Hayek identifies three main consequences of this state of affairs. First, not all groups are equally capable of organising themselves, so that the ends pursued by a legislature in the name of the majority in reality simply serve the select interests of those with greatest access to political power. Hayek’s main example of this distortion is the ability of certain trade unions in particularly crucial industries or services, such as the railways or electricity, to use their bargaining power to secure better wages and conditions than other workers, such as university teachers, who can neither organise themselves so well or who have not got the same positional advantages. Second, the competition between parties for electoral support leads politicians continually to extend the reach of the state in order to increase their

sources of patronage and hence their ability to bribe various coalitions of interests into voting for them. Third, the end result of this process is a rag bag of measures that 'not only is not wanted by anybody, but that could not as a whole be approved by any rational mind because it is inherently contradictory'.²³

Hayek maintains that the liberal's and the democrat's views of democracy have been illegitimately fused in modern states. This confusion has occurred because government, in the narrow sense of administration, has become tied up with rule-making. However, these are distinct and largely incompatible tasks. Agreement on common values is insufficient to determine a concrete programme of legislation. The direction of government policy 'demands the continuous support of the executive authority by an organised majority committed to a coherent plan of action'.²⁴ As we have seen, in Hayek's view such support 'will not be an expression of common desire for the particular results to be achieved, ... it will generally rest on the consent of the several groups to particular services rendered to some of them in return for other services offered to each of the consenting groups'.²⁵ Once the people who administer the resources of government also come to determine how much of the total resources the state ought to control, then 'the laying down of universally applicable rules of just conduct' will gradually be subsumed under 'the allocation of particular means to particular purposes', with the dire consequences we noted above. Governments 'will be driven to use their power to organise ... all the resources of society, including the individual's, to serve the particular wishes of their constituents'.²⁶ In the process, they will progressively substitute a constructed order serving organised interests, with all its attendant problems, for the spontaneous order of the Great Society. Summing up, Hayek remarks that 'to leave the law in the hands of the elective governors is like leaving the cat in charge of the cream jug – there soon won't be any, at least no law in the sense that it limits the discretionary powers of government'.²⁷

The only way to prevent government becoming a prey to special interests and adopting totalitarian policies in this manner, is to limit the powers of government by restricting the scope for which it can use its coercive powers to raise resources and organise people so as to deprive it of the ability to grant discriminatory benefits to groups or individuals. In essence, this means bringing government within the boundaries of the rule of law. Hayek's conception of limited government is quite different from and does not necessarily entail the minimal state advocated by some libertarians, such as Nozick.²⁸ Hayek acknowledges that there are a whole range of issues, such as the supply of public goods and the control of externalities, where market incentives fail to work adequately and government action is necessary. Indeed, Hayek observes that in advanced industrial societies such governmental responsibilities tend to grow rather than to diminish. These services range from defence and police protection to the provision of various kinds of collective goods,

such as a transport infrastructure, education, some welfare and disaster assistance.²⁹ However, many services can be regulated and initiated without being run by government. Though governments must ensure funds are raised and these services provided, neither of these tasks need involve government agencies directly.

Examples include education and transport. Universal basic education might be met through a voucher scheme rather than state schools and a motorway system can be funded through a system of toll roads constructed and managed by private operators. Such refinements, however, have more to do with efficiency than principle. Restricting the volume of governmental activity is not his main focus but a by-product of his suggestions for limiting its character and extent. The criteria Hayek employs for this latter purpose derive from the attributes he ascribes to law as a system of general, universal and abstract rules. These criteria exclude, in Hayek's opinion, legislation either directly aimed at particular people or the use of the coercive power of the state for the purpose of such discrimination. In particular, they rule out redistributive measures and attempts by governments to directly manage the economy, including control of the money supply. Taxation for essential government purposes, for example, is to be proportionate to income rather than progressive so as to be capable of being universalised.³⁰ Hayek even advocates that the methods for raising revenue be decided on separately from considerations of the cost of particular programmes a government might seek to sponsor.

To keep government within the bounds of the rule of law, Hayek puts forward a novel constitutional scheme. He believes democracy as 'majority rule' became the dominant conception because of representative assemblies taking on the powers of absolute monarchs – a change embodied in the doctrine of parliamentary sovereignty. Traditional constitutional mechanisms for limiting government through the separation of powers have been rendered largely redundant by this development, which has united executive, legislative and to some degree judicial power in the hands of the ruling administration. Hayek proposes a new tri-cameral system to remedy this problem, in which a 'governmental assembly' would be entrusted with administration and what he earlier called 'legislation', what he confusingly calls a 'legislative assembly' would be charged with the continual task of gradually improving the general rules of just conduct or 'law', and a 'constitutional court' would be concerned with periodic changes in the semi-permanent framework of the constitution and the mediation of conflicts between the other two assemblies.³¹ It is worth noting that while the detailed proposals assume a nation state, he sees the basic model as being appropriate to a federated global system in which the legislative assembly and constitutional court would be international bodies and the government assemblies highly localised 'quasi-commercial corporations competing for citizens'.³²

The basic purpose of Hayek's scheme is to separate governing from law-making and to subordinate the first to the second, a separation achieved through the

division of labour between the governmental and legislative assemblies. He assigns what he believes to be the democrat's, or instrumental, idea of democracy to the first chamber and the liberal democrat's, or intrinsic, version to the second. The governmental assembly's need to mobilise popular support around a particular set of measures makes it appropriate that it should be guided by the *will* of the majority. Hayek believes the competitive party system is well suited for this function, since it provides a highly effective mechanism for log-rolling disparate interest groups together and creating a majority package amongst a highly diverse electorate. However, he does remain wedded to the 'old argument' that government employees and all others who receive some form of support from the state, such as pensioners and the unemployed, should be disenfranchised. That such groups 'should have a vote on how they should be paid out of the pocket of the rest, and their vote be solicited by a promise of a rise in their pay, is hardly a reasonable arrangement'.³³ Moreover, this body's activities must be constrained by the framework of rules laid down by the legislative assembly.

This latter body operates according to a very different logic, one which reflects the *opinion* of the majority. In traditional liberal fashion, Hayek wants to guarantee this assembly is composed of independent individuals, free from considerations of personal or group interest or strong ideological conviction. They are to be Weberian '*honoratiros*, independent public figures'.³⁴ This concern leads him to suggest that membership should be limited to 'mature' individuals aged between 45 and 60, who are elected for a 15-year term after which they serve 'in such honorific but neutral positions as lay judges, so that during their tenure as legislators they would be neither dependent on party support nor concerned about their personal future'.³⁵ He proposes that one-fifteenth of the legislature be elected every year by those members of the population currently in their 45th year, ideally by some indirect method whereby citizens vote for an electoral college who choose the legislators. To overcome class and social antagonism, he suggests making age the most significant focus of political identification, anticipating the formation of national cohort clubs in which members drawn from all sections of society will discuss political issues and acquire a civic education.³⁶ As an additional safeguard to secure the independence of these '*nomothetae*', persons who had served in the governmental assembly or in party organisations would be ineligible for election.

This assembly's function consists in the articulation of the moral norms, 'the views about what *kind* of action is right or wrong', that underpin a liberal market order.³⁷ These norms involve general rules of just conduct that are essentially negative in character and help uphold a protected domain within which 'all can use their abilities and knowledge for their own ends so long as they do not interfere with the equally protected domains of others'.³⁸ It might be thought that this role could be served by a Bill of Rights. Although Hayek initially favoured some such

scheme,³⁹ he rejected it in his later writings. First, he feared attempts to list all the fundamental rights that must be protected to prevent arbitrary power risked falling into the error of constructivist rationalism. As societies develop, certain kinds of protection may become inappropriate and other unforeseeable exercises of freedom deserving of protection arise. New technology, for example, has dramatically altered our notions of privacy and freedom of speech in these respects. Second, all rights require interpretation within the spirit of the law in order to prevent conflicts of rights developing. To hand over this task to an unrepresentative and unaccountable judiciary reproduces in the legal context many of the problems associated with centralised planning in the economy. Their decisions may well suffer from professional bias and be insufficiently responsive to changing circumstances.

Hayek's legislative assembly attempts to get around these difficulties by providing for what John Gray has called 'a common law *Rechtsstaat*'.⁴⁰ This chamber tries to mirror the way common law judges discover what justice demands in the ever fluid and complex developments brought about by the spontaneous order. At the same time, it has the capacity to correct instances of spontaneous disorder through a process of internal critique designed to maintain the coherence and stability of the system of law as a whole. Finally, through judicial review it can constrain the activities of the governmental assembly within the boundaries of the rule of law whilst responding to the new exigencies of the times which might lead an administration to use its coercive powers to raise revenue to correct market failures of one kind or another. Although the determination of administrative policy (and hence the volume and direction of expenditure) would be a governmental matter, the kind of law requiring the conformity of the population that could be passed, including the means adopted for raising taxes, will have to be consistent with the general and uniform rules laid down by the legislative assembly.

Hayek believes that his constitutional model will secure 'the containment of power and the dethronement of politics' more effectively than traditional liberal checks and balances have done.⁴¹ The key to its alleged success resides in it having dissolved the paradoxical relationship between democracy and liberalism. For his legislative assembly does not lay claim to being a sovereign body which expresses any superior 'will' to the 'popular will' of the governmental assembly. Rather, it subjects government to a 'predominant opinion on the principles which ought to govern and restrain individual conduct'. This opinion is independent of any specific ends, interests or rational programme. It merely expresses widely dispersed views intrinsic to the operation of the Great Society.⁴²

In the following sections, I shall argue that Hayek's attempt to circumvent and circumscribe politics by deriving legal principles from social processes proves too neat. Hayek's argument is both circular, in that the legal principles are said to derive from the very process they make possible and in part create, and vulnerable to

sociological criticism as implausible within modern pluralist societies. His attempt to separate law and legislation and the associated distinction between intrinsic and instrumental democracy fail for similar reasons. Outside small-scale homogeneous communities, political and legal decision-making necessarily involves a mixture of both.

3 Law, legislation and the paradoxes of liberty

The central claim of Hayek's conception of the rule of law is that in pluralist and complex societies we require a neutral framework of law capable of facilitating human interaction in a way which allows individuals the most extensive freedom consistent with allowing an equal degree of liberty to all. The problem with this doctrine is the normative and practical one of how we decide between different sets of conflicting liberties so as to arrive at the greatest possible liberty on balance.⁴³ What metric do we use to sort out the potential clashes between, say, freedom of association and the freedom not to be discriminated against, or between freedom of speech and the freedom of privacy, so as to increase freedom over all? Can any one of these liberties be judged greater or lesser than others? Practically, such choices are unavoidable. They arise, for example, in legislation aimed to secure equal opportunities and freedom of information respectively. In these sorts of cases, prioritising liberty in itself proves indeterminate, for many sets of equal liberties could be assigned consistently to all people, with each set emphasising some liberties at the expense of others. Thus, judgements about the greatest liberty are necessarily qualitative rather than quantitative. They can only proceed on the basis of some view of the value of different human activities, which regards certain liberties as being more intrinsic to human flourishing and well-being than others.

Hayek wants to steer clear of such controversial evaluations because they threaten the whole liberal constitutional project as he conceives it. If no non-normative objective ideal of liberty exists, then claims to uphold the greatest possible freedom within the framework of the rule of law will depend either on some substantive account of essential human interests, the hallmark of a positive account of liberty and most constructivist theories, or on differing subjective understandings of the relative importance of various liberties, which are themselves likely to collide. In this latter instance, it may not be possible even to agree when conflicts between liberties occur, let alone to resolve such disputes in an objective manner. In this case, it would be hard for Hayek to argue that the constitutional framework cannot be a legitimate matter of instrumental democratic bargaining and horse-trading between groups holding differing preferences and values.

Hayek attempts to circumvent this difficulty in two ways, neither of which is satisfactory or completely compatible with the other. In part, he relies on a social

thesis which sees the rules and norms regulating societies as the spontaneous products of human interaction. Conventions emerge to resolve coordination problems and remove uncertainty, with the most functionally adaptive with respect to the needs and circumstances of a particular society's members surviving through a process of natural selection. Hayek develops this thesis in his theory of the market as a spontaneous order or 'catallaxy', composed of free exchanges between independent individuals serving their mutual wants.⁴⁴ However, we have seen that Hayek is not so sanguine that he believes a liberal polity will automatically emerge from the evolutionary process so long as it is left alone. The coordination of spontaneous orders can break down, for example as a result of prisoners' dilemmas generating negative externalities.⁴⁵ These failures may not be rectified by market forces alone, since often the structure of rights and entitlements supporting the market either rules out such transactions or makes them uneconomic. Stable but inefficient equilibria may also develop which are essentially at odds with a free market system. Without some intervention both to secure those public goods necessary to the functioning of the market itself, and to eliminate the public bads generated by its own unregulated operations, the spontaneous order gives way to disorder.⁴⁶

These difficulties lead Hayek to develop a philosophical defence of liberalism capable of defining and protecting those rights essential to the freedom of individuals, whilst allowing legitimate government interference to protect individual liberty overall.⁴⁷ As we saw, for this philosophical thesis, he turns principally to Kant. He argues that each individual should be guaranteed the maximum degree of freedom compatible with an equal liberty for all. Again following Kant, he insists that this goal is best secured by a legal framework consisting solely of universal rules of just conduct, protecting a recognisable private domain of individuals.⁴⁸

Hayek believes the social and the philosophical aspects of his doctrine are mutually supporting, the one implying the other. Clearly, he expects the law-makers of his legislative assembly to employ a mixture of both. On the one hand, they adopt the social thesis by consulting the implicit norms present within the prevailing 'opinion' of society. On the other hand, they deliberate along the Kantian lines specified by the philosophical thesis by seeking to adjudicate between and give expression to these norms in terms that are universalisable. However, whilst in some respects these two theses and the types of deliberation they invoke are interdependent, in others, they are incompatible.⁴⁹

The social thesis holds the role of reason in social life must be severely circumscribed. The philosophical thesis offers a systematic defence of the liberal order on rational grounds. Thus, the second thesis contradicts the anti-constructivism of the first. Hayek appears caught in a dilemma, yet he cannot escape it. For the first thesis's claim to derive liberalism from the discovery of a

spontaneous order in social affairs, can only be sustained within the context of the moral theory contained in the second thesis. Only the latter is capable of identifying a specifically liberal set of individual entitlements and of justifying them as essential to the very nature of a social order as Hayek conceives it. In itself, the social thesis leads not to liberalism but to a form of traditionalist conservatism Hayek explicitly repudiates. As Hayek points out, for the liberal: ‘the decisive objection to any conservatism which deserves to be called such ... is that by its very nature it cannot offer an alternative to the direction in which we are moving. ... It has, for this reason, invariably been the fate of conservatism to be dragged along a path not of its own choosing’.⁵⁰ Since the social thesis cannot point in an explicitly liberal direction, it must be supplemented by a philosophical thesis which does. But in this case, the philosophical thesis cannot be derived from the social thesis, as Hayek claims; rather, it provides its normative basis and preconditions.

These tensions come to the fore in his theory of liberty and its relationship to the rule of law. From the perspective of his social thesis, Hayek appears to adopt a ‘negative’ conception of liberty as simply ‘the absence ... of coercion by other men’. On this view, our freedom suffers no restriction even if our options are few and unattractive, so long as no person has intentionally and directly limited them so ‘that the conduct that the coercer wants me to choose becomes for me the least painful one’. Accordingly, for Hayek ‘the penniless vagabond who lives precariously by constant improvisation is ... freer than the conscripted soldier with all his security and relative comfort’⁵¹ – a thesis basic to his defence of the market as a realm of freedom. He argues that ‘while the uses of liberty are many, liberty is one. Liberties only appear when liberty is lacking’.⁵² As a result, he regards the trading off of certain liberties against others as incoherent. Since liberty is a unitary concept, it can only be increased or diminished. However, this argument is only tenable on the basis of either an implicit teleology supplied by the social thesis, whereby different life plans are invisibly harmonised, or a strongly normative or ‘positive’ view of what counts as liberty supplied by the philosophical thesis. Otherwise, for reasons given above, conflicts between different sets of compossible liberties will arise, which because of their incommensurability cannot be weighed up against each other.

Not surprisingly, when we turn to Hayek’s philosophical defence of liberty, we discover he employs a positive notion of freedom of the kind his social theory condemns. Hayek opposes coercion on the largely Kantian grounds that it ‘eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another’.⁵³ Unqualified, however, this definition potentially renders all transactions coercive, including commercial ones. Some criteria are needed to distinguish coercion from the usual terms and conditions some one might set for providing a service to another.

Hayek makes two suggestions to get around this difficulty, both of which lead him to introduce the sort of normative considerations he formally disavows. First, he argues that ‘so long as the services of a particular person are not crucial to my existence or the preservation of what I most value, the conditions this individual exacts for rendering these services cannot properly be called ‘coercion’’.⁵⁴ But, as Ronald Hamowy notes,⁵⁵ this argument increases Hayek’s problems since what count as being ‘crucial to my existence’ or the ‘preservation of what I most value’ potentially turn on the agent’s own highly subjective judgements. In which case, individuals can raise or lower the degree of coercion they perceive to exist in society simply by broadening or narrowing their range of important values. Second, he suggests that we need to make a distinction between a positive command obliging us to perform a specific act and a prohibition deriving from a general rule.⁵⁶ Whereas the former is coercive, the latter is not because I can know beforehand that if I place myself in a particular position I will be coerced and generally avoid this circumstance arising. Furthermore, he claims that ‘in so far as the rules providing for coercion are not aimed at me personally but are so framed as to apply equally to all people in similar circumstances, they are no different from any of the natural obstacles that affect my plans’.⁵⁷ The weakness of this thesis is well brought out by Hamowy’s sarcastic observation that ‘hence, one could regard a gang-infested neighbourhood in the same way as a plague-infested swamp, both avoidable obstacles, neither personally aimed at me and therefore not limiting my freedom’.⁵⁸

The indeterminacy of Hayek’s conception of freedom affects his theory of the rule of law and forces him to adopt a less procedural argument. As he notes, coercion ‘cannot be altogether avoided because the only way to prevent it is by the threat of coercion’.⁵⁹ Practically, the solution is to confer a monopoly of coercion on the state. But to avoid arbitrary rule, a line needs to be drawn between legitimate and illegitimate coercion. Hayek adopts Kant’s solution to this question, and argues that laws are only legitimate if they are universalisable so as to apply equally to all. Indeed, again following Kant, he maintains ‘that when we obey laws, in the sense of general abstract rules irrespective of their application to us, we are not subject to another’s will and are therefore free’.⁶⁰ As John Gray remarks, Hayek’s argument closely resembles the central tenet of positive conceptions of liberty – namely, that we are only free when we obey the general will, and hence what Hayek calls ‘true law’ cannot limit freedom.⁶¹ Indeed, as we shall see, there is a strong Rousseauian flavour to Hayek’s whole legislative scheme.

Hayek strives to get around this problem, but his solutions only compound his difficulties. For example, he tries to avoid the charge of constructivism by stressing the formalism of the Kantian test of universalisability.⁶² There are three broad ways of interpreting this injunction, all of which Hayek employs at one time or another.⁶³ The first involves avoiding any reference to proper names or indexical terms. However,

with a little ingenuity numerous injunctions totally incompatible with individual liberty in either the positive or negative senses can be made to pass this criterion. Nor does it determine adequately the protected domains of individuals, within which they cannot be coerced and outside which they have no absolute entitlement to stray.⁶⁴ As feminists have pointed out in criticising liberal notions of formal equality, for example, this test lets in all sorts of clearly biased and unfair rules that can implicitly discriminate against particular groups.⁶⁵ Second, universalisability can be interpreted to mean that rules must be impartial between people's mental, physical and material resources, so that one would be prepared to accept them whatever one's place in society. However, even assuming real people outside of a Rawlsian style 'veil of ignorance' could achieve this degree of detachment from their actual roles, this argument still allows universal rules that favour some preferences and values at the expense of others. So, a third more stringent test of universalisability is needed, namely that maxims must give equal weight to all points of view. The trouble with this suggestion is that it risks making the criteria so strict that it is hard to imagine any law proving acceptable.

Hayek's other possible solution creates similar difficulties. This reading, propounded by Gray, suggests that Hayek's theory be seen as a form of indirect utilitarianism, in which a social system incorporating certain kinds of individual rights and liberties is valued for its conduciveness to the maximisation of human welfare.⁶⁶ This interpretation potentially fills a gap in Hayek's evolutionary social theory, namely the absence of any criterion of the function of social institutions. Hayek can be seen as offering a number of candidates for this role, referring at various points to the beneficial consequences of a liberal regime in terms of increased population, material prosperity and human progress.⁶⁷ However, he makes an implausible utilitarian. As Kukathas has stressed,⁶⁸ the strongly anti-rationalist stance of his social theory, with its antipathy to all constructivist ethics, rules out even the most sophisticated forms of utilitarianism. Hayek rejects totally the possibility of any sort of end-state comparative judgements concerning human happiness or preference satisfaction, vital for utilitarian doctrines of all kinds. From the standpoint of his social theory, the chief virtue of the liberal order is not that it promotes any given goal but that it simply enables human beings to adapt to an ever changing environment, the moral quality of which remains an open question. Since preferences are moulded in the evolutionary process, '[p]rogress in the sense of the cumulative growth of knowledge and power over nature is a term that says little about whether the new state will give us more satisfaction than the old'. Progress, according to Hayek, is simply 'movement for movement's sake' rather than an advance to some putative state of human fulfilment – a definition which would be radically at odds with his liberalism. Nor can knowledge of the general character of this process enable us deliberately to construct the conditions most

amenable to its unfolding. For human reason itself is a product of evolution and hence 'can neither predict nor deliberately shape its own future'.⁶⁹ Once again, the attempt to provide a philosophical defence of the liberal social order is undercut by the social thesis which denies the validity of any such undertaking.

These considerations undermine Hayek's constitutional scheme. The role allotted to Hayek's legislative assembly requires that there is a greater fit between the social and the philosophical aspects of his theory than he himself considers possible. If the law-makers are to frame the law in Kantian terms, then for the Kantian test of universalisability to produce widely acceptable determinate outcomes it will be necessary to assume a common good amongst the members of the community. In a sense, Hayek's Rousseauian banning of factions from this chamber and his attempt, via cohort clubs, to foster a sense of civic purpose amongst its members, all seek to achieve this result. But he himself admits that in modern societies such agreement on ends is highly unlikely. Yet, without some sort of consensus on a more comprehensive morality than he regards as either likely or desirable, the appeal to universalisation will either be vacuous or yield rules that to many groups or individuals appear totally arbitrary.

Similar objections arise with Hayek's second model of legal reasoning, that of immanent critique. This method informs his account of the evolution of the common law through the various decisions of judges and, along with Kantian universalisability, guides the decisions of his law-makers. However, this thesis makes Hayek sound like Hegel. And as Michael Rosen has shown in his analysis of Hegelian philosophy,⁷⁰ the internal logic of immanent critique is vulnerable to what he calls the '*post festum* paradox', namely the paradox of only being able to evaluate the results of immanent critique by depending upon the validity of these same results. The sole escape from the circularity of this argument is to assume history or social evolution involves the progressive unfolding of truth. In Hegel's system this role is played by the concept of *Geist*. Hayek's grounding for his apparent faith in the cunning of reason increasingly became an equally contentious social Darwinism. His later writings justify liberalism and capitalism as evolutionary necessities rather than by reference to the principle of freedom.⁷¹

Neither the social nor the philosophical theses can provide a determinate content to Hayek's notion of the rule of law without surreptitiously drawing on the sort of substantive moral reasoning he disavows. Consequently, there is nothing in Hayek's theory to curb government intervention in social life, since this could always be reconciled with the purely formal Kantian criteria of universalisability or presented as a necessary adaptation to the evolving needs of society. Indeed, for the same reasons it would be hard to resolve the jurisdictional problems between Hayek's two main chambers and decide what belongs to the province of legislation and what to law. As a result, his distinction between two forms of democratic decision-

making would also collapse.

4 Markets and the need for politics

The same criticisms I have levelled at Hayek's account of the rule of law also undermine his presentation of the market as a non-coercive institution that cannot be legitimately interfered with. As we saw in the first section of this chapter, Hayek argues the inequalities and poverty that may follow from market transactions are an unintended consequence of individual choices rather than the product of deliberate human actions aimed at particular persons. So long as everyone has abided by the general rules of law, no infraction of individual freedom or injustice is involved. This thesis rests on a view of liberty and a related notion of coercion which we have now shown to be highly contentious. Hayek's belief that liberty and justice are only involved when an assignable individual has intentionally and directly acted so as to bring about a given distribution cannot be treated as morally neutral. Rather, it rests on a somewhat narrow and certainly contestable understanding of moral responsibility.

Even Hayek has doubts in the case of a monopolist of a vital resource, such as a water hole in a desert. He admits that even if the monopoly was achieved in a formally just manner, the owner should be prevented from using the resulting power to coerce others by refusing them access – a point which leads him to introduce some notion of vital human interests into his argument.⁷² Nor is it clear that either intentionality or a direct causal relation for a certain state of affairs are necessary conditions of moral responsibility. A reckless driver may not have intended to kill his victim, but we hold him responsible if an accident was a foreseeable result of his actions. The onlooker may not have personally weakened the hand rail at the top of the tower, but many would hold her culpable if she knew of the danger, yet omitted, at little or no personal cost, to warn the children who fell to their deaths after holding on to it so as to lean out and get a better view. Likewise, market exchanges may not be intended to disadvantage any particular individual, but it is perfectly foreseeable that they may have disagreeable consequences for specific groups of people. It is likely, for example, that the relative position of the poorest section of the community will deteriorate under market distributions. Just as Hayek's case for markets partly depends on their being broadly more successful than central planning at promoting people's economic welfare, so the case for redistribution can point to the likelihood that unemployment and a falling differential standard of living will strike some people, even if no one in particular has been targeted, and that we have a responsibility to guard against such predictable events.⁷³ In which case, the operation of markets cannot be immunised from moral criticism and governments have to confront the issue of social justice. That can be achieved partly through

'law'-like considerations aimed at ensuring the justice of what John Rawls calls 'the basic structure of society' – the background conditions and social context within which market transactions take place.⁷⁴ Measures can be instituted providing a safety net for certain categories of people, for example. But as Hayek notes, no welfare system can avoid using discretion and making policies of a special or particularist nature, relating to the specific circumstances of the case at hand. Law and legislation will become mixed, therefore, and legitimately so.

A Hayekian might grant that welfare and other considerations warranted setting up a state scheme in areas where markets fail, yet still argue such arrangements are best handled in a quasi-market manner – through the provision of vouchers for health, housing and education, say. The reasoning here relates to the supposed superiority of market over political allocations in terms of efficiency and responsiveness to people's preferences. It might be thought those virtues would be particularly in evidence once the distortion of unequal resources had been removed, as vouchers would do. This thinking informs the attempt to devise internal markets within education and the National Health Service in Britain, and will be discussed in Chapter 6. Here I shall merely make some general critical remarks.

The supposed advantages of markets rest in part on the assumption that they respond best to the basic pluralism of modern societies. This claim may be questioned on a number of counts. For a start, the assumption that all values can be seen as expressions of subjective preferences trivialises the nature of pluralism. Moral conflicts are so intractable because they involve a clash between *objective* goals, values and types of reasoning which are independent of the will or inclination.⁷⁵ Similarly, the normative individualism of market theories is no respecter of collective goods, as early conservative and socialist critics of capitalism who bemoaned its destructive impact on tradition and social solidarity pointed out. Such criticisms have come to seem ever more relevant in recent years, and have been added to by certain religious and ethnic groups wanting to stress the worth of forms of life where individual choice plays little or no part. More important, the market reduces all goods and values to a common medium of exchange, namely money. This process of commodification goes hand in hand with the diffusion of a market ethos that imputes a certain form of self-interested, utility-maximising agency to individuals in all spheres of activity. In many areas, such as sport, health or education, such incentive structures may be totally inappropriate and actually distort the nature of the good being delivered. Michael Walzer has been a particularly astute critic of the individualist bias of markets and of the imperialist extension of the market ethos into all spheres of social life, and we shall examine this criticism further in Chapter 3. Finally, justifications for the market tend to be on the basis of either utilitarian considerations that stress its economic productiveness, or rights-based arguments usually related to the individual's right to private property. Hayek employs both at

different times. We noted in the introduction, however, that the heterogeneity of morality is such that neither of these types of moral claim tells the whole story.⁷⁶

Preserving pluralism, therefore, may entail preventing the market's incursion into all spheres of life in order to protect a wide range of goods and practices that might otherwise be distorted, and to preserve the justice of the basic structure of society. As economies expand and become more complex, so the role of the state is likely to grow. Governments now watch over and provide a wide variety of public services and have responsibilities for matters ranging from energy policy and macroeconomic management to welfare and environmental protection. Even Hayek half accepts such growth as an evolutionary necessity of modern economic and social systems. He acknowledges, for example, that public regulation, if not direct state intervention, will be likely to increase in modern economies in order to provide the social infrastructure, preserve public goods, protect against externalities and generally police markets in ways that are essential for the smooth running of private production and distribution.⁷⁷

Hayek rightly notes that this expanded role for the state requires a rethinking of democracy. Adequate democratic mechanisms are needed not only to control the state apparatus, as he maintains, but also to make it responsive to the concerns of the people. However, Hayek's scheme does not work. His attempt to distinguish the formulation of general norms from the pursuit of particular interests overlooks the manner in which the two increasingly interact as societies become more complicated and pluralistic, and governments are forced to take on the difficult task of making concrete policies that reconcile numerous conflicting demands. That poses the issue of whether law and legislation can be coherently blended without the first being simply absorbed by the second and the state swelling into a bureaucratic monolith controlled by a self-serving clique, as Hayek claims it will.

5 Democracy and the compromise of law and legislation

Hayek's antagonism towards the everyday practices of democracy reflects a largely 'public choice' conception of politics, in which politicians and voters are rational self-interested maximisers. According to this view, the differential costs and benefits of organised action between different groups of electors creates a systematic bias in the political system, in which the unorganised majority end up carrying the burdens of self-serving pressure-group activity by well-placed minorities.⁷⁸ He counterposes to this political version of democracy an alternative apolitical understanding of the democratic process, according to which disinterested independent agents formulate general rules. However, this opposition is overdrawn. We have seen that the latter view proves far too ambitious outside of small-scale homogeneous societies, whilst the former view notoriously misrepresents actual

democratic practices, failing even to explain the ideological motivations and sense of citizenly duty required to account for why anyone would vote in the first place.⁷⁹

Hayek's distinction between two forms of democracy rests on a supposed contrast that he sets up between decisions based on the pushing and shoving of interests and norms arising out of discussion.⁸⁰ However, a third view regards the two as being linked in the formation of compromises.⁸¹ A compromise reflects neither a coalition of interests nor a universal principle capable of being wholeheartedly endorsed from all points of view. Rather, it arises out of a contingent agreement on both maxims and policies between a variety of existing preferences and values, requiring recurrent updating in the light of changing circumstances as part of a continual process of mutual accommodation. The resulting rules share the characteristics of 'law' and 'legislation'. Traffic regulations, for example, have elements of generality designed to ensure fairness and secure the benefits of cooperation equally for all (e.g. 'drive on the left'), but are also determined in part by considerations of expediency and an attention to both procedural correctness and certain substantive purposes (e.g. decisions about speed limits and their enforcement, which usually allow for a number of exceptions). Indeed, all government regulation has these dual features. For if, as Hayek insists, it would be impossible to direct centrally all the activities of a complex society, it appears equally problematic to employ solely abstract procedural norms possessing no determinate content. Moreover, the fact of pluralism within the modern world turns compromise into a moral virtue, at least for liberals, since it reflects a concern to show equal respect for the views of others.

A mixed conception of democracy, which involves elements of each of these two models, proves a far more realistic starting point for thinking about the issues raised by liberal constitutionalism within modern societies. Like a number of other writers, Hayek has a tendency to confuse the case for constitutional government with that for limited government.⁸² Liberal constitutionalism, however, involves not just a negative desire to restrict the sphere of government, but also a positive wish to ensure the public scrutiny and influence of state action and to obtain the benefits of competition and criticism in the formulation of policy. These are complementary rather than competing purposes, that in an advanced economic system, requiring, as Hayek acknowledges, more rather than less economic intervention, increasingly go together. Indeed, the incorporation of a positive role for democratic politics within a radically pluralist model of democracy follows on from Hayek's account of the benefits of a dispersed system that elaborates practical norms drawing on local knowledge and extends it from the economic to the political sphere.

Part II of this book will attempt to show how a democratic liberalism can achieve this dual goal of liberal constitutionalism through a reconceptualisation of democratic mechanisms rather than via an all-embracing legal framework. For the moment, we

shall simply consider how such a scheme might overcome some of the difficulties Hayek associates with democracy. A democratic liberal politics has two basic elements. First, it devolves power to a plurality of social groups and organisations to allow them to formulate and apply the norms appropriate to their particular purposes and situation. Second, it creates a federated institutional structure, of which parties and parliamentary bodies form only a part, to enable the various elements of the social system to regulate their interaction and to resolve their disagreements. Such a setup replaces traditional liberal substantive constitutional constraints for the protection of openness and pluralism, such as entrenched bills of rights, with procedural institutional checks and controls involving new forms of the division of power and representation. These might range from the establishment of distinct functional and cultural as well as territorial areas of legislative and administrative forms of competence on the one hand, to the development of corporatist and specialist bodies for the scrutiny and formulation of policy on the other.

So far as Hayek's critique of democracy is concerned, five observations are in order. First, just as market transactions need to be informed by a set of functional norms guaranteeing their fairness, so the procedures of democratic liberalism incorporate a set of norms that guarantee the integrity of the public decision-making process. Moreover, just as Hayek regards the norms regulating the market as spontaneous products that have emerged over time, so the norms that regulate democracy can be regarded as evolving out of a culture of compromise that has grown up since the wars of religion of the sixteenth century and the attempt to achieve an equitable and tolerant *modus vivendi* between a plurality of agents and agencies holding a variety of divergent conceptions of the good.⁸³ The resulting norms are regulative in nature, however, operating as functional components of the political system necessary for the peaceful resolution of conflicts of values and interests. They attach to the acceptance of certain procedures which are seen as being authoritative within the political sphere as mechanisms for the distribution of burdens and benefits within society. These procedures possess a normative power that rests neither on 'persuasion', in the sense of agreement on some fundamental universal principles of morality, nor mere 'coercion'.⁸⁴ They reflect a situation of moral and social conflict, in which the only basis for political justice is a compromise constructed through a fair decision-making mechanism. Similar to rules of evidence within the scientific community, these norms enjoin that the discussion be open and exhaustive and that decisions be arrived at by due process and be susceptible to review. Whilst such a system does not require us to show equal respect to all beliefs, it does entail an obligation to treat all persons as they treat us, and to regard a person's possession of an opinion as a ground for discussing it rationally with him or her. The stability of the political system, however, rests less on the norms

themselves so much as the institutionalisation of a division of power conducive to a continued allegiance to the culture of compromise that they embody.⁸⁵

Second, Hayek criticises such a pluralist conception of democracy on the grounds that it leads to ‘a deadlock between these organised interests, producing a wholly rigid economic structure which no agreement between the established interests and only the force of some dictatorial power could break’.⁸⁶ Whilst this analysis has been true to some degree of Britain and the United States, the experience of Austria, Sweden and Germany has been happier. This success can be largely explained by the more inclusive character of the organisations concerned and the provision of an open forum within which they are compelled to bargain with others and take their concerns into account. The distortions feared by Hayek result from partial and exclusive organisations lobbying for special interests behind closed doors, rather than in open and formal corporatist forums in which a wide range of interests are represented through inclusive organisations that are themselves subject to democratic control. For such mechanisms allow the intrinsic as well as the instrumental qualities of democratic politics to operate which enable preferences to be transformed and not just aggregated, allowing opposed interests to find acceptable compromises or even agreement on common values.⁸⁷

Third, one of Hayek’s chief criticisms of contemporary democratic practice is the doctrine of parliamentary sovereignty. However, a democratic liberalism involves the dispersal of political authority both territorially, between international, national, regional and local bodies, and functionally, between producers and consumers of various services and industries. The distribution of decision-making throughout society and the designation of distinct areas of competence forms the best means of ensuring that policies are accountable to smaller groups and interests as well as the larger organisations.⁸⁸

Fourth, unlike liberal democracy, democratic liberalism attempts to institutionalise the liberal concern with equality through the equitable distribution of power amongst real agents within the actual decision-making process, rather than in a set of putative universal principles reflecting the attributes of ideal agents within some hypothetical ‘original position’ or ‘ideal speech-situation’. As such, this approach shares Hayek’s distrust of a constructivist rationalism that idealises certain forms of agency in ways that build its conclusions into its premises and ties the rules of justice to contentious meta-ethical doctrines. Indeed, it has a flexibility and responsiveness to the developing wants and requirements of the social system which he should have approved. For such compromises correspond to a conception of justice and morality as a response to the problems of securing mutually beneficial cooperation due to conflicts generated by scarce resources and limited sympathies, that Hayek and other liberals have generally regarded as congenial. It may nevertheless be objected that the rules emerging from such a process of compromise do not

necessarily define just conduct.⁸⁹ This may well be true, which is why decisions must always be consistent with a notion of equal respect for persons that allows the possibility for ongoing discussion and a process of review.

Finally, it should be noted that these features of a democratic liberalism provide for a model of democracy capable of incorporating many of the advantages Hayek associates with the market, such as flexibility and an ability to respond to the disparate individual demands, values and expertise that are diffused throughout society. However, by incorporating not just the instrumental reasoning of market transactions but intrinsic and normative considerations as well, such a democracy is capable of mitigating many of the shortcomings that Hayek himself accepts arise within any market system.

6 Conclusion

To a high degree, the New Right have set the constitutional as well as the economic and social agenda of the last decade. If the desire to resurrect the mechanisms of liberal constitutionalism to curb the excesses of populist democracy are currently voiced by the left of centre, they originated with the right in the 1970s and continue to bear many of the marks of these origins. In particular, they share an ambivalence about the extent to which safeguarding against the abuse of governmental power requires the limitation or the extension of democracy. This ambivalence has tended to mirror a similar distinction to the one we have found in Hayek between instrumental and intrinsic conceptions of democracy, and a general distrust of the former. As in Hayek, whereas the latter conception supposedly gives rise to a consensus on general, abstract, universal principles that are embodied in constitutional rules such as bills of rights, the former is said to be in conflict with and needs to be constrained by them. This view has been associated in contemporary political philosophy with the recent writings of John Rawls. The next chapter reveals his arguments to be as flawed as Hayek's, and for much the same reasons.

2 Trimming values: Rawls and the constitutional avoidance of politics

The recent writings of John Rawls have been preoccupied with the issue of political stability in pluralist societies. He believes his two principles of justice offer an ‘overlapping consensus’ between people holding differing conceptions of the good, and so provide the basis for a stable liberal democratic constitutional settlement. Much as Hayek’s constitutional proposals reflected the industrial unrest of the late 1960s and 1970s, and the alleged economic overload of governments and the destruction of the market by well-organised interest groups manipulating the political system, so Rawls’s project (whilst not indifferent to these concerns) stems from worries that democracy could be morally overloaded by the multicultural politics, the rise of the religious right, and the new social movements of the late 1970s and 1980s.¹ Like Hayek, albeit with a different emphasis, Rawls has sought inspiration in traditional liberal arguments for limited government. Whereas Hayek drew on earlier liberal views on ‘factions’ and ‘sinister’ interests and their threat to the separation of powers, Rawls returns to the liberal attack on religious ‘enthusiasts’ and ‘fanatics’ and breathes new life into the doctrine of the separation of church and state. The upshot is much the same, in formal terms at least, namely, a constitutional restriction of politics that severely circumscribes both the sphere within which the state may legitimately exercise its coercive power, and the kinds of considerations voters can invoke and legislators ought to take into account when making policy.

This chapter assesses Rawls’s attempt to define the political core of liberalism in a manner compatible with pluralism. The first section gives a brief account of his project and its relation to the pluralist challenge, and makes some general criticisms of the form his argument takes. Rawls claims to make a political rather than a metaphysical case for justice as fairness. However, his desire to guarantee stability through an ‘overlapping consensus’ on constitutional essentials will not work without invoking fairly strong liberal metaphysics, and involves the exclusion of real politics. The second and third sections reinforce each of these criticisms respectively. The second section turns to the substance of his political conception of justice – the set of basic constitutional liberties which for Rawls defines the language and terms of politics. This turns out to be as subject to the differing

interpretations he associates with pluralism as other values. The so-called ‘method of avoidance’,² whereby citizens trim their comprehensive, metaphysical views within the political sphere, proves impossible and, as the third section shows, undesirable. Preventing people expressing the reasons underlying their demands leads to a woefully impoverished political discourse that alienates citizens from the state rather than attaching them to it.

1 The constitution of liberal politics

Rawls’s starting point is a standard liberal view of political legitimacy, associated above all with thinkers in the social contract tradition,³ namely, that the coercive power of the state can only be exercised on grounds that are compatible with the rational consent of its citizens.⁴ He thinks most liberal theories rely on a comprehensive account of the liberal good, such as Kant’s conception of autonomy, to show what hypothetical citizens ought to agree to. However, this sort of argument proves incompatible with what he calls the ‘fact of pluralism’, and so is unacceptable. Instead, consent must take the form of an ‘overlapping consensus’ of a non-metaphysical and strictly political nature. Rawls presents his argument in two stages.⁵ The first derives the principles of justice from what can be publicly justified to members of a society characterised by ‘reasonable pluralism’. The second addresses the issue of whether the resulting view of justice is sufficiently stable. I shall examine each stage in turn.

Liberalism and the ‘fact of pluralism’

Rawls relates pluralism to the limits of reason in settling moral conflicts due to what he terms the ‘burdens of judgement’.⁶ These refer to various difficulties (Rawls mentions six, but notes that his list is not complete) to do with identifying, weighing up and evaluating the evidence in any moral dispute, and of reconciling different sorts of moral claim – or even of always being sure which set of values or sorts of consideration are relevant to a given decision. As I observed in the Introduction, Rawls steers clear of value-pluralism *strictu sensu* due to its metaphysical and contentious character. None the less, the ‘burdens of judgement’ place similarly insuperable obstacles in the way of reaching agreement on the best way to lead one’s life in all circumstances. These limitations are not the product of faulty logic, narrow-mindedness or selfishness but of what can be rationally demonstrated. They complicate many of the choices of single individuals. Within multicultural and highly differentiated societies, the varied life experiences of citizens will lead ‘their judgements to diverge, at least to some degree, in most cases of any significant complexity’,⁷ rendering moral disagreement an inevitable and ineradicable ‘fact’ of political life.

Rawls contends the ‘fact of pluralism’ should lead citizens to accept a number of related facts.⁸ First, they ought to acknowledge that conflicting and irreconcilable views are a permanent feature of any society that allows freedom of thought and expression. Second, they should perceive that as a consequence a shared commitment to a single comprehensive view could only be maintained ‘by the oppressive use of state power’.⁹ Third, they should appreciate that an enduring constitutional regime must be based on a political conception of justice ‘that can be endorsed by widely different and opposing, though reasonable comprehensive doctrines’.¹⁰ Finally, they should see that even after a full and free discussion, not all reasonable and conscientious persons will necessarily reach the same conclusions on many matters.

Taken together, these ‘facts’ are intended to point towards liberal institutions promoting toleration and equal concern and respect. ‘Reasonableness’ and the ‘burdens of judgement’ arising out of ‘the fact of pluralism’ are inextricably linked within this argument. ‘Reasonable’ people will appreciate that they cannot publicly justify the single-minded rational pursuit of their own ideals and interests to the exclusion of the equally valid, but perhaps conflicting, activities of others. Only dogmatists will seek to impose their beliefs on everyone else or demand to be isolated from these facts by being spared any contact with alternative points of view. Instead, they must propose fair terms of cooperation that are free of any such bias.

Rawls portrays his famous device of the ‘original position’ as representing these constraints of public reason.¹¹ The centrepiece of *A Theory of Justice*,¹² this thought experiment involves asking what principles of justice rational individuals would choose when situated behind ‘a veil of ignorance’ that denied them any knowledge of their values, natural talents or social position. In the earlier book, these conditions were employed to model a sense of ‘fairness’. He now points out that this sentiment is closely related to reasonableness. The ‘veil of ignorance’ obliges us to avoid controversial claims based on any particular conception of the good or self-interest. Instead, we are moved to engage with the perspective of others, and especially those who might be discriminated against by particular proposals, and acknowledge there are limits to how far we can legitimately press our claims. The basic point is that reasons that purely draw on an individual’s or group’s natural or social advantages or beliefs, and so are largely self-serving and self-referential, are not ones we can expect others to accept.

As a number of commentators have remarked,¹³ Rawls’s employment of the maximin to generate this conclusion in *A Theory of Justice* somewhat obscures his general argument. The parties adopt the two principles, protecting basic liberties and securing the welfare of the worst off respectively, so as to avoid being an oppressed minority or reduced to abject poverty. This makes the endorsement of liberalism seem the product of a super-enlightened if basically self-interested rational choice, rather than of a broader appreciation of the limits of what is reasonable. As

he now admits, that strategy proves vulnerable to free riding or defection whenever mutual advantage cannot be guaranteed, and as such is potentially unjust and unstable.¹⁴ Agreement may reflect no more than a contingent, temporary and possibly unfair balance of forces.¹⁵ The more direct approach adopted in *Political Liberalism* is in this respect superior.

Thus far, Rawls's argument accords with the thesis presented in Part II of this book. It suggests that within a pluralist society the moral point of view consists in the attempt to construct principles of justice and common policies through a reciprocal process of mutual accommodation and compromise so as to arrive at decisions none can reasonably reject. This approach places limits on what we might impose on others. But it does not rule out the possibility of winning people around to our position, or getting them to recognise that our interests or culture deserve special forms of support, or even searching for substantial agreement on some common good. The prime constraints apply to the conditions under which we set about such tasks, requiring us to couch our case in general terms that address the equally valid concerns of others. The emphasis is on obtaining inclusive settlements. Quite what that entails in practice will vary according to the issue and context.

Rawls, however, wants more. As the third 'fact' cited above indicates, he contends that a stable regime requires broad agreement on a core set of substantive political norms. This core must have the positive allegiance of a wide range of different comprehensive moral positions, and so become the object of an 'overlapping consensus'. Unless citizens can embrace the good of political justice as laid out in the constitution from within their own conceptual scheme, he believes they will lack the commitment always to abide by the democratic rules of the game.¹⁶ Indeed, he thinks that to be fully secure these fundamentals must be completely beyond discussion, and public debate avoid reference to any values that might fall outside the consensus.

This belief is unfounded and creates demands that are unnecessary and unsustainable. It is possible to accept a given procedure or decision as legitimate in the circumstances without conceding that left to one's own devices in an ideal world one would have chosen differently. Rawls thinks not. He contends that such legitimacy would be insufficient to guarantee our standing by the terms of any agreement. As we shall see, the pursuit of stability via a fixed 'overlapping consensus' leads him to try and construct a putatively self-contained, 'free-standing' political account of justice. Instead of a strategy of inclusion, this approach leads to the exclusion of any reference to wider metaphysical values and material concerns. However, a range of reasonable conceptions can reject elements of the substantive content of his principles by either appealing to other incommensurable and often incompatible values, or by legitimately interpreting them in different ways. The rest of this section will explore how Rawls conceives of the political and criticises his

idea of an overlapping consensus, leaving the evaluation of the content of that conception and its exclusion of politics to the next two sections.

A (meta)political consensus

Rawls wants to guarantee consensus by constructing political principles compatible with any reasonable conception of the good. He singles out three distinct and related features of his political conception of justice that enable it to achieve this goal. These are:

that it is framed to apply solely to the basic structure of society, its main political, social, and economic institutions as a unified scheme of social cooperation; that it is presented independently of any wider comprehensive religious or philosophical doctrine; and that it is elaborated in terms of fundamental ideas viewed as implicit in the public political culture of a democratic society.¹⁷

The first characteristic limits the scope of political justice, the second its status, and the third its mode of justification. By circumscribing their frame of reference in these three ways, Rawls hopes to render his principles acceptable to all reasonable views. These restrictions, however, are themselves highly contentious, and so are likely to have the very opposite effect to the one he intended.

The first limitation restricts the application of the principles to a definite ‘public’, ‘political’ sphere. What defines the ‘public’, however, is a matter of profound disagreement. Rawls bases his distinction between the public/political and the non-public/non-political on two related factors: the degree to which these are unavoidable and basic as opposed to voluntary and optional relationships, and the consequent extent to which reasoning about them must avoid contentious or partial metaphysical or psychological assumptions.¹⁸ Membership of a state and engagement in an economic activity are said to be inescapable in ways that joining a community or association such as a church or a sports club are not. The ‘main political, social and economic institutions’ form the ‘basic structure’ of any society and provide the background conditions determining our capacity to choose amongst a variety of different conceptions of the good and join numerous organisations of a less fundamental sort.¹⁹ Since the rules governing the distribution of burdens, benefits and liberties within ‘basic’ institutions broadly define our ability to engage in the activities located in mainly optional communities and associations, they should be framed on the basis of public reasons that are ‘neutral’ between conceptions of the good – a constraint that we have seen leads to the adoption of Rawls’s two ‘fair’ principles of justice.²⁰ By contrast, associational, communal and domestic organisations may employ more partial or value-laden reasoning and adopt hierarchical principles. Yet it is unlikely that the two spheres can be entirely

distinguished, since the non-public sphere has been to some degree publicly defined and regulated. Moreover, attitudes and behaviour in the non-public sphere tend to have spill-over effects with regard to how we act in public. This symbiotic relationship between the two spheres makes Rawls's attempt to distinguish them difficult to cash out in practice.²¹

As Susan Moller Okin has pointed out,²² he equivocates over how far the family, for example, falls within the public realm. Whilst he appears to include it within the basic structure of society,²³ he also states that 'the political is distinct ... from the personal and the familial, which are affectional, ... in ways the political is not'.²⁴ As Okin remarks, the family defies the political/non-political dichotomy that has become so central to his theory. Whilst hopefully characterised by affection, families also involve power and not infrequently oppression. In addition, as he had recognised in *A Theory of Justice* but largely passes over in *Political Liberalism*, families operate as 'schools of justice' that shape the attitudes children take with them into the wider world.²⁵ All the more important, one might have thought, to ensure they are regulated by the values of equal liberty and mutual respect that Rawls regards as basic to public life. The organisation of family life, however, reflects to a considerable extent the value commitments of those involved and forms the centre of most people's lives. Thus, Rawls confronts a dilemma. If he were to incorporate the family fully into the realm of the 'political' it would be exceedingly difficult for him to claim that a consensus on 'political' matters was compatible with significant disagreements as to how we ought to lead our lives in other spheres. Once illiberal views get ruled out of bounds in familial situations, it becomes hard to see where it might be appropriate or acceptable for them to be expressed.

I doubt Rawls can escape this dilemma, which threatens his whole attempt to trim wider ethical, social and metaphysical concerns from politics. He argues, for example, that *qua* citizens we should 'not view the social order as a fixed natural order, or as an institutional hierarchy justified by religious or aristocratic values'. However, 'from the point of view of personal morality, or from the point of view of members of an association, or of one's religious or philosophical doctrine', such opinions may be acceptable.²⁶ If children are socialised into the latter set of beliefs within the home, though, they will be less likely to adopt or live by the former in other contexts. Thus, women obliged to adopt a subordinate domestic role may experience difficulty in having their political views taken seriously. They will probably feel inhibited about expressing them, as well as ill-prepared, and encounter opposition and hostility from other members of their community.

Rawls accepts it will be necessary to 'contain unreasonable and irrational, and even mad, comprehensive doctrines ... so that they do not undermine the unity and justice of society',²⁷ and that 'doctrines and ... associated ways of life ... in direct conflict with the principles of justice ... [such as those] requiring the repression or degradation of certain persons on, say, racial, or ethnic, or perfectionist grounds'

may need to be ruled ‘off the political agenda’ or even not ‘permitted’.²⁸ But quite where the line gets drawn remains distinctly fuzzy. Thus, he allows sects that ‘oppose the culture of the modern world’, such as the Amish, but insists on a right of exit and compulsory civic education informing children of their political rights, including freedom of religious conscience, even though this teaching might be at odds with certain religious codes and lead some to reject them.²⁹ This uneasy solution goes both too far and not far enough. On the one hand, those religious and other groups which hold views at variance with Rawls’s political principles may feel no real concessions have been made to them, since their identity as citizens will inevitably affect their ability to sustain alternative practices at a putatively sub-political level. On the other hand, the capacity to act as citizens on the part of those whose identity has been shaped in illiberal domestic and social environments may be seriously impaired. A negative right of exit will have little value if numerous indirect and internal obstacles lie in the way of individuals exercising it.

Rawls’s attempt to separate the political/public from the rest of social life rests on an impoverished account of the conditions for political agency. This emerges from not only his inadequate view of gender and family issues, discussed above, but also his limited account of the relationship of social and economic to political institutions strictly conceived. Although social and economic institutions form part of the ‘basic structure’, they are not part of the domain of constitutional politics. Only the first, liberty, principally forms part of the constitution, whilst the second, difference, principally requires explicit legislative enactment to be operative.³⁰ Yet class oppression is as pervasive as, and usually reinforces, discrimination on grounds of gender or race. As Elizabeth Frazer and Nicola Lacey have insisted,³¹ Rawls’s view of the public overlooks the fact that the power is not exclusive to the state and that ‘political’ relations exist within a wide range of social domains. Political activity and citizenship have to be understood in appropriately broad terms. I shall return to these points in the third section below.

Parallel difficulties emerge from the second aspect of Rawls’s notion of the political – its status as a ‘free standing’ mode of argument. Rawls contends this feature is largely a matter of ‘presentation’.³² He believes the principles of political justice must form ‘a module’ or ‘essential constituent part’ within all reasonable conceptions of the good.³³ He takes this congruence of the principles with the beliefs of the citizenry to be intrinsic to the project of achieving stability via an ‘overlapping consensus’, and that its success will be evident from the very coexistence of numerous doctrines with them.³⁴ However, he thinks it wise for citizens not to investigate this relationship too far, since it is likely to differ fairly widely between conceptions and lead to speculation that some reflect the principles better than others. That line of thought could result in the principles appearing to arise out of a particular comprehensive conception of the good, and hence would greatly reduce their general acceptability.³⁵ For example, he believes a utilitarian might come to

regard ‘a political conception of justice liberal in content a satisfactory, perhaps even the best, workable approximation to what the principle of utility, all things tallied up, would require’.³⁶ Yet, it is clear from *A Theory of Justice* that he considers the utilitarian’s concern with maximising the general welfare to be incompatible with the central idea motivating the principles – ‘the conception of social cooperation among equals for mutual advantage’.³⁷ Thus, no utilitarian could affirm the principles for particularly deep or non-pragmatic reasons without in effect ceasing to be a utilitarian – a position Rawls appears to believe to be true of indirect and rule utilitarians.³⁸ Similar paradoxes are liable to arise for all but the committed liberal.

The presentation of the principles as ‘freestanding’ follows from his other two features of the political – its limited scope and specifically political sources.³⁹ By limiting the range of subjects to which the principles apply, Rawls believes its comprehensiveness can likewise be reduced, so that it need not refer to what gives value to life generally or draw on non-political ideals of personal character. However, we have seen that the political–non-political divide is extremely contested, not least because where and how the line gets drawn (if at all) tends to rest on what comprehensive view one appeals to. Certain divisions will appear acceptable to some and rather less so to others. The third feature comes in here, since it proposes an apparently non-metaphysical and uncontentious source of political ideas – namely the ‘public culture’ of a democratic society comprising its political institutions, constitutional traditions, historic texts and the loose set of ideas and beliefs that make up ‘the educated common sense of citizens generally’.⁴⁰

This argument has been read as (and sometimes appears to be) ‘thoroughly historicist and antiuniversalist’.⁴¹ On this interpretation of Rawls, put forward most forcefully by Richard Rorty, he aims only at ‘a historico-sociological description of the way we live now’.⁴² Rawls is not ‘supplying philosophical foundations for democratic institutions’, therefore, ‘but simply trying to systematise the principles and intuitions typical of American liberals’.⁴³ When citizens become accustomed to living in democratic societies they do not search for ‘extra political grounding’ for their legitimacy. ‘[S]ocial policy needs no more authority than successful accommodation among individuals ... who find themselves heir to the same historical traditions and faced with the same problems.’⁴⁴

There is some evidence for this stance.⁴⁵ Rawls conceives political liberalism as drawing on a ‘shared fund of implicitly recognised basic ideas and principles’ arising out of the liberal democratic tradition as it has developed since the wars of religion of the sixteenth and seventeenth centuries. Originating as a *modus vivendi* thanks to a fortuitous equitable balance of power between competing religious groups, liberal democratic values have gradually become part of the unconscious convictions of most citizens within western societies. An ‘overlapping consensus’ on this account is an historical product. The philosopher’s task is to bring these principles and their underlying rationale to light so that they may be adequately protected.

The ‘original position’ should not be interpreted as an objective point of view for judging the justice of all possible societies and moralities *sub specie aeternitatis*, as he appeared sometimes to argue in *A Theory of Justice*. Instead, it serves as a ‘device of representation’ that ‘models’ the basic intuitive ideas at the heart of the liberal democratic tradition and brings them into some degree of ‘reflective equilibrium’.⁴⁶ Thus, Rawls believes a theory of international justice should tolerate non-liberal ‘well-ordered hierarchical societies’ that have different historical traditions.⁴⁷

This argument is deeply unsatisfactory, however. To link the foundations of democracy to the contingencies of a particular historical tradition risks falling into relativism. Such an argument tells us neither which democratic tradition we ought to opt for,⁴⁸ and many past democracies have been singularly restricted, nor why any one of them is to be regarded as superior to other possible forms of government.⁴⁹ By naturalising the formation of an overlapping consensus in democratic societies, Rawls seems to offer a Panglossian view of the liberal constitution – as though it could be founded on no lasting wrong, and, more to the point, as though no regress from it were possible. Moreover, there is a certain incoherence in this argument even in its own terms. If citizens really do act on liberal democratic principles already, then, as conservative and communitarian critics of liberalism point out, articulating the theoretical basis of this practice risks producing a rationalistic and limited abridgement that fails to do justice to its true complexity and so potentially undermines it.⁵⁰ Surely Rawls only defends this consensus because he feels it can no longer be assumed.

Not surprisingly, Rawls ends up invoking stronger arguments of a more philosophical character. Democracy, he contends, rests on a distinctive conception of the citizen as possessing two moral powers: ‘a capacity to form, revise and rationally pursue a conception of one’s rational advantage or good’, and ‘a sense of justice’.⁵¹ This model of agency underpins his claim that all citizens can identify with his two principles and distinguish their public from their private persona. Unfortunately for his project, this perspective will only prove acceptable to a liberal who conceives society as a collection of free and equal individuals pursuing autonomously chosen goals. Such a person already holds Rawls’s political conception of citizenship in his or her private life. Yet Rawls concedes that there are many people who have ‘affections, devotions, and loyalties that they believe they would not, indeed could and should not, stand apart from and evaluate objectively’.⁵² Their religious, moral or other convictions are intrinsic to their personal identity. Unlike Rawlsian liberals, Rawls’s view of citizenship is not costless for such people. It challenges their integrity and potentially threatens certain of their vital interests. For example, religious or other ‘non-political’ reasoning concerning morality is ruled out when debating matters such as capital punishment or abortion. In such cases, however, non-liberals might feel primarily bound by a non-political conception of

justice stemming from God or some other source. Why should they feel obliged to put to one side the truth as they see it and adopt a somewhat alien (and alienating) Rawlsean political language?

Rawls has no satisfactory answer to this question. At times, he stresses largely pragmatic reasons stemming from an interest in stability.⁵³ However, this is essentially an empirical claim of dubious validity. It assumes people prefer a quiet life to protesting what, from their private point of view, is an injustice or a lack of concern. Since plenty of evidence exists to suggest people are not so passive, such exclusions may well have the opposite effect of stimulating protests that go on outside official political channels. An alternative is for him to go on the attack and argue for the superiority or truth of the liberal position. However, Rawls rules out this strategy, since he doubts a comprehensive liberalism could ever gain widespread acceptance without 'the oppressive use of state power'.⁵⁴

These criticisms of the form Rawls's project takes are reinforced when one turns to the substance of his theory. Rawls spells out his political conception of justice in terms of the 'basic liberties' enshrined in the first principle. These freedoms underpin democracy, as he conceives it, and provide a supposedly neutral language of political argument. As such, they must be 'no longer regarded as appropriate subjects for political decision by majority or other plurality voting. [...] They are part of the public charter of a constitutional regime and not a suitable topic for ongoing public debate and legislation'.⁵⁵ Their application and interpretation must rather be restricted to an independent body, such as a constitutional court.

The second and third sections will examine and criticise this substantive aspect of Rawls's argument. The second section will show that the 'basic liberties' cannot be identified, their priority defended, and clashes both between them and with other values reconciled, without drawing on normative and empirical judgements of the kind that he admits are subject to the 'burdens of judgement'. Consequently, there is no reason why a consensus on principles of political justice should be more likely than an agreement on a comprehensive conception of the good, for the right and the good turn out to be intimately connected. In such circumstances, the trimming of one's deeper and supposedly non-political values will no longer be reasonable. The third section will suggest that as a result we need a broader view of politics than Rawls allows for. Convincing people of the merits of a given policy and justifying a given exclusion involves moral argument and hence political debate. An overlapping consensus has to be politically constructed by exploring what can be resolved through political deliberation and what must remain matters of reasonable disagreement, concerning which we either agree to disagree or as far as possible attempt to find some acceptable compromise solution.

2 The priority of liberty and the constitutional exclusion of politics

Rawls declares the main purpose of his principles is to protect a set of basic liberties in order to take certain contentious topics out of the realm of politics altogether, rather than to promote any positive notion of the political good – an approach he declares to be ‘broadly speaking, liberal’.⁵⁶ ‘Liberal principles’, he asserts, ‘meet the urgent political requirement to fix, once and for all, the content of certain political basic rights and liberties, and to assign them special priority.’ This move ‘takes those guarantees off the political agenda and puts them beyond the calculus of social interests, thereby establishing clearly and firmly the rules of political contest’. Not to do so, he tells us, ‘leaves the status and content of those rights and liberties still unsettled; it subjects them to the shifting circumstances of time and place, and by greatly raising the stakes of political controversy, dangerously increases the insecurity and hostility of public life’ whilst at the same time ‘perpetuating the deep divisions latent in society’.⁵⁷

This line of argument goes back to *A Theory of Justice*. Failings in Rawls’s earlier defence of the basic liberties and their priority were first brought to light by H. L. A. Hart.⁵⁸ Hart’s criticism focused on Rawls’s contention that the prime aim of justice was to secure ‘the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’ and his conclusion that as a result ‘liberty can be restricted only for the sake of liberty’.⁵⁹ As Quentin Skinner has observed, Rawls’s thesis expresses the standard liberal view that interference by the state or the law is only justified to the extent that it decreases mutual interferences so as to guarantee a greater liberty over all.⁶⁰ Rawls illustrates this argument with the example of rules of order for debate, which restrict the unconditional exercise of our freedom of speech so as to ensure that when we do speak we can do so without interruption and with a reasonable chance of getting a fair hearing. A more extensive equal exercise of freedom of speech seems guaranteed when the liberty to interrupt continually is curtailed. However, Hart notes that most examples of a clash of liberties are not so easy to adjudicate (indeed, even this example is more complex than Rawls makes out). For the liberties in question do not always relate to shared interests or values, so that the issue of what balance leads to greater freedom turns on qualitative rather than merely quantitative judgements. Moreover, he remarks that liberty also comes into conflict with other values and that it might often seem important to curtail liberty when the exercise of freedom itself causes harm or suffering.⁶¹

These criticisms parallel those made of Hayek’s similar proposal in the previous chapter. They follow from the impossibility of philosophically (as opposed to politically) arbitrating conflicts between incommensurable and incompatible ultimate values. Rawls’s attempt to isolate discussions of liberty from these difficulties ignores the fact that how we characterise any given liberty and identify the

constraints that determine its presence or absence depends on normative and empirical judgements which are open to debate. Such factors not only undermine the neutral balancing of liberties, they may even result in a failure to agree on whether a conflict of liberties exists or not – as in the debate between libertarians and those to their left over whether market exchanges can involve coercion. Needless to say, the problem of on-balance judgements becomes even more intractable when liberty has to be weighed against other values, as in laws relating to the expression of offensive views which undermine the respect shown to those against whom they are directed.

What justice demands in such cases is far from clear, since a variety of equally important values and interests are involved. Within a democracy one might expect the natural answer to be for ordinary citizens via their representatives to seek a solution. For democratic procedures ideally attempt to ensure all relevant groups get a hearing so as to reach a mutually acceptable decision. But this solution places the basic liberties squarely within the political realm of negotiation and compromise, rather than at a metapolitical level of overlapping consensus where Rawls wishes to remove them.

In *A Theory of Justice*, Rawls attempted to avoid this descent into the give and take of everyday politics by suggesting that the specification and implementation of his principles involves a four-stage process from the original position, where the principles are chosen, through a constitutional convention, where the basic rights of citizens are enunciated, to a legislature, where the justice of laws and policies are considered, passing finally to the bureaucracy and judiciary, who apply the resulting rules. At each stage, the ‘veil of ignorance’ is progressively lifted and the principles are given greater specification and take into account more concrete information about what individuals want and need. Whatever the stage, when conflicts between liberties are involved those concerned are supposed to adopt the standpoint of ‘the representative equal citizen’ and ask what assessment ‘it would be rational for him to prefer’.⁶²

Characteristically, this process of specification aims to produce a judgement on what conditions will be necessary for ‘all to equally further their aims’.⁶³ However, as Hart points out, on matters of any complexity it will be impossible to argue that, whatever ends a person may have, he or she would opt for the same solution. Individuals with differing interests and conceptions of the good will diverge over the relative value they set on the conflicting liberties.⁶⁴ Indeed, in numerous circumstances many individuals might quite rationally decide that the advantages of the exercise of a given liberty are outweighed by its destructive effects on other valuable aspects of social life when generalised to all other members of society. Presumably, such considerations operate when motorists accept restrictions on the use of their private property and freedom of movement for the sake of the environment and the protection of other social amenities. As Hart remarks, this last

point casts doubt on whether even in the original position it would be rational for individuals to prioritise the basic liberties as the least worst option, since ‘whether it would be rational to prefer liberty at the cost of others having it too must depend on one’s temperament and desires’ and such information is not available to the original contractors.⁶⁵

In *Political Liberalism*, Rawls tries to answer some of these criticisms.⁶⁶ First, he contends the prioritising of liberty within the original position derives not from rational considerations alone, but rests on a more recognisably liberal conception of the person as possessing two moral powers: namely, a capacity for a sense of justice and a capacity for a conception of the good. Whereas the latter capacity employs merely instrumental rationality, the former involves an attitude of reasonableness stemming from an acceptance of the ‘burdens of judgement’ which inhibits individuals egotistically or dogmatically pursuing their interests or values to the utmost without any consideration for the views of others. Second, he argues that when the priority of liberty is conceived as ‘a fully adequate scheme of equal basic liberties’, it becomes possible to provide a coherent account as to how they might be further specified and adjusted to each other across his four-stage sequence.

With regard to the first revision, it should be noted that Rawls remains as convinced as before that the risk aversion assumed of the parties in the original position will drive them to opt for freedom of conscience and a liberty to pursue one’s own good in one’s own way in order to avoid the prospect of being persecuted minorities.⁶⁷ However, as numerous commentators have pointed out,⁶⁸ this inference is far from clear. For a start, Rawls has to make a further assumption that individuals will feel so committed to their religious and moral convictions that they will never trade them for the satisfaction of some other interest. This stipulation, contentious enough in itself, poses Rawls with a further difficulty when he tries to extend the defence of freedom of conscience to the other standard liberal freedoms. If they are not to be treated as negotiable interests, these, too, must become matters of conscience. Thus, sexual liberty, far from expressing a mere desire to play the field, to receive full protection must presumably be regarded as expressive of a Sadean or other conception of the good. Similarly, given that the representative chooser of the original position is comparing long-term social rather than simply short-term individual states, the benefits of a more orthodox society – indubitably, if (from a liberal point of view) regrettably, valued by many people – will only have no rational appeal to someone already deeply committed to the liberal ideal.

Having the reasonable ‘frame’ such rational calculations supposedly lead agents to recognise that the basic liberties (i) secure a stable political system in which everyone can pursue their conception of the good on equal terms, (ii) are fundamental to self-respect (guaranteeing the full exercise of our two moral powers), and (iii) contribute to a well-ordered society in which the human potential of each is realised through collaboration.⁶⁹ These propositions assume the basic liberties form a

compossible set that not only allows each individual an equal chance of realising his or her conception of the good – a possibility that Rawls regards as essential to securing the priority of right over the good⁷⁰ – but also that differing conceptions of the good will prove mutually enhancing. These arguments sound more like cooperation for mutual advantage than genuine reciprocity. Unless they are true, his thesis remains vulnerable to the standard problems of compliance associated with rational maximisers. Rawls's ambiguity here reflects his unwillingness to elaborate the sort of robust metaphysical doctrine of the self, such as the Kantian power of reason to override inclination, required to ground a full distinction between reciprocity and even super-enlightened self-interest.⁷¹ Even so, Rawls's case for the basic liberties only seems plausible on a comprehensive liberal conception of the good. Like Mill in particular, he apparently believes a 'higher' pleasure will always appear a more rational choice than the 'lower', and that genuine 'high' expressions of human freedom involve a restraint on selfish 'low' desires, and so prove more social and even complementary.

The extent to which Rawls's theory covertly trades on liberal metaphysics comes into focus when we examine his second revision. Rawls insists he gives no priority to liberty as such, but rather to a list of equal basic liberties comprising 'freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law'. This account follows the traditional liberal democratic 'focus ... on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bills of rights and declarations of the rights of man'.⁷² Priority is given to the total scheme of liberties as they apply to the basic structure of society. Rawls hopes by this specification to avoid the problems arising from the liberties occasionally clashing amongst each other and with other values.

When liberties clash they may be 'regulated' to render them compatible within their 'central range of application' – namely the political and social institutions where citizens exercise and develop their two moral powers. Unlike restriction, 'regulation' supposedly pays no attention to the content of a liberty. Rules of order that regulate when we speak but not what we say once again serve as his model.⁷³ The criteria for ranking the liberties are provided by their 'significance' in protecting the two moral powers in one or both of two 'fundamental cases'. The first relates to the 'sense of justice' of citizens and 'concerns the application of the principles of justice to the basic structure of society and its social policies'. The political liberties and freedom of thought come under this heading. The second case is 'connected with the capacity for a conception of the good and concerns the application of the principles of deliberative reason in guiding our conduct over a complete life'. Liberty of conscience and freedom of association fall into this category.⁷⁴

Rawls argues these basic liberties are intrinsic to democracy and may only be

modified to give it greater effect. Modification involves either regulation or limiting one liberty with respect to another, for these liberties have ‘absolute weight with respect to reasons of public good and perfectionist values’.⁷⁵ Restriction is only allowable, therefore, to protect the constitutional system itself. Greater effect in its turn is evaluated by the extent to which the liberties are involved in or provide the necessary means to realise or protect the two moral powers that for Rawls constitute the central features of citizenship.⁷⁶

Unfortunately, the line between regulation and restriction turns on contestable ethical and empirical assumptions. Rawls illustrates his argument with regard to free political speech, which he says ‘falls under the basic liberty of freedom of thought and the first fundamental case’.⁷⁷ Regulations affecting the time and place of public utterances or designed to secure the fair value of political speech, such as public funding of parties and limits on private contributions, are acceptable. Restrictions, by contrast, are only legitimate if the very possibility of public debate is at risk. Consequently, the verbal challenging of the principles of justice and basic liberties cannot in itself be grounds for restriction since such debate represents an exercise of the first moral power. To repress subversive advocacy, he claims, suppresses ‘the free and informed public use of reason in judging the justice of the basic structure and its social policies’ and so violates ‘the basic liberty of freedom of thought’.⁷⁸ To justify restriction, subversive advocacy must either be ‘both directed to inciting imminent and unlawful use of force and likely to achieve that result’,⁷⁹ or occur when ‘a constitutional crisis’ exists ‘requiring the more or less temporary suspension of democratic institutions, solely for the sake of preserving these institutions and other basic liberties’.⁸⁰ Whilst the first criteria would presumably cover restrictions of free speech on grounds of incitement, he thinks the second so unlikely to obtain that he comes close to suggesting that not only are bans on particular parties invalid, such as those that operated against syndicalists and communists in the United States, but that official secrets legislation is mostly groundless too.

Superficially, Rawls’s argument seems extremely permissive. He avoids any references to the content of speech presumably because to do so would automatically invite the playing off of political against other values. But this reluctance could have unfortunate consequences, suggesting that any group willing to take sufficient offence at certain sorts of remarks to cause a riot might succeed in getting such talk banned. Some British campaigners against Salman Rushdie’s *Satanic Verses*, for example, advocated such tactics. The ‘significance’ test no doubt comes in here. One assumes this might protect Rushdie against fundamentalist Muslims, on the grounds that his arguments are more congruent with the two moral powers – especially the second – than theirs, but could allow the banning of offensive racist views as unreasonable denials of the status of citizenship to fellow members of the polity. The former case is much harder than the latter, however. Whilst racism, even

when dressed up in pseudo-scientific terms, need not be regarded as part of a reasonable pluralism since it rests on self-serving bias and empirically refutable prejudices, many (if not all) of the Muslims who found Rushdie's novel offensive could reasonably claim simply to have a different scale of values to liberals. Here we have a clash of truths. In this sort of case, Rawls either has to argue that the political liberties have some higher worth, or concede that those taking offence have valid interests at stake. Either way, he will be drawn into arguments concerning the public good and perfectionist values, even if it is to justify the virtues of political debate.

To avoid such confrontations, Rawls attempts to move to a less permissive view that simply excludes these kinds of consideration from the realm of public reason. Rawls insists that citizenship imposes a 'duty of civility' that we express our views on fundamental questions in terms of political values – in other words, in terms of the two principles of justice and the basic liberties that derive from them. Political debate, on this understanding, takes place within a set of common premises and serves merely to achieve a fuller appreciation of what policies may be required to better realise them.⁸¹ Non-public reasons, deriving from more comprehensive conceptions of the good or special interests, whilst appropriate to the various associations of civil society, only have weight in the political sphere to the extent they 'overlap' with the common core.⁸² Even then, Rawls advises us not to refer to them for fear of alienating our interlocutors. Indeed, at times Rawls goes further to suggest that, should politics *tout court* ever be corrupted by private values or interests, then civil peace and stability will be gravely jeopardised – a concern that implies he does not think constitutional crises are as unlikely as he sometimes claims.⁸³

If at first Rawls seemed too permissive, now he appears too restrictive. Of course, he could say these exclusions belong solely to the political sphere and derive not from a comprehensive liberalism but from the dominant western understanding of democracy. But such strictures require all but comprehensively committed liberals to be endowed with an implausibly schizophrenic personality. Many non-liberals could embrace Rawls's public morality only by sacrificing some of their core commitments.

This observation does not deny that many people can combine an attachment to liberal politics with non-liberal conceptions of the good – liberal Catholics such as John F. Kennedy and Mario Cuomo form a case in point. As Rawls suggests, this combination reflects a high degree of compatibility and even overlaps between the two – there is after all a Catholic tradition of conciliarism that informs the early history of democracy. But when the two clash, as in debates over sexual morality and abortion, it is highly unrealistic to suppose that liberal Catholics will simply debate the issue in terms of a restricted set of liberal political values. Still less need they accept Rawls's conclusion that it would be 'unreasonable', possibly 'cruel and oppressive', and going against 'a constitutional essential or a matter of basic

justice', if they voted from a comprehensive doctrine that denies the right of women to an abortion in the first trimester.⁸⁴ A reasonable pluralism should accept this issue as an instance of genuine moral disagreement, in which the balance of basic liberties, such as the right to life and a woman's right to choose, revolves around colliding values that are subject to differing interpretations both as to their content and scope. After all, the debate involves all six of his sources of the 'burdens of judgement', from conflicting empirical arguments about when human potential starts, to competing ultimate values that cannot be reconciled in their entirety. Moreover, although interests as well as value systems are involved, the various sides cannot be regarded as merely self-interested factions any more than they are unreasonable dogmatists.

It is hard to see how any weighing of the basic liberties could be given in this case without some reference to more comprehensive doctrines or interests. The three political values Rawls mentions – 'the due respect for human life, the ordered reproduction of political society over time' and 'the equality of women as equal citizens' – need to be interpreted to be brought into some kind of balance. Rawls's belief that the latter predominates up to the first trimester hardly speaks for itself, for example, but seems to rest on the assumption that foetuses need not be regarded as potential human beings until a certain stage of development. Whilst a defensible view, it is open to reasonable empirical and ethical dispute. If the strict Catholic view that abortion is murder were true, then Rawls's refusal to countenance any reference to this opinion would be gravely unjust. Legislation on this matter should be debated, therefore, and alternative arguments and evidence canvassed.

Rawls fears that to open the matter to public debate might lead to a screaming match between rival dogmatisms and undermine the political process. Quite the opposite might be true, however. Not to allow people to express their full reasons means that genuinely unreasonable views may be passively tolerated rather than being subjected to the condemnation they deserve. Likewise, those with opposing reasonable points of view may never have to consider the other side of the argument and try and modify their position accordingly. In both cases, the result is likely to be to encourage the very dogmatic attitudes Rawls wants to avoid.

Similar problems to those discussed above arise whenever the political values need to be debated. For the 'significance' Rawls gives to the two moral powers and the related fundamental cases will only make sense within a particular comprehensive liberal view. Rawls partly acknowledges this fact when he admits that those who have militated for the constitution, such as the abolitionists and civil rights campaigners in the United States, usually did so on the basis of religious and other comprehensive moralities rather than purely political values. He implies, however, that they did so for instrumental reasons so as 'to give sufficient strength to the political conception to be subsequently realised',⁸⁵ a paradoxical argument that treats the sincerity with which certain convictions might be held in a revealingly

cavalier manner.

Different conceptions of the good do not only affect how we might wish to understand or apply the basic liberties. They can also issue in contrasting sets of such liberties. There may also be differing versions of the 'right' on offer that can only be resolved by invoking differing conceptions of the good. Different sorts of liberals disagree over the meaning of justice, for example. The whole question of what counts as a constraint on freedom divides libertarians and social democrats. Throughout his analysis Rawls attempts to avoid this dispute to ensure the theory proves acceptable to both capitalists and socialists. He does so by trying to bracket off the discussion of the political liberties stemming from the first principle of justice from the issue of social justice raised by the second. However, the link between the two is crucial to any adequate consideration of measures to secure a fair value of political speech. Whilst social democrats and others on the left argue to varying degrees that redistributive policies play a vital role in securing a fair hearing, libertarians contend that any redistribution involves an infringement of basic civil liberties. For the latter, the right to private property is a constitutional essential and the failure to include it amongst the basic liberties jeopardises all the others. For the former, by contrast, not explicitly to restrict property rights threatens to render those same liberties worthless. Neither camp will regard Rawls's equivocation on the issue as a 'neutral' application of a purely 'political' conception of justice. Libertarians will regard his proposal that donations to campaign funds be strictly limited as an undue interference with property rights,⁸⁶ whilst social democrats will demand rather stronger limitations on the power of capital to influence opinion, such as restrictions on media ownership.

This last point brings us once more to the core flaw in Rawls's account – namely, that the political sphere itself is greatly contested. We have already discussed the powerful feminist objections to his attempt to distinguish the public from the non-public. This critique has wider implications, for it challenges Rawls's entire project. If the 'central range of application' of the basic liberties proves to be a contested matter, then the mere 'regulation' of the scheme, without reference to supposedly non-public values, will become significantly harder than Rawls maintains. We saw an example of this difficulty once abortion became deemed a 'constitutional essential'. Analogous problems arise in debates over whether 'pornography' has constitutional protection under 'the right to free speech'. Here, too, the line between the public and the non-public cannot be taken as a given but has to be drawn in ways that will almost always be controversial since once again the empirical and ethical judgements involved will be matters of reasonable disagreement.

For these reasons, Rawls's minimalist 'political' strategy fails. The principles of justice cannot simply operate as a framework, with ordinary democratic procedures such as majority voting being perfectly acceptable so long as the resulting decisions do not infringe the basic liberties. The principles and liberties are themselves subject

to reasonable disagreement, both as to their definition and their application. When competing conceptions of justice and rights are in play and are themselves in competition with other goods and values, political procedures are necessary to resolve disputes in a manner that takes account of the interests and ideals of those concerned. These procedures involve a shift from the ‘ideal’ politics of consensual principles, favoured by Rawls, to the ‘real’ politics of negotiation and compromise he avoids.

3 Ideal and real politics

Rawls’s theory reflects a standard liberal interpretation of the American Constitution that gives pride of place to the Bill of Rights and the Supreme Court’s power of judicial review as essential checks on and protections for democracy. Constitutions so conceived are said not only to prevent democracy from interfering with the private and personal beliefs and activities of individuals. They also defend democracy from itself by removing the rights and liberties at the heart of the democratic process from the political agenda and placing their interpretation and protection in the hands of a constitutional court. Like Hayek, Rawls distinguishes an ideal politics of principle or ‘public reason’ from a real politics of interests and subjective values. The results are similarly unsatisfactory. For the distinction cannot be made as sharply and decisively as Rawls desires without producing an overly restricted account of the subject, nature and sphere of politics.⁸⁷ These restrictions prevent politics from performing its crucial function of reconciling difference through negotiation and debate, and risk removing certain issues from the political agenda and thereby delegitimising the public sphere – the very problem Rawls seeks to avoid.

Rawls believes the *subject* of politics proper to be the ‘constitutional essentials’ defined by the ‘basic liberties’. It covers such questions as ‘who is to vote or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property’.⁸⁸ Less ‘fundamental’ matters – he gives the examples of environmental and pollution control, much tax legislation, and funding for the arts – belong to a lower level of politics that demands less stringent standards.⁸⁹ The *nature* of politics is appropriately refined. Political discourse is to consist solely of ‘the ideals and principles expressed by society’s conception of political justice’.⁹⁰ Finally, the *sphere* of politics is suitably limited to those public forums and occasions, such as legislative chambers and elections, in which we address each other in the capacity of ‘citizens as such’. ‘Personal deliberations’ and the reasoning of ‘members of associations such as churches and universities’ are once again of a different order.⁹¹

Here as elsewhere Rawls’s desire to demarcate the public from the non-public has the perverse effect of leading him to be both too stringent in the former and too

lax in the latter. The state, it seems, must steer clear of any concern with the intensity of feeling or convictions of its citizens when making its ‘fundamental’ decisions, whilst universities and other lesser bodies may be subject to all kinds of partial prejudices and special interests. To avoid such peculiar conclusions we need a less ideal view of politics that rests on a broader understanding of all three features of the political.

Consider first the problem of insisting on a given *subject* of politics. For example, Rawls considers civil disobedience legitimate only when the ‘fundamental’ matters covered by the first principle are at stake. Additionally, it must take the ideal form of a persuasive appeal to the common principles of justice that avoids ‘militant action and restriction’.⁹² He rules out disobedience that reflects group concerns or non-public values because it might subject the basic liberties to ‘the calculus of social interests’.⁹³ This limitation overlooks that for disadvantaged groups – be they the working class, ethnic minorities, or women – the pursuit of class or group interest generally coincides with the extension of justice. Disobedience of a costly and destructive nature may be the only way of ensuring their interests get equal consideration with those of others. Indeed, in many instances no appeal to generally accepted principles of justice is possible. Although the claim that the prevailing principles of justice are being selectively or incorrectly interpreted or applied frequently does underlie protest campaigns, as in the case of the American Civil Rights Movement of the 1960s, just as often the point of civil disobedience is to challenge the current view. Rawls’s strictures exclude such challenges. For example, he suggests that civil disobedience would be inappropriate with regard to matters of social justice, such as disputes about tax policies, because ‘the complexities of these questions’ creates ‘a wide range of conflicting yet rational opinion’ so that ‘the appeal to the public’s conception is not sufficiently clear’.⁹⁴ That lack of clarity, however, may obscure a deep wrong that requires political action to bring it into the open – not least to reveal the wider context of ‘fundamental’ issues. Campaigners against the Poll Tax, for example, contended that although ‘normal’ public channels were open to them they had not registered the disproportionate effect of the policy on certain persons. In addition, they sought to highlight the constitutional implications of the policy in taking off the electoral roll approximately a million citizens. In so doing, they had to link social and political justice and dispute the government’s contention that all should pay equally for public services so as to reflect use rather than ability to pay.⁹⁵

This example also suggests why Rawls’s view of the *nature* of politics proves too narrow. As we saw in the last section, the basic liberties cannot be isolated from evaluations stemming from our more comprehensive views of the good. Nor do they necessarily exhaust all that is fundamental – in certain contexts other interests and goods may also play a part. Environmentalists, for example, might contend that property rights and rights to free movement sometimes have to give way before the

preservation of a unique habitat or a rare species. Non-political values, in this account, outweigh the political strictly conceived. It is not just that Rawls's 'fundamental' matters could be bound up in a wider spectrum of issues than he considers, something he concedes (though perhaps without pondering the consequences of this admission),⁹⁶ they also could be challenged by broader considerations.

Finally, the inadequacy of Rawls's restriction of the subject and nature of politics reflects also on this demarcation of its *sphere*. Even in his own terms, Rawls's designation of the non-state familial and associational spheres as non-public produces paradoxes. After all, the status of marriage, whilst hopefully grounded in affection, is a legal status involving detailed rights and obligations largely imposed by the state. The same goes for numerous other bodies that Rawls mentions – such as universities, which usually are publicly funded and legally incorporated by virtue of their charters. By contrast, political parties are if anything subject to rather less public accountability and legal regulation. Yet, because they belong to the official political system, they come to form part of Rawls's 'public'.⁹⁷ Singling out these bodies, however, overlooks the important role played by social movements and less formal organisations in identifying forms of social oppression and matters of fundamental political concern that are often ignored or suppressed by established political channels. A constitutional structure that only caters for ideal politics will prove insensitive to the covert domination of subordinated groups. If the rules and procedures inhibit or prevent particular groups or individuals from participating in determining collective decisions, then injustice and disempowerment will almost inevitably develop over time.

Rawls's distrust of real politics boils down to a lack of faith in ordinary citizens to engage in complex moral argument. In a *Theory of Justice* he even suggested that government by a well-educated elite may be preferable to majority rule, since they will possess greater knowledge for steering the 'ship of state' towards the realisation of justice and be less inclined to 'class legislation'.⁹⁸ In *Political Liberalism* similar reasoning leads him to identify the Supreme Court as 'an exemplar of public reason'.⁹⁹ This suggestion not only assumes an unwarranted degree of disinterestedness on the part of the well-educated, but falsely conflates expert knowledge of means with expertise with regard to ends. Since a reasonable pluralism allows for a variety of worthwhile forms of human flourishing, the demos, like passengers, will want to select their own destination and be able to choose how they travel there, rejecting those offering a poor service.

Rawls musters most of the conventional liberal arguments to defend this curtailment of democracy, his achievement being to bring them within a single theoretical vision.¹⁰⁰ These range from arguments for the protection of a private sphere or minority interests against majority interference, through proceduralist accounts of the need to preserve the rights intrinsic to democracy, to gag rules and

self-binding mechanisms that supposedly guard against myopia or unnecessary conflict. All buttress the view of courts as more likely to constitute ‘a forum of principle’ than ordinary legislative politics, and the consequent need to frame ‘normal’ law within the framework of a ‘higher’ constitutional law. I shall examine briefly each in turn, leaving a fuller discussion to Chapter 7.¹⁰¹

Liberal fears of the ‘tyranny of the majority’ arise out of a belief that individual rights should ‘trump’ considerations of aggregate welfare.¹⁰² This contention, however, ignores both that utility and rights can each involve valid moral claims, as in cases of environmental protection, and that rights themselves can conflict. Resolving such clashes is not easy. What is important is that the various considerations are genuinely weighed against each other, and an attempt made to reach an agreement that none, given the need for a collectively binding policy, could reasonably reject as showing a lack of equal concern and respect. The best way to secure this result is to allow individuals and groups to voice their opinions. Acceptable solutions are likely to vary according to the complexion of the political society involved. But so long as rights figure alongside the other relevant moral considerations within the political debate, then the liberal worry about majority decision-making proves falsely posed. Rights cannot trump majority decisions that have the balancing of rights and similarly weighty moral matters as their object, since these trumps will already have been played within the political process.¹⁰³

The proceduralist gambit seeks to get out of this dilemma. Constitutions are said not to decide matters of substance. They just protect the rules and methods of the democratic game. This position fits with Rawls’s concern to have a purely political conception of justice, that simply takes the preconditions of democracy off the agenda. This thesis has a distinguished American pedigree,¹⁰⁴ neatly captured by Chief Justice Earl Warren’s contention that ‘the presumption of constitutionality ... [is] based on the assumption that the institutions of state government are structured so as to represent fairly all the people’.¹⁰⁵ The Warren Court from the mid-1960s onwards reviewed a number of state electoral laws and districting arrangements with a view to ensuring they met this standard. The difficulty is that matters of participation and process are as contested as most other political issues. People will disagree about how ‘fairness’ should be interpreted and the degree to which it ought to be balanced against other values. Thus, as in Britain there is an American debate about the pros and cons of proportional representation, the legitimacy of special electoral quotas for particular disadvantaged groups, the relative merits of functional as against territorial representation and the like.¹⁰⁶ In many respects, these are not simply arguments about process but also about substance, since one factor in almost any evaluation of a procedure is the type of outcome it leads to. To impose a particular view of these issues as the most ‘fair’ through judicial review of the Constitution would be as potentially damaging to democracy as the other limitations we have so far discussed. Even the entrenchment of procedural democratic

rights, therefore, can be regarded as undermining the autonomy and responsibility for decision-making that define democratic citizenship and link the individual to the polis.

'Gag-rules' offer a similarly procedural reason for keeping the political agenda pure. These involve burying sensitive or contentious issues likely to give rise to irreconcilable differences that threaten to make democracy unworkable. Religious disputes, for example, might factionalise the system and prevent disinterested deliberation or mutual accommodation in other areas, or even lead to civil strife. Removing such subjects from public debate is defended not to protect pre-political rights but to prevent democracy from tearing itself apart or fruitlessly diverting energy and resources into tackling irresolvable rather than soluble problems. Such gag-rules are likened to the avoidance of contentious topics between neighbours who disagree passionately about politics but feed each other's cats and water the plants when one of them goes on holiday.¹⁰⁷ Silence in certain areas helps keep the peace and fosters cooperation in other matters.

The analogy from the private and personal domain does not transfer fully to the political and collective sphere. My neighbour's sexism may be immaterial to his ability as a cat feeder and mower of lawns, for example, but highly pertinent to his views on issues of public policy and my reaction to them. Like the other constitutional constraints examined so far, there is a danger that isolating a matter from public scrutiny serves simply to entrench an unjust *status quo* and gives tacit support to one of the sides in the debate. In such cases, removal is as likely to undermine democracy as to reinforce it. If redress cannot be obtained in principle through regular political channels, then aggrieved parties will be tempted to resort to more drastic extra-political remedies. Indeed, they may well be justified in doing so since the democratic credentials of a system that prevents discussion of the matters its citizens feel most passionately about are dubious to say the least.¹⁰⁸

One way of reconciling constitutional constraints with democracy is to present them as the product of a pre-commitment on the part of the people themselves whereby the demos in its role as the 'constituent power' constrains itself or its offices in normal times.¹⁰⁹ Once again, this is a view deeply embedded in the American constitutional tradition with its emphasis on 'We the People' as the fount of all sovereign authority.¹¹⁰ Underlying such self-binding strategies is the belief that the populace ought to bind themselves in rational moments against errors they might make in less lucid times. This is supposedly analogous to personal forms of self-restraint, such as an alcoholic's decision to sign the pledge. As such, they are presented as examples of self-governance and autonomy, rather than as an abridgement of our collective freedom. This analogy does not hold. Of course, there is a vast literature that treats the operation of the mass within democratic societies as prone to irrational behaviour, and fears the tyranny of the majority on just these grounds. But this possibility does not warrant a wholesale ban on any

discussion of either the rights and rules of the democratic game or of those that protect essential spheres outside it. Indeed, the incommensurability and non-compossibility of basic liberties lays them open to reasonable disagreements about how they are to be conceived and weighed, both with regard to each other and in clashes with other values and interests. Such disagreements are neither emotive nor unreasoned. Pre-commitment in these areas cannot be compared to the self-binding of the confirmed alcoholic. Rather, it resembles an orthodox Catholic, say, ordering his friends to keep all heretical texts from him lest he fall into doctrinal error – a far less edifying model.¹¹¹

There is also the problem that the people doing the binding may be different to those that are bound. Thomas Jefferson raised this issue in terms of the dubious legitimacy of the living being bound by the dead, a difficulty which bedevils all contractarian theories of political obligation that appeal to consent.¹¹² Surely, he claimed, the collective autonomy of the demos required that ‘each generation is as independent of the one preceding, as that was of all which had gone before’, possessing ‘like them, a right to choose for itself the form of government it believes most promotive of its happiness’.¹¹³ Thus, the main objections to this thesis either invoke traditional liberal concerns to do with the need to protect certain individual rights of the sort we examined above, or involve practical or pragmatic worries related to its workability and potentially disruptive effects. Either way, pre-commitment no longer offers the main justification.

These considerations substantially weaken the case for restricting the debate of constitutional and other principled matters to the Supreme Court. Rawls’s reasons for so-doing appear once again to be largely pragmatic. Their legal training and life tenure supposedly render them relatively immune to non-‘political’ influence compared to politicians, and so more inclined to reason solely in terms of public values when constitutional fundamentals are at stake.¹¹⁴ However, I have called into question the theoretical possibility of isolating these values in this way. If this criticism is correct, then it will be impossible for judges to resolve conflicts between the basic liberties under discussion in a ‘pure’ manner simply on the basis of an interpretation of ‘higher’ constitutional law. Rather, they will end up drawing on their own more ‘comprehensive’, and often partial, background values, opinions, prejudices and interests.¹¹⁵ As a result, the practical consequences of such judicial foreclosure may be quite other to those anticipated by Rawls.

Once the impact of a decision on the interests and values of various groups is recognised as relevant to how we understand and evaluate the principles in play, then the unrepresentativeness of the judiciary and its unresponsiveness to social influences will become drawbacks instead of advantages. The very political isolation that commends the judiciary to Rawls also renders them rather poor at weighing up how policies are likely to affect society at large. Legal reasoning is often too circumscribed and their own experience too narrow to take them into account. Cass

Sunstein has pointed out, for example, how the traditional legal model of compensatory justice is ill-suited to understanding the problem of discrimination since it does not usually consist of a well-defined set of discriminatory acts by identifiable persons against particular victims. He also notes how resolving such problems requires quite complex social reforms that courts are badly placed to provide or to motivate support for. He cites bussing as a case where legal intervention failed to consider the knock-on effects for other related forms of public expenditure, such as medical and welfare programmes, or potential popular resentment. Politics, by contrast, provides a better forum for getting a rounded view of an issue and promoting popular support for the policies that emerge precisely because it is open to the views and concerns of the people at large. Moreover, political deliberation need not be purely self-interested. The New Deal and the civil rights and environmental movements offer well-known instances of principled politics that have probably done far more in effecting social change than any isolated court case. Indeed, Sunstein argues that many landmark Supreme Court decisions, such as *Brown v. Board of Education* and *Roe v. Wade*, have been surprisingly ineffective and that the changes with which they are commonly associated have come from independent legislative and executive action.¹¹⁶

4 Conclusion

Rawls's political liberalism avoids the role of politics. Convincing people of the merits of a given policy and justifying a given exclusion involves moral argument and hence political debate. An overlapping consensus has to be politically constructed by exploring what can be resolved through political deliberation and what must remain matters of reasonable disagreement, concerning which we either agree to disagree or as far as possible attempt to find some acceptable compromise solution. As Bernard Crick has remarked:

Diverse groups hold together because they practice politics – not because they agree about ‘fundamentals’, or some such concept too vague, too personal, or too divine ever to do the job of politics for it. The moral consensus of a free state is not something mysteriously prior to or above politics: it is the activity (the civilising activity) of politics itself.¹¹⁷

Of course, different forms of conflict exist and some may prove more intractable and divisive than others. But, as will be argued in Part II, pluralist politics may prove capable of overcoming these difficulties.

3 Segregating values: Walzer and the communitarian containment of politics

The liberalisms of Hayek and Rawls offer neutral frameworks of universal and general principles of justice aimed at allowing individuals to pursue their various plans of life with as much freedom as possible. Michael Walzer disputes the possibility of such frameworks. He contends principles of justice embody the particular conceptions of the good held by people. Indeed, personal identity and ideals are themselves shaped by social practices and cultural traditions. He develops this approach to offer an alternative and avowedly pluralist and egalitarian account of the nature of justice.¹

Walzer believes the diversity of social norms, and related variations as to what count as goods, make universal or generalisable rules of justice inappropriate. To abstract from either the particular persons to whom justice is to be applied, or the specific social settings within which judgements take place, is both wrong and largely impossible. Equitable treatment, in his view, requires that justice pay attention to the plurality of goods and principles operating both within and between different communities. If justice and equality are linked, in the sense that the former turns on treating like cases alike and dissimilar cases differently, we must adopt a particularist perspective which respects the importantly plural ways in which people and societies conceive of the just and the good.

Walzer argues his communitarian account of justice involves a defence of pluralism and equality. Furthermore, he holds this view to be profoundly democratic. For it takes seriously the conceptions and assumptions of ordinary people. In what follows, these contentions will be explored and to a large extent contested. His communitarian starting point and allegedly radical conclusions notwithstanding, Walzer's thesis remains wedded to a distinctly liberal practice: what he calls 'the art of separation'. He seeks an account of justice that segregates each value within its own sphere. I shall argue such segregation often proves at odds with his communitarian methodology, and that neither perspective entails pluralism or egalitarianism. His liberal desire to similarly contain politics merely compounds these problems. It also replicates many of the weaknesses we encountered in Hayek and Rawls. Pluralism,

equality and democracy all have a universalist dimension that is a vital aspect of any defence of their particular manifestations. Justice may need to see and be seen in order to be done, making a contextual and more political approach desirable. However, that is at least partly because there are rival universalisms in play as well as different particular spheres. These operate within as well as between communities, and they cannot be segregated in discrete units. Plural conflicts must be confronted and politically negotiated, therefore.

1 Spherical justice

The social thesis

The central thesis of Walzer's theory of justice is that goods are conceived of, created and distributed within a social context. Goods do not have fixed and inherent 'natural' or 'ideal' meanings that are prior, and hence common, to all communities. All goods are the product of particular social relations and have no existence or value apart from the men and women who employ and fashion them.² Even goods that appear to have a private significance, such as a family heirloom, a pint of beer, or an esoteric invention, form part of a public culture that makes such personal appreciation comprehensible and possible. Indeed, personal identity is in crucial respects socially constructed through the use and pursuit of social goods.³

Because goods and their meanings are socially constituted, Walzer concludes that 'distributions are patterned in accordance with shared conceptions of what the goods are and what they are for'.⁴ However, social meanings are neither immutable nor universal. They change over time and differ between, and in certain cases within, societies.⁵ Walzer draws a number of important consequences from this alleged fact. First, and in contrast to Rawls,⁶ he insists that because societies value different goods and alter their own evaluations during the course of history, there can be 'no single set of primary or basic goods conceivable across all moral and material worlds'.⁷ Some goods may be highly favoured in certain societies and marginalised or absent from others. While many categories of goods will have analogues across most societies, they will usually not be understood in exactly the same way everywhere. Much of Walzer's study is devoted to tracing these differences, notably by comparing contemporary American ideas of education, leisure, office and similar goods with those found in other places and at other times. He notes how even such a basic necessity as food can have different meanings in different contexts, thus, 'bread is the staff of life, the body of Christ, the symbol of the Sabbath, the means of hospitality, and so on'.⁸ Nor will it be clear which meaning has primacy. A group of starving devout Christians might still choose to place the religious usage over the nutritional one, for instance.

Second and relatedly, the same good will be distributed in different ways in different contexts according to how it is understood by those concerned. 'Distributive criteria and arrangements are intrinsic not to the good-in-itself', which for Walzer does not exist, 'but to the social good'.⁹ He claims that 'if we understand what [a good] is, [that is] what it means to those for whom it is a good, we understand how, by whom, and for what reasons it ought to be distributed'.¹⁰ If I wish to know how to dole out the bread, for example, I must first discover how it is valued by those concerned. When it is the 'staff of life' certain criteria will apply, when it is the 'body of Christ' others will be appropriate, and so on.

Third, universalist theories that seek to apply a single distributive principle or set of criteria across all goods and societies are doubly misguided.¹¹ Different communities apply different meanings to a given good, even value a good differently in different contexts and at different times, as in the case with bread in the example above, and prioritise different sets of goods. Distributive principles vary both between societies and within them, according to the good concerned, and cannot be abstracted from these specific contexts.

Fourth, and once again taking issue with Rawls, he disputes that there can be an Archimedean point, such as Rawls' 'Original Position', for the evaluation of any given society's distributive criteria. For:

the question most likely to arise in the minds of the members of a political community is not, What would rational individuals choose under universalising conditions of such-and-such a sort? But rather, What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? And this is a question that is readily transformed into, What choices have we already made in the course of our common life? What understandings do we (really) share?¹²

Any critique must be an immanent criticism based on the traditions and practices people are engaged in. The hypothetical arrangements of idealised agents who have been artificially shorn of their identities and allegiances have no relevance for actually existing people and societies.

Finally, any theory of justice must assume a certain political as well as a social context. Walzer believes the bounded political community constitutes the best approximation 'to a world of common meanings', which, in his view, any account of goods and their appropriate distribution necessarily presupposes.¹³ Within the nation state, in particular, 'language, history and culture come together ... to produce a common consciousness', at least to a greater degree than anywhere else.¹⁴ As a result of this common culture, its members identify with each other and are 'committed to dividing, exchanging, and sharing social goods' amongst themselves.¹⁵ States

also possess a set of political mechanisms for this purpose, that are capable of arranging and securing distributions according to the criteria agreed on by the group. There would be little point in elaborating principles of justice without such institutions and a commitment to them on the part of those involved.

Walzer derives two general and related norms from the above largely descriptive claims, which should guide how we think about distribution. First, he contends that since ‘justice is relative to social meanings ... a given society is just if its substantive life is lived ... in a way faithful to the shared understandings of its members’, so that ‘all distributions are just or unjust relative to the social meanings of the goods at stake’.¹⁶ Indeed, ‘to override those understandings is (always) to act unjustly’.¹⁷ Second, he argues that ‘when meanings are distinct, distributions must be autonomous. Every social good or set of goods constitutes, as it were, a distributive sphere within which only certain criteria are appropriate’.¹⁸ Consequently, ‘no social good *x* should be distributed to men and women who possess some other good *y* merely because they possess *y* and without regard to the meaning of *x*’.¹⁹ Walzer sees the second principle as following from the first. However, as I shall show in later sections, the relationship between the two is a contingent rather than a necessary one. His prioritising of the first over the second undermines the pluralist, egalitarian and democratic credentials of his theory. Unfortunately, the second principle is unable to sustain them either.

At times, Walzer presents his principles as simple logical entailments of the social thesis and the purported intrinsic relationship between the shared meanings of goods and the criteria for their distribution. Justice, on this view, cannot be other than what a given society understands it to be. To the extent that understandings of goods and their distribution differ amongst both societies and their spheres, there are different possible accounts of justice and no way of ranking them.²⁰ Indeed, Walzer’s thesis makes it not only unjust but also nonsensical to distribute goods in any way other than according to their relative social and spherical meanings.

Some instances of such intrinsic links between spherical justice, distribution and social understandings do exist. Thus, if a prize has been established for the Politics candidate scoring the highest marks in finals, it could not be awarded to any one but the person with the best scores without changing the nature of the award.²¹ Of course, there are equally plausible criteria one might adopt, such as giving it to the individual who had tried the hardest or improved the most over the year. Choosing between them on the grounds that there exists a ‘natural’ or ‘most just’ criterion for the award of university prizes would be slightly absurd, however. It all depends on what qualities a given department or university values or is seeking to promote. In this sort of case, a just distribution is clearly relative to the social meaning of the good.

The example of the Politics prize also illustrates Walzer’s point about preserving

the autonomy of distributional spheres. Walzer is particularly concerned at the way money invades all spheres, enabling individuals to buy goods to which they are not entitled.²² The prize cannot be legitimately bought and sold, however, for it would be not simply unjust but ultimately meaningless to commodify it in this way. The only reason a less able student could have for bribing the examiners to give him the award, would be so he could pass himself off as the most successful candidate. The open sale of degrees is pointless for analogous reasons, since it would so undercut their social purpose as symbols of a certain level of academic achievement as to render them valueless.²³

This example brings out the similarities and differences between Walzer's spheres of justice and arguments for the incommensurability of certain values. The case for keeping an academic prize within its sphere gets much of its force from Raz's point that incommensurability can be constitutive of some relationships and intrinsic to an appreciation of many goods.²⁴ However, in relativising this thesis and making it dependent on the ways different societies perceive goods, Walzer is open to the objection that such incommensurability need not be true. Where money is the chief prize, no good need have intrinsic value but be simply a means to amassing more wealth. Of course, our notion of an academic prize would not exist in such a society. But that would not be a matter of regret or celebration to Walzer, merely an anthropological observation.

That the social thesis provides his prime argument emerges from his further claim that we should respect persons equally due to their capacity as 'culture-producing creatures', who 'make and inhabit meaningful worlds' involving 'distinct understandings of places, honours, jobs, things of all sorts, that constitute a shared way of life'.²⁵ Outsiders can never amend what they believe to be the unjust arrangements of another community without committing an even graver injustice. For the human ability to invent a variety of different cultures and social identities means there is no external and universal view of justice to which one might appeal to justify such interference. As with missionaries, attempts at conversion to one's point of view show contempt for people's self-understanding and tend to slide into coercion. No matter how well-intentioned, such exercises are always paternalistic, and end up offering a spurious ideological cover for some form of neo-colonial domination. The only legitimate criticism comes from inside a society in the form of an immanent critique of that society's own standards by its members.²⁶

In recent writings, Walzer has conceded that this argument for particularism involves a universalist dimension that stresses the importance of communal self-determination.²⁷ However, he couches this thesis in communitarian/descriptive terms as a claim that certain minimal moral requirements *are* reiterated within all cultures, not as a universalist/prescriptive argument that certain conditions *ought to be* recognised, whether they are or not.²⁸ The assumption that all societies value some

degree of individual and collective autonomy is empirically dubious, though, and at best offers a contingent defence of pluralism, equality and democracy within communities. Nor is it clear that all societies would accept that principles of justice are relative to the understandings of the people who employ them and the goods that they are applied to. For example, it is arguably a deep assumption of western societies that correct notions of justice are objective and capable of being justified independently of any particular group's beliefs about them.²⁹ We shall return to these points below.

Similar reasoning underlies his case for preserving the autonomy of different spheres. Human creativity not only gives rise to diverse cultures but also to a variety of goods within them, which reflect in turn the wide range of human talents and abilities. Just as the attempt to impose a particular view of justice across different societies involves a lack of equal respect that ultimately proves tyrannous, so, too, does the attempt to apply a single distributive principle across all goods within a society. Inevitably it leads to the monopolists of a particular good exploiting their advantage so as to dominate all other areas. This argument rather begs the question of whether people actually do perceive goods in this sphere-specific manner. I shall challenge this assumption below. The contention that they can and should do so, however, is crucial to the radical political claims Walzer wants to draw from his theory.

A radical liberalism

Walzer regards the argument for different spheres of justice as 'a radical principle'.³⁰ He traces the respective shortcomings of capitalism and state socialism back to their failure to respect it. Capitalism allows the sphere of money to dominate, whilst socialism gives excessive weight to those who control the sphere of political power. Both systems also work with a related and defective account of equality. The former employs a purely 'formal' view, which involves merely treating everyone the same in certain specified respects. The latter advocates a 'simple' egalitarianism, that seeks to render everyone the same in respect of some good or goods. In each case, these approaches to equality merely serve to promote the tyranny of the dominant good, leading to highly inegalitarian results of an unjustified nature.

Walzer's critique of the formal equality of capitalist societies is most clearly expressed in an earlier essay, 'In Defense of Equality', that rehearses many of the central themes of *Spheres of Justice*.³¹ Walzer criticises an argument by Irving Kristol to the effect that the inegalitarian 'bell-shaped' distribution of wealth and power in contemporary capitalist countries echoes the similarly 'bell-shaped' distribution of talents and abilities amongst human beings. Walzer counters that to get the full picture one needs to have a separate curve for each of the many human

capacities: from intelligence, physical strength, agility and grace through to artistic creativity, mechanical skill, leadership, endurance, memory, psychological insight and so on. He contends that the ability to make money is but one more talent to place alongside these. He thinks it highly unlikely that any individual will consistently show up on the same place on each of these curves. To be consistent, Kristol ought to admire the whole range of human talents and abilities. A true meritocracy would involve valuing each of them for their own special qualities rather than for other, irrelevant, reasons. The trouble with a system of purely formal equality is that it fails to distinguish adequately between the various substantive criteria appropriate to different goods, and allows individuals or groups to exploit their success in one sphere to gain an undue advantage in another. In particular, if certain talents come to attract greater financial reward than others, the beneficiaries can 'buy' into another sphere even if they lack the appropriate qualities. Millionaires may lack good looks or a scintillating personality, features that normally are needed to attract friends and lovers, yet prove attractive to others and even be praised for their beauty and wit on account of their wealth alone. Likewise, though by and large less in need of health care than the poor, the rich can jump hospital queues and purchase immediate treatment even for relatively trivial complaints. When talent really gets its just deserts then 'many bells ring'. Money reduces this pluralism to the monotone of the cash register by acting as a universal medium of exchange that allows its possessors to purchase virtually every other sort of social good. Walzer provocatively concludes that 'a radically *laissez-faire* economy would be like a totalitarian state', since it would involve both the market and money 'invading every sphere, dominating every other distributive process.'³²

Walzer thinks this line of attack offers a way of rehabilitating the socialist ideal of egalitarianism by avoiding the two classic weaknesses targeted, he believes with some reason, by conservative critics such as Kristol.³³ Namely, that it involves levelling down to the lowest common denominator, replacing meritocracy with mediocrity, and requires the state constantly to deploy huge coercive power so as to check those with superior personal skills or attributes gaining any advantage from them. The pursuit of simple equality results in the tyranny of money giving way to what Walzer concedes to be the far greater, because more direct, tyranny of the state. Political power, no less than economic power, needs to be kept in its place, and Walzer endorses all the usual liberal constitutional checks and balances designed to do so.³⁴

Walzer holds that his own position of 'complex equality' avoids these pitfalls whilst remaining socially egalitarian. This notion does not require either that all people be treated according to the same rules across all distributions, as formal equality demands, or that we try and realise equality in some important area by ensuring everyone receives the same shares of some favoured quality or good, as

‘simple’ egalitarians advocate. Rather, he argues that we should allow different goods to be distributed by different criteria, some of which will be substantive but most of which will be largely formal. Consequently, distributions will be inequalitarian so far as each good is concerned, and in most cases so will be the results.³⁵ However, no person or group will be allowed to use their monopoly or dominance with regard to any given social good to tyrannise over all other distributive spheres. Walzer contends that the social equality desired by the egalitarian arises as an indirect product of this scheme. No person or group of people is likely to excel in all things. So long as the distributive spheres remain autonomous, therefore, we will come to respect not only a wide range of personal qualities but also a broad spectrum of different people. Within such a system, power and status are far more likely to be equally distributed amongst the population as a whole, with all persons being valued and valuing others in turn according to their distinctive attributes. He speculates that ‘complex equality’ is most likely within a democratic market socialist society consisting of workers’ cooperatives, which disperses political and economic power.³⁶

His communitarian starting point and socialist preferences notwithstanding, Walzer offers his theory as a defence and development of a prime liberal practice: what he calls ‘the art of separation’.³⁷ He contends that his argument for the separation of spheres of justice carries forward the logic of liberal calls for the separation of powers, of state and civil society, of church and state, and of public and private life. In particular, he insists that the traditional liberal separations designed to limit state power are likely to be undermined unless the economic and social power of the market and wealth are kept to their proper sphere in the manner he proposes. In what follows, it will be argued that these conclusions can only be sustained if Walzer is prepared to take a general, society-wide perspective that challenges at least some of these distinctions.

2 Pluralism and equality

Walzer’s theory of justice aims to connect pluralism and equality. The plurality of goods and their different social meanings are linked to a conception of complex equality that aims to secure equal respect for the whole gamut of human qualities and forms of life. This section will dispute both the pluralist and egalitarian credentials of his thesis. I shall argue that both involve considerations that cut across the different spheres of justice as opposed to keeping them distinct, as he maintains.

Pluralism

Pluralists contend that human beings pursue a wide range of forms of life. These emphasise different goods, interests, goals and values, often involve differing sorts of moral claim, and reflect divergent world views or conceptions of human flourishing. These differing goods, ends, outlooks and evaluations are held to be not simply diverse but incommensurable, rendering conflicts between logically or practically incompatible goods, interests or ideals highly problematic. For pluralists argue that such clashes cannot be resolved by appealing to a common denominator or single scale against which all values or points of view might be measured.³⁸

How pluralist is Walzer's argument when set against this standard account of pluralism? Walzer claims to be a radical pluralist who reveals:

that the principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves – the inevitable product of historical and cultural particularism.³⁹

However, his whole approach is designed to short-circuit the potential for conflict between incompatible and incommensurable goods and moral codes. Each good is assigned its distinctive sphere with its corresponding distributive principle. Differing moral systems are allocated to different nation states, whose cultural homogeneity can be protected by an appropriate membership policy. As a result, conflicts between differing goods or conceptions of the good become a matter of boundary disputes. The trick is to segregate the sphere or social system within which a given principle or set of values may be said to operate.

Unfortunately, this avoidance of the prime difficulty of a pluralist perspective fails to work. As we noted above, Walzer's central thesis is that distributive principles are relative to the social meaning of goods. However, in all but the most homogeneous of societies, there is likely to be a variety of social meanings available. Moreover, what motivates such differences may not be a disagreement about the true social meaning of the good in question, but moral considerations that apply across spheres. For the moral concerns that theories of justice seek to articulate regarding equality of opportunity, individual responsibility, autonomy, harm, well-being and the like are not sphere-specific, but refer to human and social relations generally. Indeed, because distributions in one sphere tend to have knock-on effects for distributions in others, such general considerations are likely to prove necessary to help resolve conflicts between spheres.

These points are best illustrated by looking at a few examples. Walzer suggests that need forms the socially recognised criterion for apportioning health care resources within modern welfare states.⁴⁰ One might broadly accept this position,

however, and yet believe that a number of other considerations ought none the less to be taken into account. 'The nature of a need', as Walzer admits, 'is not self-evident'.⁴¹ Any conception of health needs or account of the relative ordering of different such needs will draw on wider social and ethical doctrines that are not themselves specific to the sphere of health.

Some theorists seek to circumvent this difficulty by sharply distinguishing needs from mere wants or desires and regarding need as a minimal requirement. Unfortunately, as Shakespeare's *Lear* famously observed, the 'natural' needs of human beings are indistinguishable from those of beasts, and do not offer a justification for anything like the range of care offered by a modern health system. Nor is it clear that one can have a purely 'medical' definition of need, related to the level of existing health technology. Are those with critical conditions necessarily more needy than those suffering from chronic complaints, for instance? In a world of limited budgets, to say both types of medical need ought to be satisfied simply side-steps the issue. All health systems are forced to cash-limit certain treatments. Whilst the grounds for choosing which patients to treat may be roughly medical, such as likelihood of success, they tend to be mixed with other considerations, such as favouring the young over the old, which reflect wider moral notions such as utility, fairness, autonomy and the like. Similar issues arise when weighing up the amount of the health budget which should go on heart and kidney transplants, dialysis or prolonged courses of chemotherapy, as opposed to the removal of piles, or hip operations. The former may be more urgent for the individuals concerned, but the treatments are highly expensive, may have less chance of success and benefit relatively few people. By contrast, the latter are more common, often cause people persistent, if non-life-threatening pain over many years, their treatment is more sure, and the quality of life of those concerned may well in the long run be greatly improved. Limited resources mean such choices have to be made. Yet here, too, reference to health care need alone does not get you very far. Purely medical reasoning has to be supplemented by broader ethical judgements.

Walzer implies that we can avoid these sorts of problems with a more socially relative understanding of health need.⁴² This solution offers a sleight of hand that allows Walzer to hide the fact that any social definition already incorporates a number of non-sphere-specific moral considerations of the sort discussed above. As Walzer himself points out,⁴³ it necessarily involves a reference to the sphere of membership, which connects up in turn to the whole range of social goods. Consequently, any social definition of need will turn on how medical care relates to all the other spheres connected to citizenship, such as education, voting, employment and the like. A social understanding of 'need' will also involve some judgement as to the relative importance of health care *vis-à-vis* these other goods. For health provision not only supports access to them, but also potentially detracts

from them. Health care advances are now such that apportioning resources on the basis of 'need' alone may well be tantamount to writing a blank cheque that will leave no money to do anything else. Spending on health, therefore, will have to be compared and weighed against the financing of other important public services, such as education. This balancing, in its turn, will necessarily involve further cross-sphere moral arguments, such as Aristotelian or utilitarian versions of the relative importance of different goods to human or social well-being. Thus, the debate will switch from an enquiry into the social meaning of a specific good, to a disagreement over which moral theory best captures the relative distribution of the whole range of goods.

Note that not only meta-ethical judgements, but also self-standing ethical values of independent weight are involved in these deliberations. Amy Gutmann has observed,⁴⁴ for example, that many would regard individual responsibility as having some bearing on the issue of how someone should be treated. Thus, those engaging in 'dangerous' sports are usually required to take out special insurance rather than relying on the public health system to pay the full amount for tending any injuries that might result. Some theorists regard heavy drinkers and smokers as similarly responsible for the increased probability of their requiring medical attention. Just as private insurers would charge them higher premiums, so, it is argued, they ought to contribute more to public funds. Analogous reasons lead Gutmann to dispute Walzer's apparent veto on people prudentially seeking to supplement state health provision by taking out private policies that allow them to queue jump and so on, on the grounds that this involves an inappropriate invasion of money into the sphere of health. Her point is that certain general moral principles, in this case the view that people ought to be partially responsible for their voluntary behaviour and reap the rewards and penalties as the case may be, influence how we think goods ought to be distributed. They belong to no particular sphere and are attached to no given good, but rather form part of the public moral culture of a community. Yet another consequence of pluralism, of course, is that these, too, may be contested – producing a further dimension of complexity missed by Walzer's analysis.

Health care, then, is not simply an issue of medical need alone. Other moral and social concerns provide a context within which we can evaluate different types of medical need and situate them within the general pattern of goods and values. Two important criticisms of Walzer's position emerge from the above. First, the social meaning of any good turns out to be itself more complex, and hence more likely to be contested, than Walzer appears to appreciate. Second, even where an agreed meaning exists, that in itself may not be sufficient to justify a particular mode of distribution. It is one thing for people to recognise that health care is a human need, quite another for them to believe that it must therefore be publicly provided on a nonmarket basis.⁴⁵ After all, food and clothing are also needs but Walzer does not

argue that they should only be available on the basis of some form of public rationing scheme in state department stores and supermarkets. The reasons for having a welfare state that offers an extensive national health service that covers everyone but only provides food, clothing and housing for those on the bread line, for example, will turn on a wide range of arguments, some of which will be directly related to health and the particular type of need it represents and others (perhaps the majority) to general issues of social justice.

Walzer ignores these difficulties because his communitarianism tacitly solves them. The fact that each good is socially constituted inherently relates it to other spheres and ideals. Walzer assumes such connections so that he does not have to tackle explicitly the tricky problem of conflicts between spheres. However, this social view of goods implicitly threatens the idea of their operating within separate spheres. Moreover, the assumption of an already existing social meaning for goods also pushes pluralism to one side. The disputes across and within spheres to which it gives rise are simply taken as solved. Unfortunately, even within highly culturally homogeneous societies pluralism will out. Given the internal complexity of most goods and conceptions of the good, and the diversity of our particular attachments, it is doubtful that any but the most hierarchical and oppressive social systems could have the coherence of purpose he requires.

Of course, the belief that each state embodies a single culture is itself highly questionable. According to Will Kymlicka, it applies to less than 10 per cent of countries.⁴⁶ Walzer does recognise that 'sometimes political and historical communities don't coincide'. However, he assumes that in these cases 'the sharing [of sensibilities and intuitions] takes place in small units' and 'we should look for some way to adjust distributive decisions of those units', presumably through the creation of a multinational federation.⁴⁷ In other words, he tries to hold on to the territorial segregation of an encompassing social culture to resolve the problems raised by diverse interpretations of the different spheres and how they relate to each other. That still leaves the issue of immigrant groups which tend to be more dispersed. Walzer advocates compulsory assimilation and restrictive admissions policies to avoid this problem.⁴⁸ Even Walzer acknowledges these policies are no longer justifiable once immigrant communities have been established. But this condition holds for most developed nations. Walzer's social thesis appears empirically as well as normatively flawed, therefore.

Equality

Keeping the spheres distinct is central to Walzer's account of complex equality. If the above argument is correct, however, this will prove impossible. Even if it were possible, this arrangement is only contingently egalitarian in the conventional sense.

A great deal turns on Walzer's claim that talents are roughly evenly distributed throughout the population – that there are no renaissance men and women who happen to excel at most, if not all, things, or any complete duffers who are no good at anything, or whose only talent lies in a somewhat trivial sphere, such as the ability to recite the whole railway timetable from memory. He also assumes that by and large inequalities within each sphere will not be too great. In the event that neither of these assumptions turn out to be true, then the relationship between people would be best described as one of complex inequality rather than equality. In this case, Walzer simply accepts that his theory would allow 'for an inegalitarian society' but concludes 'it would also suggest in the strongest way that a society of equals was not a lively possibility'.⁴⁹ The egalitarian credentials of complex equality, therefore, rest on the largely unsupported empirical assertion that inequalities will be 'small' and 'will not be multiplied through the conversion process' or 'summed across different goods',⁵⁰ although these are all theoretical possibilities of his thesis – even if the spheres remain formally separated.

Of course, Walzer's argument is that something other than the 'simple' equalising of conditions underlies the notion of equality. He contends that the 'aim of political egalitarianism is a society free from domination',⁵¹ by which he means individuals and groups employing their monopoly of one good to control access to another. Separating the spheres supposedly achieves this goal. His underlying purpose appears to be to engender equal respect for the manifold talents human beings possess as a whole – a view, as David Miller has recently pointed out – best captured by some notion of 'equality of status'.⁵² In Walzer's words, equality on this definition means 'no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters and slaves'.⁵³ Unfortunately, his argument for complex equality ultimately collapses because, for reasons already partly rehearsed above, the spheres cannot be kept distinct in the way Walzer desires. Although he rightly believes that equal status forms an important aspect of egalitarianism, it cannot be totally distinguished from equality of condition.

Note first that equality of status is as socially contingent on Walzer's account as rough equality of condition. He admits that in some societies social meanings may be 'integrated and hierarchical', and so 'come to the aid of inequality'.⁵⁴ Once again, his communitarian starting point can subvert the very defence of pluralism and equality it is supposed to support. Where a belief in the complete autonomy of different spheres forms no part of the public culture, insistence on the socially relative character of justice undermines the spherical separations his argument requires. Even then, as we have seen, it remains unclear quite how sharply such distinctions could (or should) be made. Walzer treats this problem as a peripheral one, citing caste societies as a singular instance of a society where the dominance of a group has been incorporated into the social meaning of goods. If gender is

substituted for caste, however, then the difficulty emerges as far more pervasive and pernicious. As Susan Moller Okin remarks:

like the hierarchy of caste, that of gender ascribes roles, responsibilities, rights and other social goods in accordance with an inborn characteristic that is imbued with tremendous significance. All the social goods listed in Walzer's description of a caste society have been, and many still are, differentially distributed to the members of the two sexes.⁵⁵

So far as gender is concerned, social meanings infringe the autonomy of different distributive spheres to some degree in all societies. Within a gendered society, all distributive criteria are likely to have a discriminatory bias built into them in the form of a 'male comparator' test. Keeping the spheres distinct will have no critical purchase on such discrimination – only a global onslaught on the broader social context within which particular meanings are framed. That involves thinking about justice and equality in general and not merely socially and sphere-specific terms.

According to Walzer, preserving equality of status merely involves preventing advantages (or disadvantages) in one sphere passing over into others. In spite of the high degree of social differentiation and stratification within modern societies, however, there tends to be a significant correlation and convertibility between different modes and forms of power and position.⁵⁶ Take employment, which Walzer believes ought to be distributed according to fitness for the job. For a start, having a job of any kind in itself tends to confer a certain social status *vis-à-vis* the unemployed for fairly widespread general moral reasons, such as the importance of making a contribution to society and of earning one's own living to some extent. These often make it hard for the unemployed to attain much self-respect let alone that of others. Then there are the different statuses attaching to different kinds of work. Walzer suggests that we can somehow compartmentalise these. We can give each person his or her due as a refuse collector, bank manager or academic, rank them against other members of their respective professions, yet not make comparisons between these different jobs when it comes to those persons having access to other goods. However, certain forms of work will, by their very nature, extend into more fields than others, giving people some advantages in those spheres. Indeed, in many cases there may be an inherent link between success and standing in certain jobs and high status in other areas. In part this arises because the qualifications necessary for some types of work necessarily involve a high degree of attainment in other spheres. Indeed, sociologists have noted causal links between distributions of some goods and those amongst others. Education, for example tends to give people access to better jobs generally, not simply academic ones, and operates as a positional good in all sorts of spheres. To preserve 'complex equality'

by blocking either the possibilities for conversion or the causal linkages between the distribution patterns of different sorts of goods, would require just as much, if not more, intervention on the part of the state as the 'simple' egalitarian policies Walzer criticises on just these grounds. As Adam Swift has observed, the former Eastern bloc did achieve some elements of the separation of spheres Walzer desires, with correlations between education, income and prestige apparently lower there than in western capitalist countries. Yet these were achieved at a high price so far as personal liberty was concerned, and even here elements of convertibility took place in the form of Party contacts and political influence.⁵⁷

In fact, the best way of ensuring 'equality of status' almost certainly remains ensuring equality of opportunity to different positions for all social classes and groups, and reducing financial differentials between different forms of employment. However, Walzer has difficulties with countenancing the forms of affirmative action programme that may be required to support the first strategy, or the redistribution of wealth necessary for the second. The first conflicts with his view that only suitability for the post fits our social understanding of office.⁵⁸ Yet bias does not result solely from external incursions into a given sphere. As feminists have pointed out, it is frequently internally present in the way certain good-specific criteria get formulated in the first place so as to reflect biases within society at large.⁵⁹ The point of affirmative action is at least partly to change the criteria we employ in selecting for certain spheres in ways that render them less discriminatory and more inclusive of difference.

The second strategy poses comparable problems, since it seems to involve allowing the sphere of money to encroach outside its realm. Walzer regards money as the chief culprit in undermining the autonomy of spheres and, in the process, complex equality. It destroys the inherent link between the meaning of a good and its criteria of distribution. Whilst it would be meaningless to steal your degree certificate unless I could convince someone I was entitled to it, your cheque for the best essay can be put to any use I please. Walzer draws two propositions from this quality of money, both of them misguided. On the one hand, it should be excluded, or 'blocked', from influencing decisions outside its sphere. On the other hand, he suggests that money itself has no determinate social meaning and hence that it is senseless to seek to redistribute it. 'Given the right blocks', he argues, 'there is no such thing as the maldistribution of goods.'⁶⁰

With regard to the first, Walzer's analysis is too crude.⁶¹ His main target is the commodification of goods. True, it seems perverse to think that certain goods are obtainable for money – as the Beatles memorably put it, 'money can't buy you love', although it can purchase sex. However, human beings cannot live on love alone, and even the most collective and non-monetary organisations, such as families, will need to reflect the restrictions of limited resources in budgetary terms when

identifying their priorities. The problem with ‘market imperialism’ lies not so much in the extension of the sphere of money and commodities, inappropriate though this is in certain limited areas, as in the dominance of the market ethos. Like other supporters and critics of the market, Walzer tends to conflate the two issues. But one can clearly acknowledge the need for budgets without believing they must or should be set in a market manner.

Worries about the imperialism of the market are best seen in terms of a fear that its ethos distorts the incentive structure and nature of certain practices. Games offer a good illustration of this point.⁶² Success and enjoyment can only follow from adopting a point of view that is internal to the given game. External goods and especially financial rewards may play a part in people’s involvement, especially if that is how they earn their living, but the pursuit of these rewards must not come to dominate if the spirit of a game is not to be destroyed. Concern about the commercialisation of sport, for instance, has less to do with paying tennis or football players large amounts of money than with the way these games get altered to enhance their commercial value so that these fees can be paid – say by increasing their ‘entertainment’ qualities or by retimetabling and adding extra rest periods to fit in with television schedules and advertising breaks. Similarly, and more importantly, those who complain about the way successive Conservative governments have introduced the market into the provision of certain public services over the past decade and a half, such as health and education, do so not because they spurn value for money or accountability in the delivery of these goods, but because they fear that the market ethos will destroy the internal connection between standards of performance and the type of good being delivered by focusing the attention of service providers on the acquisition of the external good of money. Pure academic research will give way to the pursuit of lucrative grants and careerism, managers will supplant doctors in the setting of priorities in the health service and so on. Non-monetary incentives, such as more research time in academia, may be more appropriate in promoting the pursuit of the good concerned.

Naturally, this does not mean that decent salaries are not important – academics have food and housing bills to pay like everyone else. Moreover, many jobs do not possess the sort of intrinsic satisfactions that research and scholarship bring, and almost all generate ‘bads’ as well as ‘goods’. Thus, we might also regard it right to compensate someone who works particularly hard not simply with greater job satisfaction but say with longer holidays and higher pay so that they can find fulfilment in other areas. Money, in other words, has a role to play in non-market spheres, even if the market ethos does not.

The market ethos proves damaging to pluralism because it renders all moral motivations the same. This aspect is reasonably well captured by Walzer’s argument for different spheres of justice. However, blocking exchanges to preserve complex

equality provides no answer to this situation, for the problem is not commodification or money *per se* but inequality of resources. In this respect, his second view regarding money – that it has no intrinsic value of its own to justify its distribution – simply misses the point. For a prime feature of market distributions is their tendency to generate highly inegalitarian results that need not even guarantee certain groups and individuals the most basic goods. It proves necessary, therefore, to have some method of globally distributing resources across spheres on such general grounds as fairness. Complex equality thereby comes to depend on considerations relating to equality of condition.

It will be recalled that Walzer feared that this approach would lead to undue political intervention with individual liberty. Here, as elsewhere in his discussion of the market, his argument has a tendency (contrary to his broader aims) to mirror that of the New Right. However, whereas patrolling the borders of different spheres would require both eternal vigilance and constant interference, redistribution through progressive taxation can be achieved in an entirely rule-governed and generalised manner. What becomes important in this approach is the justice of the background conditions against which individual activity, including that of the market, takes place. A concern with the justice of what John Rawls has called the ‘basic structure of society’ usually takes the form of state support for a number of public and cultural goods deemed necessary for different sorts of human endeavour.⁶³ The state steps in because the market either erodes or cannot be guaranteed to support these goods due to the absence of appropriate economic incentives, or would only make them available to those able to pay for them.

Walzer rightly reflects that societies will differ over which goods warrant public provision, although he down-plays the degree to which there will be intra-societal disagreements as well. Such discussions, however, concern the justice of society as a whole rather than an enquiry into the internal meanings of different goods. Equality figures in such debates not as a matter of avoiding domination, or not directly that. The equal status of those involved is already assumed, since some recognition of the importance of certain goods to all citizens forms at least part of the justification for their public regulation or provision in the first place. Such reasoning underlies the extensive welfare provision in the fields of education, health, housing and social security of most advanced industrial societies, for example.⁶⁴ Thus, it is the simple equality of citizens as members of society that entitles them, as a matter of supra-spherical social justice, to a complex array of goods, rather than the complex equality of different spheres of justice that produces the equal status of members of the community. Walzer’s argument is back-to-front.

3 Democracy and the containment of politics

The demands of equal citizenship brings us to the role of democracy in Walzer's argument. Walzer associates his theory with a broadly democratic vision of society and of value. It is socially democratic because complex equality supposedly replaces social tyranny with a world in which citizens rule and are ruled in turn, according to their ability in the given sphere of activity in which they are engaged.⁶⁵ It is epistemologically democratic because the principles of justice are said to reflect the views of those involved in exchanging the goods that give rise to them.⁶⁶ He advocates political democracy as involving both these dimensions within a form of government in which advantages in one sphere do not give domination over others. 'Every extrinsic reason is ruled out. ... Citizens come into the forum with nothing but their arguments. All non-political goods have to be deposited outside: weapons and wallets, titles and degrees.'⁶⁷

In spite of these claims for his theory, the democratic credentials of Walzer's theory can be questioned on each of these three counts. We have already noted that 'complex equality' is only contingently socially egalitarian. Indeed, it cannot even be guaranteed to promote equality of respect. Similarly, his theory will only prove epistemologically democratic when the authority of the people is socially recognised. If priests, mandarins or an all-powerful leader are regarded as the authoritative interpreters of social meanings, then the people will have at best a subordinate place in interpreting shared meanings. Moreover, where power is organised hierarchically it is highly likely that meanings will be, too.

Walzer's defence of democracy as '*the political way of allocating power*'⁶⁸ seems at first sight unequivocal. Closer investigation reveals a certain ambiguity in his account. Not only does Walzer wish to keep politics to its sphere, he also believes democracy presupposes a culturally defined demos operating within the boundaries of a territorial state. Meanwhile, a general argument for democracy has to confront its lack of universal support amongst all nations of the world. All three worries serve to undermine his case.

The first concern is motivated by his fear of tyranny. Walzer accepts that the boundaries of the different spheres have to be policed and defined by politics. 'Political power', therefore, 'is always dominant – at the boundaries, but not', he wants to argue, 'within them. The central problem of political life is to maintain that crucial distinction between "at" and "in".'⁶⁹ Because the various spheres cannot be kept as separate as Walzer wishes, however, this distinction also collapses. As we have seen, a sphere's meaning and hence its boundaries are tied up with general moral issues that cut across spheres and serve to define how, when and to whom goods ought to be distributed. Goods and their distributional principles have only a very limited autonomy, and are defined as much from without as from within. Walzer appears to suggest that such matters might nevertheless be discussed in terms of 'pure' political arguments, such as liberty rights, shorn of 'every extrinsic

reason' – a position reminiscent of Rawls's theory of 'public reason'.⁷⁰ Yet, to fully appreciate the force of the various moral considerations and interests relating to and across different spheres, they need to be voiced directly. He also tries to minimise the extent of such generalised disagreements by assuming relatively homogeneous communities. However, pluralism makes this assumption unlikely in all but the most ethnically cleansed and authoritarian regimes. To the extent that democratic politics offers the means whereby these different general views can be voiced and balanced against each other, it must necessarily operate within and across as well as at the borders of the spheres.

Keeping politics 'at' the borders also overlooks the extent to which oppression operates 'within' them and may require political rectification. Feminist complaints prove instructive once more, since Walzer's argument reflects a typical ambiguity in the liberal distinction between the public and the private that they have done most to highlight. The absence of personal space may be the mark of a tyrannous regime, but unregulated that space can also be the locus of private forms of tyranny that are every bit as oppressive as those of the state. Moreover, discrimination and subordination within the private sphere can distort in their turn the character of the public. The type of influence exercised within their spheres by employers, family, friends, fellow members of a club or church and the like is a political matter, therefore, both in itself and because of its external effects. Walzer's remarks on 'The Woman Question' show up this problem in his argument well.⁷¹ In keeping with his spherical demarcations, he contends that 'the real domination of women has less to do with their familial place than with their exclusion from other places'.⁷² Yet elsewhere, in the context of a discussion of nineteenth-century China, he acknowledges that liberation from 'political and economic misogyny' may require that 'the family itself must be reformed so that its power no longer reaches into the sphere of office'.⁷³ In this case, however, as well as in the tantalising hints he offers with regard to reforming the contemporary organisation of families,⁷⁴ 'social meanings' have to be challenged and a commitment to equality imposed across spheres. This may have the effect of preventing domination in the domestic sphere spilling over into others as well, and so prove consistent with Walzer's separation of spheres. But that entails prioritising his second over his first principle – something he is reluctant to do. Indeed, the autonomy of the different spheres could not provide the main rationale for this policy – more general egalitarian considerations that apply to some degree within as well as between all spheres do.⁷⁵ Nor are such changes likely to occur without the political will to politicise the personal, at least in part. Segregating politics to its own sphere cuts off these all-important issues. In any case, it is doubtful that a hard distinction can be drawn between inter-spherical boundary drawing and intra-spherical interference. The outer contours of a sphere will almost certainly have some bearing on its inner character as well.

Politics assumes a public culture concerning the rights and duties of citizens. Walzer's second worry comes in here. Though he says 'politics ... establishes its own bonds of commonality', he believes politics only works when such commonality already exists in the guise of a homogeneous national culture. As we saw, he accepts that multinational states may require a degree of regional autonomy. He observes the necessary adjustments of distributive decisions will need to be 'worked out politically'. However, he contends the adjustment's 'precise character will depend upon understandings shared among citizens about the value of cultural diversity, local autonomy, and so on. It is to these understandings that we must appeal when we make our arguments'.⁷⁶ Yet, the demand for greater regional autonomy presumably issues from an absence of shared meanings. Working matters out politically cannot appeal to already existing shared meanings. A common platform needs to be politically created. But this political shaping of the contours of the polity contradicts Walzer's social thesis with its assumption of ready-made meanings simply awaiting their expression. Once again, his segregationist approach denies any role for politics in negotiating between conceptions of the good. Yet, a pluralist polity requires just that.

This problem could be overcome if there were universal arguments favouring democracy. As I noted in the first section, one universal principle runs through Walzer's argument: namely, that we should respect the cultural creations and choices of different human beings. In earlier work, he linked this idea to the need for all social arrangements to be based on consent – a thesis that suggests democracy is the best form of government.⁷⁷ Recently, however, this conclusion has come unstuck on Walzer's third worry. The only valid universalism, he now contends, is the 'thin' reiterated product of numerous 'thick' particular moralities, and always bears the peculiarities of its local manifestations. From this perspective, there are no universal democratic principles. If and when they emerge, they will be the distinctive products of the societies which give them birth. There are 'a number of different "roads to democracy" and a variety of "democracies" at the end of the road'.⁷⁸

Unfortunately, there are societies where it is part of the meaning of citizenship and political power that it be distributed unequally and hierarchically – feudalism being an example. Those at the bottom are not asked to consent, just to obey. Walzer's solution to this problem has been that societies always possess the resources for immanent self-criticism. Inside every 'thick' reactionary regime, it seems there is a 'thin' liberal one waiting to get out. This belief can best be described as a pious hope. As Joseph Raz has observed,⁷⁹ the thesis that existing morality can be interpreted so as to provide a moral criticism of itself proves incoherent. It implies the paradox that the prevailing morality contains both true and false moral propositions. Yet, if morality is simply the existing morality, it cannot be a source of moral error, only of truth. Likewise, any radical overhaul or even any change of the

existing morality would imply that it was or had somehow become wrong. This proposition, too, is logically absurd, since once again the only ground for moral correctness is that self-same morality. The only possible immanent moral critique, therefore, consists of pointing out false deductions from accepted premises, uncovering duplicity and the like – a point that Walzer sometimes appears to concede.

Such reasoning may not produce the radical conclusions Walzer desires, however. As Raz pointedly remarks, neither the protesters in Tiananmen Square nor their foreign supporters, with the apparent exception of Walzer,⁸⁰ based their condemnation of the Chinese government on arriving at the correct interpretation of the relevant cultural discourse. It may well be that according to Chinese political traditions the massacre was justified. Critical purchase on this event derives from invoking principles that have a wider and not just a parochial relevance, whereby certain forms of behaviour are condemned as simply wrong.

Walzer's invocation of a 'thin' universalism was an attempt to block this line of criticism. To do any work, though, universalism has to be more than purely formal – otherwise, Walzer risks the slide into relativism, the avoidance of which motivates this new twist to his thesis. However, if local cultures are to remain consistent with a more substantive universalism, they are likely to offer only a particular 'thin' elaboration of 'thick' universal concepts, rather than differing totally from them in the way Walzer supposes.⁸¹ Britain, France and Italy, for example, all have recognisably liberal democratic political systems that are informed by certain common 'universal' principles, such as a respect for human rights. Yet, there are considerable differences in the political and legal procedures they adopt for realising them that reflect important local historical differences. Thus, Walzer is undeniably correct to say the Chinese should seek to construct a democratic system suited to China rather than simply importing American institutions. But this need not involve studying Confucian or Mandarin traditions, let alone Maoist–Leninist vanguard doctrines, for an elusive Chinese conception of democracy, as he proposes.⁸² To the extent that democracy possesses certain intrinsic merits, it can be justified independently of the existence of any indigenous form. Its introduction merely entails adapting the democratic ideal and its associated rights to Chinese circumstances. That this task will be probably better performed by the Chinese than others, no matter how well-intentioned, is in most cases no doubt also true. Walzer suggests that such regard for the self-determination of peoples only proves consistent for an 'interpretive' approach that respects the 'thick' local moral views of others.⁸³ But 'thick' universalists need not be paternalistic imperialists, as Walzer fears.⁸⁴ They can believe that China will have to embrace democratic practices of its own accord for largely pragmatic reasons, such as that it will probably be more enduring and successful in that case, or because they value autonomy as an inherent aspect of democracy.

The only ways Walzer can consistently hold to an interpretative morality based on a purely immanent critique is for him either to adopt some form of progressive immanent teleology, whereby existing morality is seen as the evolution of some inherent principle that must gradually work through various stages with all their contradictions. Or he has to argue that existing ‘thick’ moral systems involve far more ‘thin’ universal elements than he usually wants to admit, but that these are shockingly poorly observed by many of those who claim to profess them.⁸⁵ On occasion, he appears to adopt the former course, as when he argues that the modern view of human equality ‘grew out of the critique of a failed hierarchy’ during the feudal era, and that progressive interpretations will culminate in the acceptance of egalitarianism.⁸⁶ This view, however, is hopelessly optimistic. For example, far from adopting the radical welfare and democratic socialist measures that Walzer contends are at the heart of Western liberal values,⁸⁷ the general trend is towards the ever greater extension of the market – a development for which libertarian thinkers can provide a perfectly coherent rationale. This fact does not mean that radical views cannot be defended or libertarian ones criticised, merely that appeals to contemporary *mores* are unlikely to prove the best ground for conducting a debate between these positions. By contrast, Walzer’s frequent complaint that many philosophers fail to recognise the degree to which ordinary people’s beliefs are moral points in the direction of the second course. However, this strategy fits ill with his assertions about the variety of moralities. Either way, he cannot avoid offering some criteria for sorting out the wheat from the chaff in any tradition.⁸⁸

Walzer’s argument here (as elsewhere) trades on confusing two levels of pluralism: namely, differences of view over the universal rules, on the one hand, and disputes as to the interpretation of those rules, on the other.⁸⁹ Certain debates of the first kind will concern differing justifications for democracy – such as discussions between utilitarians and Kantians. Moreover, both camps allow for plenty of room amongst their adherents for disagreements of the second kind. Within this range one can talk of different paths and kinds of democracy, and a diversity of policies on matters such as welfare, employment and the like. But some putatively universal moralities simply deny democracy along with any, or only minimal, concessions to pluralism and equality. At the local level, Walzer’s arguments have no purchase so far as they are concerned. They can be challenged only in universal terms. Thus, it is the differences between and within a number of thick and broadly democratic universal moralities that allows for a thick politics with numerous thin local variations, not the reverse as Walzer contends. Neither the justification or sphere of operations of democracy is totally particularist, therefore. Rather, to a large degree its rationale and purpose lies in the equitable weighing of universal positions and applying them in given contexts. To fulfil this task politics cannot be squeezed into an elusive space between the spheres.

4 Conclusion

Walzer maintains the democratic socialism he supports is implicit in the public culture of modern industrial societies and develops out of the complex equality they favour. This chapter has disputed both these contentions. Contemporary societies are more plural and the meanings of goods more contested than he appreciates. The resulting fragmentation of traditional societies means that social solidarity cannot be assumed, as he believes, but needs to be politically constructed. Complex equality tends to reinforce rather than challenge the social divisions between rich and poor and their tendency to live in such different spheres that the former are largely ignorant of and indifferent to the latter. In this context, arguments for social justice have to be made across and not only between spheres. Indeed, given the poverty of the third world, they increasingly need to be made across societies as well. Walzer's desire to segregate different spheres of justice, and the resulting containment of democracy, denies his approach the resources for this task.⁹⁰ It is to the ability of politics to negotiate a way through the maze of pluralist conflicts that we now turn.

II

Democratic liberalism and the politics of compromise

FOR EDUCATIONAL PURPOSES ONLY

4 Negotiating values: from consensus to compromise

The chief criticism of the theorists examined in Part I of this volume was that they all sought to restrict politics within a putative consensus on constitutional or communal values. Pluralism challenges such consensual agreement, however, and creates clashes of principles, values and interests that can be defused only through political compromise. The next two chapters show how to arrive at such compromises. I argue that they are produced by a form of politics that makes liberalism an aspect of the democratic process itself, rather than a normative constraint on the scope of democracy. This democratic liberalism removes the tensions between liberals and democrats present within liberal democracy, whilst offering a model of legitimate governance suited to a pluralist society. This chapter deals with the kind of politics needed to generate a liberal type of compromise, the next with the constitutional and institutional mechanisms necessary to foster such political attitudes.

Compromise is sometimes portrayed as inimical to a principled liberalism. Theoretically, however, it can indicate a laudable and liberal willingness to see another's point of view, thereby showing a decent respect for pluralism. The spirit is more than one of tolerance in the weak sense of putting up with people one disagrees with. It goes with adopting a moral standpoint and is thus at odds with the self-interested, particularistic attitude of much current moral and political philosophy. It looks askance at an instrumental account of rationality in politics. It invites a less individualistic and more communitarian-minded understanding of liberalism. It takes consensus to need a moral core, constructed through a series of compromises by all concerned in trying to accommodate the values and interests of others.

This approach should suit a pluralist and multicultural perspective. It reflects variations between political communities to match their social complexion. But this depends on answers to two questions. Are there liberal limits to flexibility which pluralism and multiculturalism can accept? Does compromise presuppose a sense of solidarity which helps define the rules of the game without reference to liberalism?

I begin by discussing the aim of a liberal compromise. The first section compares four models of liberal democratic politics and distinguishes the reciprocal

accommodation sought by *negotiators* from a bargain struck by *traders* for mutual advantage, an agreement among *trimmers* to avoid contentious issues, and the policing of borders practised by *segregators*. I then turn in the second section to the art of compromise, exploring the nature, preconditions and limits of the negotiating process, and asking what can and cannot be compromised. In upshot, negotiators must construct collective decisions which embody a liberal idea of justice. The question is how pluralists and multiculturalists can relate to this process. In the final section, the long historical compromise of American liberal democracy with slavery and its current wrestlings with abortion provide examples of compromising positions of an unacceptable and an acceptable nature respectively.

1 The aim of compromise

Compromise is the stuff of both democracy, with its concern that everyone has a stake, and liberalism, defending individual and group freedom. Plurality of interests and ideals suits both and depends on it. Adaptability can be a good thing, reflecting a liberal regard for diversity and difference as well as a democratic egalitarianism. Yet liberals do not approve of compromise, if it signals that democracy is pandering to the whims of those who shout the loudest rather than those with the best case. Then compromise is discreditable, a sacrifice of principle to expediency. It shows a lack of integrity that neatly captures the moral ambivalence felt by liberals about politics at large: to adopt a 'compromising position' is the mark of politicians motivated by pure self-interest and ready to do any deal for the sake of furthering their careers or holding on to power. To compromise is to compromise oneself. When democracy indulges such compromising dispositions, therefore, it exposes old tensions between liberals and democrats.

By contrast, conservatives and realists suspicious of ideals in politics have largely praised compromise. Edmund Burke contended in his 'Speech on Conciliation with America' that:

All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights that we may enjoy others ... Man acts from motives relative to his interests; and not on metaphysical speculations.¹

He speaks for an enduring conservatism which regards the bartering of interests as the proper stuff of politics. Yet he is no friend of an egoism which bids each of us pursue our particular interests as in a market. 'Man' is to be construed in a generic sense which makes us contributors to a great enterprise connecting past to future and binding the dead, the living and the yet unborn. Yet, as groups, if not as

individuals, we also have separate interests. So a society needs its own constitution, organically grown, rather than conjured up by metaphysical speculations, and setting the rules of a political game of compromise and barter between interests. Hence both the spirit and the purpose of compromise in politics elude the Enlightenment rationalism which treats political questions as a matter for experts in the public good and which overrides or re-educates people's ideas of their interests in the name of a vision of progress.

This organic conservatism sets today's liberals a challenge. They, too, see politics as barter among interests. But, as heirs of the Enlightenment, they believe in holding the ring for these conflicts by means of a neutral constitution, rationally defined in the name of justice. Yet, if justice as fairness is, as Rawls now insists, political, not metaphysical,² what view of the nature and scope of politics shall liberals take? Neutrality suggests that principles should be kept well clear of political debate. But how can they, if a procedural theory of justice is itself political, not metaphysical? The challenge is supposedly met by appeal to a historical consensus, although not a Burkean one favouring the past distribution of power. It has to be one reconstructible as a reflective equilibrium and broad enough to satisfy pluralists. Even so, what does it imply for the toleration of dissidents? If a group rejects the consensus, for example, because their religion denies the equality of men and women, the contrast between metaphysical and political is called into question. Without a principled view, we cannot tell whether consensus is an exercise in right or in might. And, if the consensus is political rather than metaphysical, why should it express more than a historical coincidence of interests, incomplete and temporary?

Peter Singer has argued that equality of voting rights and majority rule make democracy 'a paradigm of a fair compromise'.³ The idea is that people take turns at getting their own way, practising compromise by succession rather than arriving at consensus on each particular issue. This thesis appears to assume that there is no permanent minority, consistently outvoted, and that issues are clear cut, with majorities themselves not the product of compromise. Neither ingredient can be taken for granted. A liberal compromise presupposes at least a rough equality of power. There is nothing acceptable to a liberal about a dictator's 'compromise' which spares the life of one dissident in twenty to stop a final desperate rebellion, or confiscates only most of the property of citizens whose offence is to be Jewish. An acceptable compromise occurs among groups with a real power to be awkward, whose different ideals and interests have an equal claim to legitimacy. That suggests that any majority will itself be built on compromise. Yet this is not very restrictive. It is consistent with three models of democratic compromise which attract many contemporary liberals but which I shall argue against. One is of *traders*, striking a bargain in a free market but having aims unsuited to a liberal politics. Another is of *trimmers*, who find common ground by ignoring matters which a liberal must face. The third is of *segregators* who seek consociational solutions that keep the warring

parties as far apart as possible.

By *traders*, I mean people who bring something to a market and take something away, after exchanging freely with others to mutual advantage. Markets work only with rules, agreed and kept to; and a process which leaves everyone better off is an attractive model for a liberal politics. In a 'trader' model, these rules are themselves the result of trade, with examples ranging from the regulation of weights and measures to codes of ethics for stock-brokers or estate agents. Each rational participant can see that rules of conduct are needed and so might not only generate them but also keep them. Such rules can vary with the particular market and need no higher or more ideal aim than to leave the particular participants better off. Thus weights and measures vary with their purpose and with the variety of interests represented in setting them up; the ethical codes of stock-brokers differ from those of estate agents, which, in turn, differ in their ethics from one social context to another.

To underwrite the hope that this is a satisfactory approach, there is the theory of rational choice, extending to the theory of games and bargaining. Generalised to an 'economic' theory of human behaviour,⁴ it has been presented as an account of democratic politics.⁵ It offers a liberal notion of rationality as the enlightened assessing of advantage, and of neutrality as a refusal to pass moral judgement on the interests included. On this account, 'mutually beneficial compromises' naturally emerge from the 'partisan mutual adjustment' encouraged by democratic bargaining.⁶

Such happy outcomes may occur within suitably 'polyarchical' societies. However, difficulties will arise whenever the conditions favourable to a liberal balance fail to materialise. The crux is whether a theory of rational choice can show why it is rational for traders to comply with the rules and agreements which it is rational for them to have made. Formally, it looks rational to defect in the Prisoner's Dilemma (and to ride free in the Free-Rider problem, which is its n -player version). If so, it looks as if the theory has to recommend a battery of sanctions of all sorts, which are too cumbersome and costly to convince and whose administration raises the original crux all over again. The point may be clearer from the informal version, the problem of public goods. A public good is one which everyone wants but which is non-excludable, in the sense that its benefits cannot be confined to those who contribute to providing it. So a rational agent seems bound to reason that it is rational not to contribute, unless forced, whether or not others do. Classic examples are street lights, national defence and a system of law and order. Subtler ones, and more disputable, are a national health service and a politics free of firms whose activity includes retainers for MPs. The examples apply markets without and non-market theory within, since economic activity depends on trust. Market exchanges are only likely to prove acceptable where the norms of fair trading are not themselves for sale, as in bans on insider dealing, and bargaining power is not so unequal that no offers can be refused.

The last paragraph presumes that an economically rational choice is one which

best suits the self-interest of the agent. When traders bargain, they each look out for themselves, taking account of the interests of others only in so far as it affects what needs to be conceded. The strong need to concede less to the weak than to the strong, the rich can outwait the poor. This is no model for a liberal politics resting on equal concern and respect. Nor can restrictions on what can legitimately be traded be dismissed as side-conditions, when the core of liberalism is a view about what is not negotiable among equal citizens with conflicting ideas about what can be traded. Admittedly, there are ways of playing down the areas of conflict. Formally, bargains involve some wholly common ground, typically what can be modelled as a solution to a problem of coordination. But that does not stop the several equilibria varying in whom they favour, as in *Battle of the Sexes*, or, in real life, when mutually beneficial divisions of labour favour men over women. Nor does it deal with the situations where the recommended outcome is not an equilibrium, as with free-rider problems. In the conditions of life at sea, for instance, fishing boats and fleets are still behaving rationally in each breaking an agreement which all have rationally signed, even though everyone can see that the sum of these breaches will be a dearth of fish in the future. A theory which makes rational choice a matter of individual self-interest gives no reason to think that a sum of rational choices will be in the collective interest.

Can this be overcome by pointing out that, strictly speaking, the theory of rational choice is premised not on self-interest but on an assumption merely that people further the satisfaction of their own preferences? That may perhaps show why not everything which looks like a Prisoner's Dilemma or Free-Rider problem really is one. But it still leaves a gap between the good of each and the good of all. It cannot, for instance, get the unselfish but rational citizen to the polls, if the costs of voting still outweigh its expected utility. That would still be so in seats where there will be a predictable majority large enough to minimise the chance that a single vote will matter. Admittedly this thought turns paradoxical if each of the electorate knows that the rest are moved by it. But I think this indicates that the theory of rational choice must come up with a contractarian theory of ethics – speculative territory at best.⁷ Short of that, there is no reason to think it a rational duty not to have self-regarding preferences. Meanwhile, unless citizens are public-spirited, the old problem of why minorities should be fairly treated is bound to surface somewhere.

Note, too, that there are still questions of integrity and of the incommensurability of what conflicting groups want. Liberals can no longer assume, as utilitarians might, that conflicting values can be homogenised as preferences in search of a common utility. Burke praised barter but firmly believed that 'in all fair dealings, the thing bought must bear some proportion to the purchase made. None will barter away the immediate jewel of his soul'.⁸ He speaks for many. Identity, on this account, is not simply an inelastic preference, nor integrity a self-indulgent stubbornness in

resisting a felicific calculus. It will seem so, if the preferences can indeed be homogenised; but not if a crucial question has been begged. In that case, all values must be ranked independently of the political market, which merely measures power in satisfying them. A deeply plural society may settle for utilitarianism on practical grounds. But any challenge needs to be met more reflectively and utilitarianism is then in difficulty. If utility is one source of satisfaction among many, what makes it the right choice? If it is the only possible source, how can it have any teeth?

Thus, the usual liberal ground for protecting minority groups and individual freedom from majority tyranny is not that this ultimately makes for greater overall satisfaction but that certain values and interests cannot be weighed in the scales of utility. But, although there is room for manoeuvre in deciding which values and interests are to be insisted upon, we are now outside the range of what traders can be the model for.

Trimmers are skilled in achieving a measure of consensus on such vexed questions. Some of their number give them a bad name, like the celebrated Vicar of Bray who turned his coat whenever there was a change of government. But the Marquess of Halifax has a nobler idea of trimming and one with definite political merit. In 'The Character of a Trimmer', he puts it like this:

This innocent word *Trimmer* signifieth no more than this, that if men are together in a boat, and one part of the company would weigh it down on one side, another would make it lean as much to the contrary; it happeneth there is a third opinion of those, who conceive it would do as well, if the boat went even, without endangering the passengers.⁹

For trimmers, stability, rather than justice *tout court*, is the defining characteristic of the good society. Trimmers know that, in politics, the best is the enemy of the good. Even if some pressure group or interest is entirely right in what they are campaigning for, it does not follow that their case should be conceded. There is a price for virtue in the frustration of other people's legitimate aspirations, and the politician should register every legitimate interest within the game. So green policies are allowed an influence roughly proportional to green voters and the enthusiasm for greenery in voters of other persuasions; but they are not allowed to shift the boat away from an even keel. Trimmers see to it that the boat goes even and their skill consists in their ingenuity at constructing compromises for the purpose.

Trimmers work best, however, when principles are largely agreed or else kept off the agenda. Can such principled agreement or collective restraint be themselves the product of trimming? Some recent liberal theorists have thought so, and have tried to describe the liberal democratic constitution of a pluralist society in these terms. Neither opportunists, like Bray's famous cleric, nor mere pragmatists, such as Halifax, these principled trimmers none the less think it prudent to bracket our differences

over the good and the true in order to settle on principles of right that provide for our safety and security. Thus, Charles Larmore and John Rawls have characterised what they call a political liberalism as an approach that abstracts as far as possible from controversial comprehensive moral positions.¹⁰ They exhort citizens to conduct public debate in terms of neutral, strictly political principles that avoid, as far as possible, contentious arguments over which they are likely to disagree. In the spirit of Halifax, they contend that such trimming is essential to the long-term stability of a pluralist society, characterised by profound and interminable disagreements over the meaning of life.¹¹ Such self-restraint supposedly stops democracy from tearing itself apart by keeping the rights and liberties that define the democratic sphere clear of political controversy, and prevents energy and resources being fruitlessly diverted into tackling irresolvable problems.

As I commented in the chapter on Rawls, these ‘gag-rules’ may be likened to the attitude of neighbours who keep the peace by refusing to talk politics among those at political loggerheads over the ethics of private health care or schooling.¹² Trimming in this context sees to it that baby-sitting gets done and cats are fed when their owners go on holiday. These are useful services; but not ones which touch the conflicts of principle. When trimmers turn their hand to these deeper disagreements, the results are far less satisfactory. Their aim is an ‘overlapping consensus’ on the liberal principles underlying a democratic regime by putting such contentious issues off limits.¹³ Assuming that a society is basically liberal democratic, achieving that result involves no more than reconciling dissenters to the majority view, perhaps with the help of a small concession by the majority. It leaves the defence of liberal principles untried.

Liberal neutrality, by analogy, is a sort of lowest common denominator, with compromise a matter of playing down the importance of whatever cannot be included. As long as the underlying consensus is a liberal one, that poses no problems. When it is not, or only incompletely so, then this approach is consistent with the persistence of a great wrong, where those wronged cannot make themselves heard without becoming outlaws. Making stability a prime criterion of justice risks leaving the boat’s centre of gravity where it was and its course much as before. For example, one might wonder whether it is right or wrong to ban gay couples from adopting children. But, if neutrality is a matter of successful trimming, this question is not settled, or even debated, in the achievement of a lowest-common-denominator consensus. Thus trimmers resemble G. K. Chesterton’s man of universal good will, ridiculed for saying, ‘Whatever the merits of torturing innocent children to death, and no doubt there is much to be said on both sides, I am sure we all agree that it should be done with sterilised instruments’.¹⁴ Trimmers take it for granted that the middle ground is the home of truth and virtue. Liberals should not do so without a debate which trimmers believe in avoiding.

This critique may appear to make neutrality too much like a pragmatic *modus*

vivendi – a position that Rawls for one has criticised, at least in his latest writings.¹⁵ Principled trimming, he claims, is a more *a priori* affair, involving the separation of public and private, politics and metaphysics, the right and the good. These distinctions have never come out cleanly, however. Non-liberals will often contest any such separation, and even liberals dispute where the line is drawn. Consequently, different brands of liberalism offer divergent views of the right – as debates between libertarians and social liberals over taxation, welfare, affirmative action, and the death penalty, to name but a few examples, amply attest. Needless to say, their disagreements with non-liberals frequently prove far greater. Thus, liberal neutralists find themselves caught in a cleft stick. Any attempt to divorce principles of justice from all controversial moral and metaphysical considerations risks vacuity. For the self-same reasons that lead to disagreements over the nature of the good produce controversy over the nature of the right. In practice, therefore, a minimal liberalism will end up making an appeal to an assumed consensus on liberal democratic values of the kind criticised above. The only way out of this dilemma will be to trim a little less and inject rather more metaphysics into their theory than they currently admit to.¹⁶

Segregators believe ‘good fences make good neighbours’.¹⁷ They aim at avoiding all compromise by preserving the integrity of each value, culture or interest within its own domain. Conflict is contained rather than conciliated. Political arrangements serve to police the relevant borders and prevent their breach. Identifiable groups are said to coalesce around particular goods or ways of life. Power sharing, concurrent majority voting, minority vetoes and similar devices protect these groups from compromising collective decisions. I subject these institutional mechanisms to critical examination in Chapter 5. The theoretical flaw in this strategy lies in assuming these borders are not themselves contested. The relations between goods and forms of life are fluid and complex. They involve internal and external plural conflicts generated by their component concepts and values, and their clash with different particular attachments and other cultures. As a result, the individual allegiances of any group to given values, interests, claims and so on are unlikely to stack up in an entirely systematic and coherent manner. Members of groups have certain common patterns of identification, including with each other, rather than sharing an identity. Most groups can be subdivided in numerous ways and deciding the appropriate level of aggregation is rarely unambiguous or valid for all purposes. Designating any section of the population as a group will be controversial and likely to err. Thus, setting the boundaries itself entails compromise and the participation of those affected both within and outside them. Segregation to avoid all compromise requires all questioning of existing boundaries be suppressed, and so invariably entrenches the domination of hegemonic elites.

The aim of compromise in a liberal politics is thus that of *negotiation*. Traders look for a mutual advantage or concession which will leave each party better off;

trimmers try to keep the ship of state on an even keel by steering clear of the winds of controversy; and segregators build strong fire walls to block all compromise. *Negotiators* practise reciprocal accommodation as part of a search for conditions of mutual acceptability that reach towards a compromise that constructs a shareable good. Unlike traders, they seek a mutually satisfying solution rather than one that simply satisfies their own concerns. Instead of viewing a conflict as a battle to be won or lost, the parties see it as a collective problem to be solved. The aim is an integrative as opposed to a distributive compromise, with the interests and values of others being matters to be met rather than constraints to be overcome through minimal, tactical concessions.¹⁸ Thus, negotiators adopt a more deliberative model of democracy than the instrumental account favoured by the trader, who credits political actors with an ordered set of exogenously defined preferences. The negotiator contends that our preferences are largely shaped and ranked endogenously through the democratic process itself, thus giving otherwise inaccessible information as to the range of moral and material claims involved.

With politics thus a forum of principle, the reasons for trimming such issues from the political agenda also diminish. Most accounts of constitutional democracy by liberal trimmers assume the traders' view of democracy. Here majority tyranny is a real possibility, since, as we saw, concessions only arise in the most contingent circumstances when self-interested agents cannot get all their own way. This makes trimmers believe that clashes of values are either best not discussed at all or should be resolved by a special body, such as the judiciary, who can be counted on to handle such matters more impartially. Such considerations have less force if we think of a deliberative democracy, however, where conflicts of values are not treated as mere rationalisations of subjective preferences to be summed into or sacrificed to the satisfaction of the greater number. Within this model, a majority does not ride rough shod over a minority simply because it can muster the votes to do so. It prevails through seeking to do justice to the community as a whole, thereby gaining the willing acquiescence of the minority. By contrast, trimming makes such justice-seeking solutions less rather than more likely by encouraging trading. If aspirations and mutual understanding are kept artificially low, then the desire to reach more integrative agreements will be similarly dimmed. The assumption will be that the interests and values remaining in play ought to be ones over which non-costly concessions can be made. Moreover, judicial compromises will be similarly weakened. A focus on the litigated case can lead judges to overlook the broader context of the whole range of policies being undertaken by governments and the wider needs and wishes of citizens. They may ignore, or be unaware of, the consequences which legal intervention in one area may have for other equally important programmes elsewhere, most obviously by withdrawing resources from them. By contrast, a deliberative politics not only promotes an awareness of the wider picture when formulating policies and legislation; it also mobilises popular

support behind them – something the courts find harder to do.¹⁹

Third-party arbitration more generally proves unsatisfactory for parallel reasons. Much as the Rawlsean ‘method of avoidance’ assumes that a line between the ‘political’ and the ‘metaphysical’, the ‘public’ and the ‘private’ can be drawn *a priori*, so deference to an allegedly ‘neutral’ arbitrator presupposes the possibility of an impartial standpoint from outside the debate. There is a danger in each case that certain voices will get excluded or feel less involved than others, so that the eventual settlement will appear arbitrary. Much as a fair criminal justice system rests on due process of law, so a fair compromise needs the process of negotiation both to ensure that all involved get a hearing and to legitimise the eventual outcome.

Keeping the peace by separating warring parties suffers from similar flaws. Fences only make good neighbours when they are built collaboratively in mutual recognition of the other’s boundaries. Ultimately, no moral blue berets can substitute for agreements made by the disputants. Moreover, negotiating the borders will be a continuous process as circumstances, identities and allegiances change. This is not to say that third parties, segregation, trading and trimming, cannot play a role in getting negotiations going. On the contrary, their importance is well known to foreign diplomacy analysts and handlers of industrial disputes.²⁰ Neutral zones and speaking via an intermediary often form a vital preliminary to talking face to face – particularly in cases where the hostile parties refuse to recognise each other. Initial trimming to allow trading on peripheral matters can help build the confidence necessary to tackle the central, and usually value-laden, matters in dispute. My claim is merely that such stratagems cannot be ends in themselves. They only produce a just and long-lasting compromise when they serve to build up the moral resources of trust, reciprocity and mutual respect that are essential to negotiating proper. It is to the nature and limits of this moral core of the art of compromise to which I now turn.

2 The art of compromise

Even a negotiated compromise creates tensions for those who adopt it. A compromise is not a synthesis, that all regard as superior to their previous position. Compromisers must endorse a package many of the components of which they would reject if taken in isolation. Though they consider the agreement as the most acceptable to all concerned, each retains his or her own view of what is best. Some find this circumstance hopelessly muddled. ‘Compromise is odious to passionate natures because it seems a surrender’, remarked George Santayana, ‘and to intellectual natures because it seems a confusion.’²¹ His observation neatly poses the main objections, that compromise lacks motivational appeal, that it is incoherent and impracticable, and underlying these criticisms, that it is unprincipled and illegitimate.

Let’s start with incoherence, since, if compromise can be shown to be both

intellectually defensible and practically achievable, it is more likely to prove emotionally and morally attractive too. Compromise arises from a conflict of values; and some commentators put all such disagreements down to confusion, self-interest or the presence of injustices. But a pluralist perspective contends that people often pursue goods, ways of life and adopt moral codes that reasonably differ in ways that are either incommensurable or, for logical or contingent reasons, incompatible. Moreover, factors such as scarcity, uncertainty and complexity can generate tensions within a shared conception of the good and at times even within a single individual. All legitimate claims cannot always be met. Opinions may differ over the weighting or interpretation of morally relevant factors of a non-moral kind, or over which of a number of possible moral considerations might apply. Dissent of these kinds can lead to conflict over how the situation should be resolved, as in the allocation of scarce medical resources, for example. Different expert opinions can produce divergent views of how we morally evaluate a given case, and even affect our judgement as to which interests and principles might be in play. When these conditions are present and decisions have to be made, a compromise becomes the only alternative to deadlock or the coerced capitulation of one or more of the parties.²²

Different types of conflict will generate different sorts of compromise, according to the nature of the diversity at issue, the context of the dispute and the complexion of the groups involved. Political conflicts are standardly divided into three categories: conflicts of interests for limited resources, ideological conflicts involving rival-rights claims and the collision of opposed identities each seeking recognition.²³ Compromise is most familiar to us in the first case, where we can ‘split the difference’ along a single dimension with a common denominator. Here the claims put forward are of what Albert Hirschman has called a ‘more or less’ type.²⁴ These situations fit the trading model well, and indeed are commonest in the market sphere. Haggling over the price of a house or wage bargaining are typical examples. Although pressure-group activity sometimes takes this form, I noted above the difficulties of extending trading beyond economics to politics. Behind divergent interests usually lie different ideologies and identities that people are unwilling to trade. Here conflicts tend to be of what Hirschman calls the ‘either/or’ sort, and hence unsuited to solutions based on ‘splitting the difference’. Pluralists will contend that no common denominator, highest goal or lexical priority rule is possible to resolve clashes between incommensurable identities, world views or types of claim. Monists, too, may be drawn to accept that arbitrating between competing positions cannot be resolved along a single dimension, where it is unclear how or exactly what principles or values are implicated. In these circumstances, a different sort of compromise will be necessary. Whereas ‘splitting the difference’ simply entails mutual concession, compromises over ideological and identity issues prove more exacting and require constructing a distinctive position to accommodate the various claims, values and

ideals at stake.

Compromise here can take a number of forms, depending on the policy and the character of the groups between whom it is negotiated. A decision to 'live and let live', for instance, needs underwriting by agreement on principles of toleration that involve a compromise over what any one group might wish to impose on others in the name of the truth as it sees it. Alternatively, a more detailed policy might emerge, taking the form of a composite agreement in which each party gets some but not all of what it wants. This usually proves easier when more than one policy is involved. Because groups often have rather different priorities, they can concede on issues they do not feel strongly about in order to obtain similar concessions from others on the matters they regard as most important. Such processes are crucial to the log-rolling and coalition-building practised by political parties. This practice need not entail the view that all opinions are reducible to interests, as is sometimes assumed. In fact, these sorts of deals are more like bartering than normal trading, because they generally occur precisely because divergences in people's moral views lead them to evaluate goods and even what constitutes a matter of morality differently. The exchange entails incommensurability, since it might well not have taken place had it been conceived in standard 'more or less' terms, with all goods translated into a single common currency. It also proves more responsive to intensity of feeling than a simple trading model. However, it will only work if those involved can avoid judging particular issues on their merits.

When a compromise has to be reached on a single issue, such trade-offs cannot be achieved. Moreover, a mutual adaptation of views may be highly unsatisfactory, producing a result that nobody wants rather than something for everyone – precisely the situation critics who accuse compromise of incoherence most abhor. One way out of this dilemma, recently proposed by Robert Goodin, is an agreement on a second best.²⁵ A notion adapted from economics, the basic idea is that modifications to one's preferred option may be less desirable than obtaining one's next best or an even lower-ranked choice. Indeed, individuals or groups with conflicting first preferences may have shared second preferences. A compromise on an agreed second best may prove a more coherent and acceptable decision, therefore, than an attempt to combine first preferences in ways that transform them out of all recognition or involve inconsistencies of various kinds.

Sometimes no compromise on substance proves possible. This dilemma often arises for purely practical reasons to do with the nature of the decision rather than because of any lack of good will amongst those making it – such as a choice between two somewhat different but equally good candidates for a post, for each of whom a sound case might be made. In the case of such non-divisible and non-shareable goods, the compromise might have to be on process rather than outcome, such as tossing a coin. As we saw, Singer has remarked how within purely procedural versions of democracy the majoritarian principle operates as a compromise of this

sort.

The more differences turn on a clash of ideologies or identities rather than of interests, the less satisfactory trading or trimming become. To appreciate the complex circumstances making for compromise and achieve integrated solutions involves taking a broader view of an issue, that encompasses a range of non-moral factors and differing yet legitimate moral claims. Then we are made aware of potential as well as actual conflicts and have to complicate our judgement of how they ought to be resolved. Theoretically one might still believe that a single, just solution could be found, although pluralists would disagree. Practically, however, one must frequently decide long before any such unique right answer can be perceived. Negotiation both fosters the enlarged perspective likely to make the need for compromise apparent, and encourages the search for novel ways of combining preferences and values necessary for successful compromises in such cases.

Of course, segregationists argue no compromise is possible in the case of identity politics. But that can never be the case. As we have seen, identities are complex and have to engage with other identities, even if only to agree where fences might be erected. Internal complexity and the different kinds of diversity between groups can aid rather than hinder the negotiation process, however. They provide the cross-cutting levels of commonality and difference needed for the trade-offs, bartering, log-rolling and so on crucial to negotiated agreements.

Compromise need not imply either intellectual or practical confusion, therefore. The circumstances of factual uncertainty and indeterminacy, moral complexity, and scarcity may all give rise to conflicts that lend themselves to the kinds of compromises outlined above. That still leaves open the questions of what motivates the parties and the conditions of their legitimacy. Traders tend to believe that relative bargaining power alone promotes a willingness to concede to others; trimmers that it is a desire for peace and stability; whilst segregators deny it can ever appeal. But, as we have seen, these suggestions are inadequate. The first implies that might is right, the second that we would do anything for a quiet life, the third that compromise always implies coercion or moral cowardice. Certainly, neither traders nor trimmers offer either a plausible or desirable characterisation of what might motivate a consistent willingness to compromise without going beyond the limits of what might be wise or ethical. Negotiators, by contrast, avoid these pitfalls by practising reciprocity and arguing that settlements that foster mutual understanding and respect have a moral significance in their own right. Though pluralists find compromise more congenial than monists,²⁶ even the latter can accept its virtue as a means of constructing community in circumstances of actual disagreement, so long as certain moral limits are preserved. My claim is that such limits are intrinsic to a negotiated compromise.

Aptly described as lying mid-way between prudence and ethical universalism, reciprocity encourages compromise through the search for mutually acceptable

solutions.²⁷ That goal demands more than the mutual benefit that satisfies traders but less than a universal justification. At the same time, it encourages trimming only to the extent that it forces those seeking agreements with, or concessions from, others to justify themselves to them, and so to accommodate their concerns and interests as well. The obligation to obtain the acceptance of others forces people to present their case at a certain level of generality and in ways that appeal to a shareable norm of justice or interest, constituted in each case by compromise on either a composite good or principle or some package of goods and principles. That constraint will usually mean moderation of the proponent's initial position. It will also rule out totally self-regarding claims and arguments that rely on implausible premises or evidence not susceptible to public assessment, or which require the wholesale adoption of the views of the proposer. Opinions expressed in this manner brook no compromise, requiring rather the capitulation of those with opposing values or interests.

It cannot be settled *a priori* how far any individual's or group's interests and values need to be set aside or moderated, the level at which shareable norms and concerns have to be invoked, or the nature appeals to common ground will take. All depend on the demand or policy under discussion and the complexion of the community deciding the matter, since these factors largely determine the type of compromise to be negotiated. Where the debate concerns non-moral matters or the disagreement is over means rather than ends, then bargaining and appeals to mutual benefit are likely to be the most appropriate methods for resolving disputes. When conflicting values are involved, bartering may still be possible or a switch to a mutual second best, or a settlement on an agreed procedure. When a claim requires special treatment or imposes burdens on others, then appeal may have to be made to some underlying principle, such as a norm of equity, that the others also share, or comparisons drawn with other such claims through the use of precedent, analogy or *a fortiori* arguments.

For example, suppose that the issue is religion in a multicultural society. Are sectarian schools to be permitted, encouraged or forbidden? Four answers are up for negotiation. One favours the traditionally established religion. That argument might take the form of an appeal to a common interest, such as that it remains the traditional cement of even a multicultural society where most people subscribe to other faiths or none. Another is advocated by the pressure group of a particular religion, interested only in its claim to be recognised and taught in schools. Where certain religions already receive state support for educational purposes, such as the public funding of religious schools, this argument might involve a claim to equal treatment. Where state education has hitherto been strictly secular, the claim might involve drawing a parallel with state financing of some humanist analogue to religious belief, such as the arts, in which the cultural aspect of religion and its role in forming individual identity is emphasised. Yet another position is to let many

flowers bloom, stressing mutual benefit, a spirit of ecumenicalism or some principle of toleration. Finally, it might be agreed to ban all religions for public purposes, allowing them to flourish as private organisations but insisting that a multicultural society must be officially secular. This decision might arise out of going for 'second best', if each group's first preference is support only for their own religion and there is no case for paying to promote doctrines they believe deeply flawed and possibly pernicious. In all these cases, the negotiators are looking for an even-handed solution which all will be content to have been party to. The process matters almost as much as the outcome. Even-handedness means addressing the substance of the cases made, as well as the historical and social power of their advocates. The aim is to decide collectively what shall be deemed to be agreed, what can be left as legitimate differences and what needs excluding altogether. In some situations the secular solution will be right, in others not. Since there are no antecedently right answers, negotiators must simply talk themselves into accepting whichever is right in the circumstances.

The arguments of those religious fundamentalists who will only debate on their own terms, seeking to convert rather than to compromise, are conspicuously and deliberately absent from the above discussion. As I noted, a politics of reciprocity excludes fanatics who scorn the necessity of justifying themselves to others in terms the addressees can recognise, and insist instead that the truth can only be perceived if one adopts their creed. Negotiation with such persons has no point, because they do not themselves acknowledge the need for it. Crucially, they fail to demonstrate equal concern and respect for the opinions of others.

This moral core at the heart of compromise also explains why universalists and theorists of difference should comply, despite their worry that compromise involves compromising their moral and personal integrity. For the one compromise demands too little, for the other too much. The universalist will argue that what counts is demonstrable truth. Compromise may be practically warranted in the short term, to secure popular support for a proposal or out of a regard for minority rights in circumstances where imposing a given measure, no matter how justified in its own terms, might entail committing an even greater injustice than its enactment would remove. But this should not stop someone expressing and pressing for the truth as he or she sees it. The fear, well expressed by John Morely in his classic liberal essay *On Compromise*, is that to pursue compromise as a moral end leads to 'a shrinking deference to the *status quo*, not merely as having a claim not to be lightly dealt with, which every serious man concedes, but as being the last word and final test of truth and justice'.²⁸

This concern seems justified in the case of traders and trimmers, but misconstrues the reasons lying behind the search by negotiators for mutual acceptability. It sets the wrong constraints, not least because of the fact of pluralism and the complexity of many concrete situations. These factors, I have argued, can offer even moral

monists motives for moderating their demands in practice, even if they believe the issue ought to be resolvable theoretically in an unambiguous and uniquely correct way. Indeed, the very existence of disagreement can alter how we judge a given matter by raising further moral considerations like the good of peace, the desire to avoid oppression or the merit of preserving the self-respect of one's interlocutors. These points are consistent with Morely's acknowledgement of the occasional necessity of compromise and are actively promoted by the criterion of mutual acceptability.

The search for compromise can also be a good in itself. Attempts to devise universal moral principles can sometimes be insensitive to important variations in the contexts in which they have to be applied and the importance of promoting a sense of empowerment and identification with them amongst both those charged with their enactment and those exhorted to comply. Feminist critics of certain liberal notions of equal opportunity, for example, point to the ways they can entrench the standards of hegemonic groups whose interests and preferences define the criteria for the places on offer, and argue that attempts simply to redistribute posts and resources through affirmative action and similar policies miss the importance of involving the disadvantaged in formulating the principles and the processes of selection.²⁹ Others criticise the account of moral agency underlying certain varieties of liberal universalism. They doubt whether individuals can act solely on the basis of rational considerations of pure principle that abstract from their sense of identity as persons holding certain convictions and possessing particular attachments. Principles, together with the moral motivations and character of those who follow them, need to be fleshed out with natural sentiments and such virtues as courage, honesty, gratitude and benevolence that arise out of specific ways of life. For the acknowledgement and specification of basic rights rests on their being overlaid by a thicker web of special obligations. Welfare states, for example, require relatively strong feelings of solidarity amongst citizens for their operation, as well as a sense of justice.³⁰

These considerations point towards a more communitarian account of liberalism than certain universalists advocate, in which principles of right are related to the differing conceptions of the good of those to whom they are to apply. A community also involves a thicker web of on-going relationships, the presence of which tends to foster reciprocal negotiation by making cooperation more necessary and habitual. Neither observation entails either a post-modern relativism or a pre-modern return to small-scale homogeneous societies, as some communitarians suggest.³¹ One cannot suppose that actually existing communities will automatically possess the desirable qualities assumed by these historicist arguments. Societies of any complexity are highly heterogeneous. Some groups will interact regularly and intimately, others only highly sporadically and at a distance. In the former case, familiarity can breed contempt rather than solidarity and respect, especially where

one group is consistently in the service of another. In the latter case, motivating reciprocity often requires greater effort; yet, as diplomatic negotiations indicate, is not impossible even when the parties are deeply hostile and largely ignorant of each other. As earlier communal theorists appreciated, reciprocity has to be created through appropriate institutions – a point I take up in the next chapter. But communitarians rightly signal the importance of the internal point of view of those engaged in constructing the just society. For justice to be done in ways that are not only justified but also legitimate, it must be seen to be done. That requires a widening of the circle of those involved in the process. In pluralist societies, however, this will almost certainly increase those features that serve to complicate the exercise of moral judgement and render compromise more likely as the best that can be justifiably as well as legitimately achieved. Correctly managed, pluralism and complexity can encourage rather than frustrate reciprocity and the communal bonds that accompany it, therefore.

Theorists of difference might argue that the claims of community in this account are none the less too strong, and that compromising one's principles may, for certain groups, involve compromising oneself.³² The worry here relates to how convictions can affect identity. This concern underlies segregationist arguments for special rights protecting particular cultural practices and often involving limits to legal entitlements available for others in the polity, such as limitations on selling property within a native reserve, or exemptions from public schooling regulations for the children of ethnic or religious minorities. Nothing in the scheme proposed here prevents minority groups from putting forward such cases and attempting to negotiate them. Indeed, achieving mutual acceptability requires that we ensure they are present in the public sphere, so that their concerns can be voiced. To that extent the claims of difference and identity are recognised, though special forms of representation such as reserved seats or some sort of federal scheme may sometimes be necessary to secure it. However, the case will have to be made in ways that show as equal a respect for the concerns of others as is being claimed for one's own. That seems vital where demands impose burdens on others. Demands are unlikely to gain recognition solely on their own terms, therefore. Yet it seems self-contradictory for members of a polity seeking mutual respect to make no concessions. Here political arrangements that allow any group to withdraw to the extent of not having to engage and compromise with those from whom they request tolerance seem both imprudent and potentially immoral.

It is one thing for a group to be able to gain a fair and equal hearing for its concerns, quite another that it should be allowed to adopt a narrowly sectarian position. That stance can only encourage a politics centred on the pursuit of individual or sectional interests, such as traders favour. As we saw, this model is not well disposed towards minorities. Also such groups – be they organised around ethnicity, nationality, gender or religion – are themselves rarely totally homogeneous.

Openness to diversity within a group goes hand in hand with willingness to interact with those holding different views who lie outside it. A politics that exempted groups from ever having to compromise with others would encourage internal intolerance and oppression.

Reciprocity constrains what can be demanded and how, forcing arguments to be made with consistency and by appeal to publicly ascertainable assumptions and shareable interests. Whilst sensitive to particularist perspectives, it promotes impartiality and a roughly moral point of view sufficient to appeal to universalists. Some contemporary contractarian trimmers have employed a similar notion to construct a consensus on basic, pre-political principles of justice.³³ Within a pluralist polity, however, the only principles likely to attain the reasonable endorsement (or non-rejection) of citizens would be expressive of a compromise. In other words, they would be composite rather than synthetic principles. This is apparent even at the abstract level these theorists choose to operate. Hart's depiction of Rawls's theory as caught between the claims of utility and rights is highly apposite in this respect.³⁴ A like attempt to pull off some such balancing act between equality and liberty, social and individual justice, characterises most current work in the field. These exercises fail none the less because they can only produce a trimmer's compromise. The special circumstances and attachments that make compromise necessary can only be appreciated when negotiated amongst the real citizens of a given society rather than specified *a priori* as what hypothetical citizens might consent to.

Similarly, it is the need for actual compromises that provides the rationale for the deliberative devising of social and legal norms, not the search for consensus as certain theorists of deliberative democracy suppose. For example, Habermas follows contractarian trimmers in relegating compromise to conflicts of interest. He argues that to be fair, bargaining must be framed by procedural conditions consisting of principles of right.³⁵ These moral preconditions derive from a discursively redeemed rational consensus in which reasons convince all the parties '*in the same way*'.³⁶ Indeed, he suggests that ethical disputes over the good likewise 'call for discourses that push beyond contested interests and values and engage the participants in a process of self-understanding by which they become reflectively aware of the deeper consonances in a common way of life'.³⁷ However, pluralism undermines such 'consensual rational agreement' and 'deep consonances'. *Pace* Habermas, consensus may be only possible at the level of interests, where traders bargain along one dimension. It is the conflict of values that requires compromise. If a substantive synthesis of opinions were theoretically achievable, the practical legitimation and mutual justification offered by the democratic process would be less important.³⁸

Reciprocity comprises a set of dispositional qualities that are linked to the practice of compromise. It consists not of a set of pre-political principles that frame democracy,

but of a collection of civic virtues such as civility, charity, courage and honour that inform democratic politics. Rights and liberties derive from the particular accords and laws arrived at between citizens participating in the political process. They do not constitute that process. Democracy so conceived operates as a form of rolling contract for the construction of principles of justice that reflect the evolving character and circumstances of a particular people. As a result, the specific social mix of interests and values can be taken into account, and in certain cases special rights granted to meet the peculiar requirements of certain groups, like reproductive rights for women. Furthermore, counterpart duties can be allocated with precision, whereas constitutional rights leave them vague and unspecified. Who owes what to whom when securing freedom of speech or welfare, instead of being left to judicial or bureaucratic discretion, becomes a matter to be determined by political deliberation.

In sum, the aim of a good compromise is to integrate the various interests and ideals in play, and to reach solutions that are mutually acceptable and embody equal concern and respect for those involved. The art of compromising is negotiation. By engaging with others, individuals and groups are led to take an enlarged view of a situation. Instead of seeking to get as much of their own way as they can, in the manner of traders, negotiators try and accommodate others as far as possible. Whereas trimmers seek a lowest common denominator, negotiators strive for collective agreements embodying the highest degree of mutual recognition attainable. That goal arises out of a deliberative process through which all parties moderate and in part transform their preferences by placing them in the context of the claims and needs of the rest of the community. Such negotiations have to be carried out in a spirit of reciprocity, within which each acknowledges an obligation to participate on an equal basis with others in the framing of joint decisions. Demands that are incompatible with such conditions go beyond what can be legitimately compromised with.

3 Compromising positions

To focus discussion, consider two contrasting examples of a compromise – the accord over slavery agreed between the northern and southern states during the early years of the American republic and recent legislation over abortion.

Compromise over slavery was motivated largely by the belief that the continuance and stability of the Union took precedence over the justice of its internal arrangements. It displayed the weaknesses of trading and trimming as forms of compromising and of segregation as a way of avoiding compromise altogether, showing how each can reinforce the others in the service of considerable injustice. The Missouri Compromise of 1819 and those that followed in its wake were typical examples of a bargain based on mutual advantage. The idea was to keep the voting

power of slave and non-slave states equal as the Union expanded, thus preserving the status quo. This so-called compromise was designed to prevent deliberation of the slavery question by allowing the south to effectively block moves in this direction. As such, it pointed towards segregation, since the aim was to remove all necessity for compromise in this area – a conclusion made plain in Calhoun’s famous proposal for a system of ‘concurrent majorities’ in his posthumous *Disquisition on Government*.³⁹ In these circumstances, only trimming will maintain the Union of slave and non-slave states. Abraham Lincoln’s retort to Stephen Douglas in their famous debate on this issue pinpoints the problem. Douglas had argued that disagreement over the morality of slavery required the state be neutral on the matter. Lincoln observed such silence could only appeal to someone who saw no wrong in slavery. Taking the matter off the political agenda was not only morally reprehensible, it was also bad politics since it was ‘a false statesmanship that undertakes to build up a policy upon the basis of caring nothing about the very thing every body does care the most about’.⁴⁰

As Morely pointed out in his impassioned discussion of this policy, a traders’ or trimmers’ compromise here sacrifices principle to, as it turned out, short-term expediency.⁴¹ From a negotiator’s perspective, by contrast, slavery proves beyond the pale because the racist presuppositions on which it rests prove incompatible with the moral presuppositions and spirit of a deliberative politics. Such arguments are almost always transparently self-serving, and appeal to empirical or, in the case of religiously motivated prejudice, normative assumptions that are either defeasible by or inaccessible to public challenge and scrutiny. The position cannot be presented in a mutually acceptable form that entails reciprocity. Bracketing the issue or making its advocates immune to criticism via segregation simply entrenches an unjust *status quo*.

Current American debate over abortion has been spoken of as the source of a second civil war. ‘Abortion’, according to Ronald Dworkin, ‘is tearing America apart ... distorting its politics, and confounding its constitutional law.’⁴² A standard liberal response to this situation has been a trimmer’s compromise. Since the matter is one of irresolvable moral conflict, it would be wrong for the state to seek to arbitrate. Rather, agreement should be sought at the level of the political values that hold the polity together, such as toleration and equal citizenship. That should leave women free to choose whether or not they have an abortion, with a certain allowable difference of opinion as to whether that means simply that abortion ought not to be made illegal or necessitates its availability under state medical schemes. This discussion itself supposedly need not touch on the rights and wrongs of abortion *per se*. The problem, however, is that this position so clearly favours the pro-choice view. Only someone who feels that a morally significant distinction can be drawn between a foetus and a baby will be happy to bracket the issue in this way. After all, unlike Chesterton’s ‘man of universal good will’, few liberals are willing to trim on

the issue of infanticide.

The fear is that to open up the debate will simply lead to internecine strife because the two positions are irreconcilable. However, this belief is too simplistic. Many, perhaps most, on the pro-choice side accept that a foetus has a significance sufficient to differentiate an abortion from the removal of, say, an in-growing toenail. Their argument typically turns on certain conceptions of what gives value to life, often supported by a particular reading of the biomedical evidence, and an appreciation of a variety of countervailing moral claims. Thus, there are a host of middling positions between those who oppose abortion of any sort and those who believe it should be freely available on demand up to 26 weeks or beyond. Many otherwise pro-life advocates make exceptions in the case of rape, particularly when the woman is under the age of consent, or for therapeutic purposes when the mother's life is at risk, or in cases when the foetus is shown to have grave defects, such as spina bifida. Likewise, pro-choice supporters often differ over when the cut-off date for abortions should be depending on how they interpret, and the significance they give to, data on when sentience in the foetus begins. Their decision is framed by a range of considerations, from the social costs of unwanted children to the dangers of back-street abortions were it to be banned.

The point here is that the abortion debate exhibits precisely those features which I have argued make compromise practically necessary and morally acceptable. These are the complexity concerning the types of moral claim involved, plurality of ideals and interests, and uncertainty in the evaluation of the empirical evidence and its relationship to different normative positions. Opening up discussion on abortion, far from producing stalemate, could lead to a fuller understanding of the force of the other side and hence produce a willingness to search for mutually acceptable ground. The role played by the obligations of equal concern and respect and the spirit of reciprocity in this discussion is not that of the liberal constitutional trimmers who attempt to translate the debate into these terms. They operate, rather, as constraints on a solution that failed to accommodate or engage with any of the concerns of the opponents, such as a pro-life policy that takes no account of the selective discrimination it imposes on women. That still leaves a number of different styles of compromise open, analogous to those I explored in the case of multicultural education.

4 Conclusion

The moral disagreements that accompany pluralism often appear so interminable that it seems better to try to turn them into a debate about something else more tractable, skirt around them or avoid them altogether. I have rejected these strategies of traders, trimmers and segregators, respectively. Although curiously favoured by contemporary liberals, they can have decidedly illiberal results. Instead, I have

argued that liberals have principled as well as pragmatic reasons for embracing compromise. It goes together with a democratic politics informed by duties of mutual respect and a concern with the collective good, in which the only people who are compromised are those who through prejudice or selective blindness refuse to compromise at all. I must now address the political forms best able to bring such compromises about.

FOR EDUCATIONAL PURPOSES ONLY

5 A negotiating democracy: the political constitution of a pluralist polity

The last chapter looked at compromise in the abstract, defending it as a suitable ideal for a pluralist politics to pursue. This chapter takes a more practical turn, and explores its implications for the organisation of a pluralist polity. Pluralism is both the life-blood of democracy and its greatest challenge. Without the clash of interests and the conflicts of values to which pluralism gives rise, the political negotiation so central to democratic societies would lose much of its rationale. Yet a polarised pluralism, in which rivals refuse to deal with each other and seek domination either covertly or overtly through violence and war, subverts the political process. A democratic constitution has two tasks within a pluralist society, therefore: the positive task of recognising and reconciling differences, and the negative one of checking pluralism's anti-political manifestations and controlling the abuse of power.

Liberal democrats concentrate on a constitution's negative function. They worry about the disruptive effects of pluralism on politics – a concern most commonly expressed in terms of fears about factions, the nefarious influence of religion on the state and the tyranny of the majority. These anxieties are further fuelled by a largely instrumental view of democracy as a mechanism for trading private preferences and interests. Consequently, they concentrate on excluding groups voicing non-tradable values and reducing the state's power to interfere. Thus, Hayek and Rawls employ judicial frameworks embodying liberal principles of justice to exclude or trim supposedly subversive claims from politics and to constrain its domain. They seek to reduce mutual and state interference and so maximise the space for individuals to exercise their putative 'natural' liberty. From a different perspective, Walzer also uses the liberal art of separation to segregate politics within a given sphere and limit its practice exclusively to those sharing common values.

Instead of promoting diversity, such exclusions assume a consensus on the moral worth of a certain form of liberal agency. Indeed, without such a consensus and the supposedly harmonious trading of individual interests that results from it, the strategy of exclusion would be incoherent. As we have seen, this kind of liberalism is inappropriate within a pluralist society. First, any general principles of justice, set of rights or political boundaries acceptable to a plurality of agents and

agencies are going to be more indeterminate than liberals usually allow. Not only will different conceptions of the good and alternative calculations of interests often lead to divergent and incompatible understandings of them and how they relate to each other, moral disagreement in a number of areas may even hinder a consensus on which principles, rights or borders are in contention.¹ Second, general principles or other kinds of exclusion tend to be insensitive to difference and hence to the presence of domination.² Whilst liberals acknowledge the equal rights of individuals to pursue their own good in their own way, for example, they often overlook that equal opportunity can be so defined as to entrench the opinions and positions of hegemonic groups.

Trading, trimming and segregating neglect the positive role of a constitution. When incommensurable rights, interests and values clash, so that people reasonably disagree as to what justice requires, a decision can only be legitimately taken via authoritative mechanisms resting neither on appeals to superior reason nor coercion. Within complex, plural societies, principles of justice must be integrated with accounts of authority and power. A more positive and political approach achieves this integration by relating liberty to membership of a polity in which the laws result from political negotiation so as to achieve a fair compromise. I call this strategy democratic liberalism.

The key to this democratic liberalism lies in institutional mechanisms that disperse power amongst the appropriate mix of actors to ensure collective decisions respond to the interests and values of those they affect. Of republican inspiration, it identifies the constitution with the political system. It aims at freedom from domination rather than the absence of interference. Whereas liberal democrats favour bills of rights and the separation of powers, democratic liberalism employs the dispersal of power to produce a social mix conducive to political negotiation. The rule of law is the product of the rule of men, not superior to it.³ Democracy plays a more demanding role than the standard liberal one of simply allowing people to advance their preferences and interests. It also involves citizens reasoning and seeking mutually acceptable solutions. This strategy incorporates the negative or exclusionary task of a constitution within the more positive one of promoting diversity and dialogue. The same mechanisms giving minority opinions a say in collective decisions and encouraging deliberation check the purely self-interested or partial exercise of power.

The first section compares the legal constitutionalism favoured by liberal democrats with the republican style of political constitutionalism adopted by democratic liberals. If the former excludes pluralism through trimming, the second includes it by negotiating between the differences to which it gives rise. The second section examines the institutions needed for this kind of politics, and distinguishes them from the political mechanisms employed by traders and segregators. The third section defends this proposed return to the liberties of the ancients against charges of its impracticality and undesirability in the modern world.

1 Two models of constitutional democracy

Liberal democracy and democratic liberalism involve different conceptions of liberty and the rule of law, and relate them in contrasting ways to democracy and the political system more generally. I shall examine each of them in turn, summarising the criticisms of liberal democracy made in Chapters 1 to 3 and indicating how democratic liberalism avoids these difficulties so as to meet the pluralist challenge.

Liberal democracy

Liberal democracy rests on a distinction between the state and civil society. Liberals see constitutionalism as a normative framework that sets limits on and goals for the exercise of state power. Traditionally, its principles are grounded in a social contract designed to legitimate the state's monopoly of violence. According to this argument, free and equal citizens would only consensually submit to a polity that removed the uncertainties of the state of nature whilst preserving the most extensive set of equal natural liberties. Interference by the state or law is only justified to reduce the mutual interferences attendant upon social life so as to produce a greater liberty over all. The separation of powers supposedly fosters this aim by preventing any one from being judge in his or her own cause, thereby constraining the arbitrary and partial framing and interpretation of legislation. The rule of men is replaced by the rule of universal and equally applicable general laws.⁴

Two features of these arrangements are worth highlighting. First, as James Tully has observed, the normative consensus assumed by the 'modern' liberal conception of constitutionalism hypothesises a degree of uniformity amongst the constitutive people.⁵ It assumes that behind different beliefs and customs lies a common human nature, a natural equality of status and shared forms of reasoning sufficient to generate agreement on constitutional essentials. What divergences remain are supposedly eroded as historical progress leads to more homogeneous and less stratified societies that conform to a similar pattern of social and political organisation, and stand in contrast to the ranked societies and cultural particularisms of the past. Nation building further strengthens this process. As co-nationals, the people share a corporate identity as equal citizens of the polity.

Second, the rights-based approach goes together with a conception of freedom as non-interference and of the state as a neutral ring master, unconcerned with upholding any particular set of values.⁶ This understanding of the constitution encourages in its turn a purely preference-based picture of the economy and an interest-based account of democracy. In each case, what matters is the degree outcomes correspond to the uncoerced choices and express desires of those concerned. The conditions of production and the protection of public goods enter with difficulty into this view of the economy. The first are assumed to be the result

of voluntary contracts, the latter left up to an invisible hand. Likewise, politics becomes a competitive market within which rival interest groups bargain with each other, and involves no attempt to evaluate the interests concerned. Its purpose is purely instrumental: to protect against incompetent or tyrannous rulers by allowing their removal, and to aggregate individual preferences through majoritarian voting and encourage politicians to pursue policies that conform to them.⁷

Liberals accept that economy and democracy need regulating when they threaten the constitutional structure. However, identifying when such threats occur and who possesses the authority to remedy them proves problematic. Because the economy forms part of the private sphere, there are difficulties about whether the requisite interference is legitimate or perpetrates an even greater intrusion in people's lives than those it prevents. Such decisions cannot necessarily be left up to democratic governments, since interest groups may use the state's coercive power to further their personal goals. This dilemma raises a further source of tension between the hypothetical consent underlying the constitution and the express will of the people. Liberals try to avoid this crux by treating the constitution as a 'higher' law that provides the preconditions for the 'normal' legislation arising out of democratic politics. They see judicial review by a court buttressed by a bill of rights as the best bulwark against the democratic subversion of the constitution.⁸

Pluralism erodes this liberal settlement. The social and economic complexity of advanced societies, and the consequent multiplicity of interests and values within them, render majoritarian decision-making more problematic, increase the difficulty of regulating the unaccountable power located in civil society and subvert the rights consensus upon which liberalism rests. Increased functional differentiation results in a proliferation of autonomous centres of power.⁹ These centres are capable of making decisions according to a variety of criteria specific to their respective domains, with unpredictable knock-on effects for other parts of the social and economic system. Citizens find themselves locked into a variety of these spheres, and get pulled in opposite directions by the inner logic of each. Problems become more technical, less amenable to general regulations and hence harder to control through centralised democratic mechanisms. The range and scale of decisions handled by unaccountable specialised bureaucracies, and involving considerable technocratic discretion, expands. The autonomy of many sectors of economy and society is increased.¹⁰

Reconciling such clashes by democratic horse-trading proves highly problematic.¹¹ The various areas of social life operate with increasingly distinct and largely self-validating criteria. They become ever more taken up with their own concerns and tend to interpret the world from their own perspective, generating incommensurable and incompatible claims. Clashes of interests appear more zero-sum, and their aggregation harder to legitimate and enforce because their relation to any given collectivity is unclear. The making and sustaining of collective decisions

is further complicated by the spread of multiculturalism as improved social mobility renders states more pluriethnic as well. Differences of beliefs and identities prove even less amenable to democratic bargaining and the formation of stable and fair majorities than economic and social interests. As a result, the likelihood of conflict or the oppression of minorities rises.

Liberals have responded to these failings of democracy as an instrument for interest aggregation and accountability by trying to make political trading more balanced, seeking more consensual forms of democracy based on segmental power-sharing, further trimming through the enhanced juridification of politics, or some combination of these three. I shall examine pluralist traders and consociational segregators in the second section, merely commenting on trimming here. Trimmers look to a legal constitution grounded in a consensus on rights and principles of justice to guarantee the polity stays just. They suggest citizens can trim their divergent substantive beliefs on the good to arrive at agreement on what is politically right. But this distinction proves elusive. As we have seen, rival rights are not easily detachable from, and are as contestable as, differing conceptions of the good. Thus, rights to privacy can collide with freedom of speech, confronting us with a choice between incommensurable values. Not only may different cultures view them differently, but deciding how and when they clash may also be in dispute since the presence or absence of constraints may be normatively and empirically evaluated from a range of reasonably different perspectives. In pluralist societies, the basic liberties and their interpretation become contested matters, therefore. In practice, liberal trimming entails the imposition of a particular reading of liberalism and the judicial exclusion of dissident voices. Without democratic support, however, the constitution and the courts risk appearing self-validating and being either practically impotent or obliged to adopt coercive measures. Nor can we avoid this dilemma by dispensing with politics altogether and turning to the market. This either trivialises or ignores pluralism, strategies that are neither normatively nor practically sustainable. It remains to be seen if a more inclusive and political strategy is available.

Democratic liberalism

Democratic liberalism harks back to a pre-liberal conception of constitutionalism that identified the constitution with the social composition and form of government of the polity.¹² Much as we associate a person's physical health with his or her bodily constitution and regard a fit individual as someone with a balanced diet and regimen, so a healthy body politic was attributed to a political system capable of bringing its various constituent social groups into equilibrium with each other. Social and political power are linked rather than kept distinct. Political power was socially dispersed to encourage controlled political conflict and deliberation and

ensure the various social classes both checked and ultimately cooperated with each other, moving them thereby to construct and pursue the public good rather than narrow sectional interests.

As Quentin Skinner and Philip Pettit have shown,¹³ the heart of the republican approach lies in a different conception of freedom to the liberal's. Liberty is seen as a civic achievement rather than a natural attribute. It results from preventing arbitrary domination rather than an absence of interference *tout court*. Domination denotes a capacity intentionally to control and diminish an agent's realm of choice, either overtly through various explicit forms of restraint or obstruction, or covertly by more subtle forms of manipulation and influence. Arbitrariness rests in the power to exert domination at whim, and without reference to the interests or ideas of those over whom it is exercised. Pettit notes that an absence of interference can be consistent with the presence of domination. Those with such power may simply choose not to wield it. Social relations will be adversely affected none the less. A good king may leave his subjects alone, but they remain his subjects none the less and will treat him with deference on that account alone, regardless of any personal merit or demerit he might possess. Likewise, seeking to reduce interference may in given contexts be compatible with leaving certain agents or agencies with considerable power over others. For example, attempts to reduce the arbitrary hold men have traditionally exerted over women in marriage have been challenged on the grounds that they are too intrusive and themselves involve a greater degree of interference. Similar arguments have been used against laws to protect employees from unscrupulous employers. Even social liberals, such as L. T. Hobhouse, accept that the onus of proof rests on the proponents of state intervention to show that less interference is thereby created overall.¹⁴ Republicans by contrast, see debate about the legitimacy of interference *per se* as misconceived. They concentrate on providing a non-dominating environment where citizens can lead secure lives, plan ahead, and live on a basis of mutual respect – conditions which may require intervention.¹⁵

This view of liberty shapes the republicans' distinctive linkage of the rule of law with the distribution of power and democracy. Instead of the constitution being a precondition for politics, political debate becomes the medium through which a polity constitutes itself. This occurs not just in exceptional, founding constitutional moments, as some liberals grant, but continuously as part of an evolving process of mutual recognition. Domination and arbitrary power involve more than an infringement of the formal rule of law espoused by liberals. It is entirely possible to promote general rules based on whim or self-interest and that entail a gross curtailment of people's freedom of action. The generality and universality requirements can also seem themselves arbitrary if employed to disqualify special rules that refer to properties that apply to only some groups – as when maternity leave for women or affirmative action policies are accused of being discriminatory,

or when such considerations are used to block all regulations focused on particular contexts or outcomes, as is often the case with economic controls.¹⁶ Such formal criteria appear particularly inadequate at tackling structural forms of domination, where discrimination and selective blindness have been built into the institutions, norms, social and economic relations, and procedures within which the rules are framed.

Contemporary liberal jurists try and get around these difficulties by adopting a more substantive view of the rule of law, identifying it with the upholding of rights by an independent judiciary. As I noted, this approach proves problematic. A political constitutionalism takes a different tack. Justice becomes identified with the process of politics. Political mechanisms not only ensure all are subject to the laws and that no one can be judge in their own case – the traditional tasks of the separation of powers – but also that the laws connect with the understandings and activities of those to whom they are to apply – the side benefit of dispersing power so that more people have a say in its enactment. *Audi alteram partem* forms the watch-word of legal fairness, not the formal or substantive properties liberals associate with the law.¹⁷

‘Hearing the other side’ within a pluralist polity implies respecting that people can be reasonably led to incommensurable and incompatible understandings of values and interests, and seeing the need to engage with them in terms they can accept. We saw in the last chapter how this criterion constrains both the procedures and the outcomes of the political process.¹⁸ It obliges people to drop purely self-referential or self-interested reasoning and to look for considerations others can find compelling, thereby ruling out arguments that fail to treat all as of equal moral worth. Political actors must strive for common ground through mutually acceptable modifications. Because the clashes of principle and preferences associated with pluralism preclude substantive consensual agreement, political compromise takes the place of a pre-political consensus.

Paradoxically from a liberal perspective, a democratic liberalism contends the rule of law depends upon the rule of men. The only guard against arbitrary and dominating rule is if the law-making power remains with the people or their representatives.¹⁹ That position remains consistent with the acknowledgement of the standard liberal set of individual rights to freedom of expression, association, bodily integrity and the like. Indeed, it compels recognition of them.²⁰ Yet it also allows the democratic balancing of their relative weight in relation to both each other and to additional values and interests according to the issue and the people involved. Diversity in the ethical reasoning of agents and the moral relevance they give different factors is natural within pluralist and complex societies. Dispersing power helps both the appropriate mix of voices to be heard and the peculiar circumstances of particular contexts to be taken into account. Not only can general rules be tailored to a wide variety of objects and concerns, and their implementation

and monitoring enacted to meet the special requirements of a given situation and constituency, but also – and often more importantly – specific norms can be established to meet special circumstances and relevant differences. In consequence, the need diminishes for a judicially monitored principled constitution to frame democracy. Much as a judge guides a jury on points of law and conduct yet is subject to their decision, so judicial review can track whether reasoned debate occurs, but need not substitute for an absence of such deliberation.

This politicised account of justice suits a concern with domination and the fact of pluralism. Domination most commonly manifests itself through inhibiting or preventing groups or individuals from having a voice in the decisions governing their lives. When this occurs they are far more likely to find themselves oppressed by social structures that stunt or prevent their capacity to employ and develop their capacities or lead lives expressive of their beliefs and culture.²¹ For if political institutions constrain certain groups' ability to influence both the issues that get discussed and how those that do get decided, they will lose status and standing, and become marginalised and ultimately exploited. Typically, oppression has manifested itself indirectly through the mechanisms of hegemony. At the extreme, however, exclusion from politics may eventually lead oppressed groups to resort to extra-political means to put their case – a move that often lends legitimacy, albeit of a spurious nature, to the employment of outright force against them. Such has been the fate of indigenous peoples in colonial societies, of many ghettoised immigrant communities, of workers denied the vote either in general elections or in the workplace, to name but a few well-known examples of this phenomenon.

As these cases indicate, such domination involves not just an oppression of human beings but of a diversity of ways of life, values, interests and allegiances. In other words, it is linked to the denial of pluralism. Since these diverse attitudes and concerns are often related in their turn to different conceptions of the right and the good, the injustice their suppression entails is not fully captured by reference to a particular conception of justice that may – perhaps unwittingly – itself embody aspects of the dominant position. Justice can only be done, therefore, by being seen to be done within a non-dominating political structure that allows the various conceptions to confront each other so that their conflicts can be resolved through free negotiation.

Democracy plays a central role in this system, protecting against arbitrary rule and enabling the educative engagement with others.²² Decisions may be contested and the rationale behind them tried. Interests are not simply advanced and aggregated, as in liberal accounts of the democratic process. They get related and subjected to the criticism of reasons, transforming politics into a forum of principle. Positions can shift, and common views emerge. Democracy operates within civil society as well as the state. Power is not simply devolved down in a hierarchical manner to lesser levels of the state, as in a standard federal system. It is dispersed

amongst semi-autonomous yet publicised private bodies. In this way, politics shapes rather than being simply shaped by social demands. The danger of majority tyranny reduces in consequence. Rights and minority interests are factored into the democratic process, informing the claims made by participants. The crux lies in the political system motivating a search for mutual accommodation rather than simply getting one's own way.

2 Motivating political negotiation

Chapter 4 revealed how the type of compromise, and the style of politics needed to achieve it, depends on the issue and the character of those involved. Constitutional design uses the political system to foster the form of democratic debate appropriate to the requisite kind of fair compromise. These considerations guide where decisions are to be made, how people should be represented and the degree of autonomy particular bodies or sections of the community may claim. They are integral to a political constitutionalism, with its intimate linking of justice, the rule of law and the democratic mixing and balancing of values and social interests.

In the ancient ideal of mixed government, the favoured mechanism was to assign particular governmental functions to different social classes. In contemporary societies, the answer lies in multiplying the sites of decision-making and the forms of representation via the dispersal of power and the electoral system. These devices influence *where* decisions are made, about *what*, *who* takes them and, less directly yet crucially from our point of view, *how* they are made. For the best way of fostering a mutually acceptable compromise is to ensure laws and policies are informed by those affected and must confront dissenting opinions. Though the standard liberal democratic tools of devolving certain government tasks to regions and municipalities, on the one hand, and universal suffrage and equal voting rights, on the other, contribute to this goal, they are not sufficient. Plural and complex societies require forms of governance that are similarly diverse and differentiated. To see why, we need to clarify further the aims and hazards of schemes for distributing power, selecting representatives and voting within a pluralist polity.

Equal but different: the aims and dangers of compromise politics

Such schemes must aim at making outcomes more equitable rather than, as is often assumed, simply equalising the input of citizens. Indeed, one cannot know how to guarantee equal inputs without appreciating what counts as an equitable outcome.²³ For a democratic liberalism, that means compromise decisions which can be justified to and accepted by all citizens.²⁴ To achieve this end, decision-making must be made truly collective and accommodate a range of perspectives. This goal is more demanding than guaranteeing everyone a say or a piece of the action, important

though these may be in attaining it. Equalising representation by such measures as devolving decision-making or making the electoral system more proportional can contribute to that result, but may also frustrate it.

Much depends on the context and the type of compromise to be negotiated. When mere preferences collide, ‘splitting the difference’ is appropriate. However, these cases may enjoin the proportionate weighting of preferences. Democratic equality would be violated if the composition of the demos was such that a majority vote meant the preferences of two-thirds of the population consistently held sway, and those of the remaining third were always overlooked. Not simply proportional representation but some form of power-sharing may be necessary to gain proportionate outcomes.²⁵ But the character of compromise is different in matters of principle, and equalising representation in this way may be either too much or not enough. Here, the object will be to ensure equal consideration of the content and intrinsic importance of different values for particular groups of people, so that they seek solutions that are acceptable to a variety of different points of view. Instead of trading or bargaining, participants in this sort of dispute must argue.²⁶ In the case of bargained compromises, preferences can be taken as exogenous to the system and democracy seen in largely instrumental terms. As we saw, a negotiated compromise involves a more deliberative model of democracy, that leads to preferences being shaped and ranked within the democratic process itself as otherwise inaccessible information regarding the range and intensity of the moral and material claims involved comes to light. Achieving this result requires groups reach a sufficient threshold to have a voice that people take seriously. With very small groups, that may involve more than proportionate voting power, with others somewhat less will suffice.²⁷ It might even be advisable to have voting arrangements within the legislature that force majorities to obtain the support of minority representatives for certain measures.²⁸

The importance of attending to such considerations becomes apparent when we look at the pitfalls to which such schemes are prone. The dangers to guard against are of either creating a mere *modus vivendi* or promoting Ottomisation or even Balkanisation. The one stems from trading, the other from segregation. These flaws bedevil respectively the two commonest liberal democratic models of pluralist democracy – interest-group pluralism and consociationalism.

A *modus vivendi* built on a fair balance of power will not itself produce mutual acceptance. It always risks simply reinforcing the self-interested scramble for scarce resources. It may lead to stalemate and will not prevent majority tyranny if a group is sufficiently large legitimately to arrogate the lion’s share of power. The search for accommodation involves a different quality of decision-making, with trading giving way to negotiation. So long as the democratic process is conceived solely in instrumental terms, as the means for pursuing ‘naked’ or unrefined preferences, attempts to keep the peace by balancing power will be at best temporary expedients,

obtaining little more than a cessation of hostilities whilst the various factions await the chance to get their own way.²⁹ Nor will there be an appreciation of the objective worth of different values and practices and their relationship to people's identity. Treating religious beliefs or sexual orientation, say, as preferences may fail in significant respects to do them justice. Though some people join churches for the social events and the pageantry, most do so from the conviction that a given faith presents a truth they ought to follow. Heterosexuality and homosexuality are not life-style choices but simply how people are. Thus, for different reasons neither religious conviction nor sexuality are detachable from how people conceive themselves and the world. To recognise these sorts of differences, they have to be treated as entitlements rather than mere wants that may or may not be fulfilled.³⁰

These shortcomings of political trading are well illustrated by the interest-group pluralism associated with American political scientists such as Robert Dahl. These theorists see democracy in instrumental and procedural terms, regarding a fair political system as one that is responsive to the balance of societal demands. Problems such as majority tyranny are swept under the carpet by assuming 'modern, dynamic and pluralistic societies' create favourable conditions by dispersing 'power, influence, authority, and control away from a single centre toward a variety of individuals, associations and groups' and 'fosters attitudes and beliefs favourable to democratic ideas'.³¹ In this environment, party competition supposedly opens up the system to new groups and favours the building of coalitions between different minorities over a wide range of issues as political elites struggle to attain office.³² Dahl acknowledges the need to equalise the bargaining power of certain less well-organised interests, most particularly by sponsoring workers' cooperatives so that labour can compete on equal terms with capital.³³ However, procedural fairness in itself offers too indeterminate a guide as to what this equalisation requires.

As I observed above, without some idea as to what kind of outcome is desirable, there are no criteria as to which interests should be represented or how. Moreover, unless the political process is seen as having some effect in shaping people's preferences, they will not develop a civic consciousness geared towards finding an equitable basis for living together.³⁴ Even radically egalitarian measures will not get around this difficulty. For example, Phillippe Schmitter's ingenious scheme for vouchers, redeemable against public funds, which citizens can distribute to the associations they favour in exchange for particular services or as contributions towards their political campaigns, extends interest-group pluralism whilst retaining its defects.³⁵ It remains a *modus vivendi* that is insensitive to the intrinsic worth or reasonableness of certain convictions. Dahl (and presumably Schmitter) partly get around this defect by assuming economic growth makes politics less zero-sum, rendering 'mutually beneficial compromises' possible.³⁶ Even he admits this only works for preferences of a certain sort, however: namely, those operating along a single dimension and involving merely a desire for more of a certain good, where

‘splitting the difference’ makes sense. As he ruefully remarks, sub-cultural pluralism ‘greatly reduces’ the prospects for his form of pluralist politics.³⁷

Dahl recommends consociationalism as the best solution to this difficulty. Yet in spite of Arend Lijphart, its most prominent advocate, styling it a ‘politics of accommodation’, it too provides only a *modus vivendi* solution.³⁸ Additionally, it comes perilously close to falling into the trap of Ottomisation – the re-creation of a millets-type system where a state subdivides into a patchwork of semi-autonomous theocracies, and risks descent into Balkanisation, the contested division of a previously unitary state. In consociational systems, only the political leaders need cooperate with each other within a joint executive or ‘grand coalition’, albeit with the protection of a ‘minority veto’ over collective decisions. ‘Segmental autonomy’, both territorial and functional, combined with ‘proportionality’ in the allocation of public funds, positions and representation, means the need for political bargaining and negotiation across the divisions is minimal. A person’s whole life can be passed amongst his or her own segment, from, say, birth in a denominational hospital, through education and employment in schools, unions and enterprises of a given religious persuasion, to burial in a church cemetery. Greater segmental identity poses no problem, since happily that will enhance the authority of the leadership and its ability to deliver the support of its community and so if anything is to be desired.

Though Lijphardt claims consociationalism offers a universal panacea for ‘deeply divided’ societies,³⁹ his scenario is likely only in conflicts of a certain kind. Brian Barry has observed that consociational management favours religious and ideological divisions which tend to be focused on hierarchical organisations, such as churches and parties, and have a body of doctrine on which expert opinion can claim to pronounce over the heads of ordinary members.⁴⁰ Ethnic differences and those associated with new social movements, such as feminism, usually have a far more contingent organisational embodiment and their programmes are a far more contestable matter. Their concern is not just with a fair division of spoils, but with the shape and nature of the polity within which such resources get defined as well as distributed. Consociationalism survives in large part by hindering the development of groups around such divisions. Poor internal democracy silences competing leaderships, whilst the system generally favours those differences that are already organised politically and makes it difficult for new concerns to emerge.

Consociationalism proves a largely negative and doubly exclusionary strategy, therefore. It works by, on the one hand, excluding new and potentially less manageable groups from attaining a political voice, and on the other hand by encouraging an increasingly exclusive identity amongst the various segments it does recognise. In both cases, difference is less accommodated than removed and segregated in a manner reminiscent of Walzer’s position in *Spheres of Justice*,⁴¹ examined in Chapter 3. Neither elites nor their constituents engage in genuine dialogue with each other.

The former simply cooperate in a mutually beneficial carve-up of resources, whilst the latter are encouraged to adopt a largely separatist mentality. Since democracy might loosen both the power of elites and the homogeneity of the groups they speak for, it is kept to a minimum. Clearly unsatisfactory from the point of view of less homogeneous and hierarchically organised groups, it is also dubious that it achieves anything more than a temporary period of coexistence amongst the segments it purports to serve. Where consociational systems have survived, as in Switzerland, there has usually been a long history of elite cooperation dating back to the early-modern period, and greater popular consensus – evidenced in the Swiss case by national referenda – than consociational analysts have claimed.⁴² Where social changes have not led to greater cultural homogenisation and the passing away of the system, as has happened in the Netherlands, and no political efforts have been made to encourage more popular interaction between the segments, then the polity has begun to come apart – as the example of Belgium illustrates.

Consociationalism can undermine the very benefits its advocates expect from it.⁴³ Consociationalists hope a degree of group autonomy, either in the organisation of a region or in running certain services, will help minorities express and act on their differences within the context of a larger unit. They also believe such empowerment, combined with a guaranteed say in any national legislature, offers a way of transforming the thinking of dominant groups by encouraging them to look beyond their own assumptions and interests so as to take on board those of others. Segmental autonomy, however, may prove even more intolerant than the wider community of individual dissenters and those minorities that prove unable to organise themselves in this way. Moreover, far from fostering changes in the hegemonic culture, it may be perceived by the dominant group as a pragmatic concession that safely confines the minority to the ghetto. Whereas mutual acceptance implies a principle of freedom of conscience that acknowledges the obligations secular or religious convictions impose on those that hold them, segmental autonomy may only involve a *modus vivendi* between organised creeds based on pragmatic non-interference in their spheres of influence.⁴⁴ As such, this solution is likely to be not only unstable, for reasons outlined above, but consistent with considerable infra-group oppression.

Parallel effects are likely to arise from similar schemes, such as guaranteed group representation or minority vetoes within legislatures. For understandable reasons, advocates of a politics of presence for dominated groups concentrate on its effect in unravelling the prevailing consensus, arguing that it broadens the horizons of dominant groups by compelling them to adapt to different perspectives. Such adaptation is only likely to be genuine, however, if it is reciprocal. Group representation risks insulating hitherto subordinate groups from any such necessity and may undermine the motivation of dominant groups to do so, too. Worse, it can result in deadlock and acquiescence in an unjust status quo, particularly when

buttressed by a veto. Whilst a veto may protect minorities against the passing of discriminatory laws, it can also be wielded to protect the perpetration of injustice by them. Tyranny can result from acts of omission as well as commission, as John Calhoun's notorious scheme for concurrent majorities to safeguard slavery in the American south demonstrates all too clearly.⁴⁵

These problems relate to the difficulties of identifying relevant groups, mentioned in earlier chapters.⁴⁶ A group meriting special treatment must be a structural minority – in other words a group that by virtue of certain shared constitutive characteristics will remain a minority even after its members have exercised their individual rights. These properties must be significant for personal identity, unlike red hair, say, and hard to exchange or drop. Moreover, they must pass a minimal threshold of 'acceptability', so that their oppression is unjust. Paedophiles, for example, are a justly oppressed minority group. In many cases, minority status varies between particular populations. Thus, women are minorities only relative to elites in certain privileged spheres, not within the population as a whole. In addition, the defining characteristics can vary both objectively (as in shades of colour) and in their significance for those who possess them. Indeed, often their importance owes more to the prejudices of the majority than to any attachment by the minority itself. Group members also have other allegiances and may be almost endlessly subdivided into sub-groups. So the group to be accorded special treatment must be sufficiently coherent not to be fragmented in this way, and of a quantitatively significant size. Finally, identification as a group must be internal to the group itself, not imposed by outsiders. Even the most well-intentioned external definitions risk either including people who would rather be left out or excluding others who would like to be incorporated. British Asians have criticised the term 'black' in discussions of racial discrimination on both these grounds, for instance.⁴⁷

These difficulties suggest that the representation of difference ought to avoid such devices as minority veto or forms of group presence. Paradoxically, these are only likely to be given to those groups well-organised enough not to need them. They are open to abuse by elites, who see them more as an opportunity for rent-seeking than the means for promoting dialogue with either the collectivity or within the group itself. Only participation in shared decision-making can produce a continuous process of justification and mutual understanding amongst all citizens, and promote the self-reflection on the part of both dominant and dominated groups that a concern with civil freedom calls for. That does not imply that all differences have to be combined in some sort of communal melting pot, merely that all have to continue to relate to the needs and concerns of others. Nor need the public sphere necessarily be organised within a single hierarchical system to achieve such connections. It is to suitable ways for distributing power, electing politicians and voting on decisions that we now turn.

Dispersing power

Within complex and differentiated societies, centralised and hierarchical ways of distributing power will be inadequate. Sheer size as well as cultural and other differences often render centralised decision-making inappropriate and inefficient by over-representing people unaffected by, or with scant interest in, the resulting policies, and under-representing those most involved. Federalism and other mechanisms for sharing power amongst a variety of constituencies open up spaces for undominated choice and allow the framing of laws to suit the particular needs of a more diverse public along the lines discussed in the previous section. This form of dispersing power not only offers – via multicameral legislatures or joint executives – a means whereby the decisions of central government can be made more responsive to such diversity. It also provides the prospect of a more vertical organisation of sovereignty which allows rules and measures to differ between constituencies and domains.

The dispersal of power need not be territorially based but might include the whole gamut of public services, such as schools and hospitals, for example. As proponents of associative democracy have argued, the failure of both the centralised bureaucratic state and corporate capitalism to respond to the needs of a heterogeneous citizenry, especially the poor and underprivileged, can be partially rectified by re-distributing public funds and responsibilities for regulation and service provision to self-governing agencies, such as neighbourhood schools.⁴⁸ When there are homogeneous communities with a strong collective identity, the various autonomous organs of particular groups or associations can sit alongside representative bodies with a plural membership, thereby avoiding the problems of consociationalism. Denominational schools, for example, might still form part of a local education authority and participate in the formulation of regional funding priorities, teacher training, assessment and the setting of attainment targets for pupils. However, people increasingly belong to multiple demoi operating at different sites and levels, rather than as a cohesive group. They belong to neighbourhood associations, unions, local action groups, parties and single-issue movements. The key, as noted, is to reflect this diversity in the organisation of the polity whilst making connections between these various activities so that this dispersed and diverse participation has a civic and public focus.

We shall look at this scheme in more detail in the next chapter. An important clarification is none the less necessary to make here. Certain discussions of the relationship between democracy and civil society make it appear that almost all associational life helps promote the common good and that the relinquishing of state responsibilities to social groups is generally empowering.⁴⁹ Such views overlook the distinction between dispersing and devolving power amongst civic associations and unloading state responsibilities onto discrete civil associations.

Many clubs and societies foster fellow feeling amongst members but this may merely reinforce sectional cleavages and prejudices. Privileged golf clubs and workingman's clubs arguably have this effect, for example. In rather different ways, so may special-interest or single-issue organisations such as the Automobile Association or the Royal Society for the Protection of Birds. Links to politics may be highly tenuous or indirect, and when they occur take the form of promoting a narrow subset of the personal interests or views of their members rather than a broader appreciation of the public good. Indeed, they may even work against the wider interests of their associates. Unloading power to such groups essentially privatises it. The related responsibilities are frequently burdensome and the association under-resourced, with the result that self-interested or partial reasons predominate. Charity begins and ends at home in such organisations. The removal of funding from schools can lead to active Parent Teacher Associations in middle-class areas, but further widen the gap between schools with rich and poor catchment areas, for example. Civic associations prove more public spirited through being socially and culturally mixed or part of a network of different social and cultural groups, and by providing community services and consulting with other associations. They are an official part of the polity, benefiting from public funds and occasionally raising them. In other words, they belong to a political system that preserves and encourages a sense of how the diverse parts fit together.

Dispersing power amongst civic associations increases the opportunities for political participation amongst ordinary people. Classically, republican theorists saw greater political involvement as the best way to make citizens more responsive to each other's intrinsic merits and attach them to shared social and political institutions. However, even when power is dispersed in the manner advocated above, the direct involvement of all citizens in decision-making within large-scale societies is impossible. Schemes to employ new technology for this purpose miss the point that participation in any meaningful sense requires more than just pushing a button. It is becoming informed and debating that takes time. Although a teledemocracy could conceivably transform the situational geography of politics by allowing us to interact with more people, over a wider distance and on a greater number of issues, these developments will tend to exacerbate rather than diminish the core difficulties of decisional and informational overload that are the prime barriers to turning all citizens into legislators. Of course, spaces will continue to exist at a more local or specialised level for direct involvement by citizens. But their role will remain necessarily supportive and subsidiary in complex societies. Moreover, unless these more popular spaces are themselves heterogeneous they may reinforce group identity at the expense of a broader civic consciousness. Yet if a world in which everyone is a politician seems an unrealistic and probably undesirable proposal, that does not mean we cannot inject many of the qualities associated with participatory politics into the political system, and especially

amongst those who do make politics their profession.

Selecting politicians and policies

Within a pluralist polity the twin goals must be to ensure that politicians of different groups interact with each other and are accountable to both a wider as well as a sectional public so that policies reflect a fair compromise. To bridge communities, they cannot be segregators and must act as negotiators rather than traders in both the legislature and with their constituents. As theorists such as James Madison and Alex de Tocqueville saw, electoral systems and forms of representation complement the dispersal of power in taking political constitutionalism forward into the era of large-scale commercial republics.

Two different sorts of mechanisms are at work here: those that operate via positive or negative incentives, and those that select for particular kinds of disposition and capacities.⁵⁰ The first sort operate on the assumption that agents are rational utility-maximisers and seek to positively correlate the private benefits accruing to the actors with those that go to others as a result of their activities. As Brennan and Hamlin have noted, the most common means are via the expectation of rewards within *ex ante* competitions and the prospect of punishment from *ex post* monitoring.⁵¹ The best-known political example is the economic model of a competitive election.⁵² Pursuit of the benefits of office supposedly leads politicians to offer people the policies they desire and fear of rejection keeps them up to the mark. This scheme works with the trading model of politics, however, and reproduces its characteristic flaws. It assumes too reductive a view of human motivation and the nature of the goods people value. To the extent the desired effects do result, they occur indirectly and haphazardly. As we noted, these disadvantages increase within a pluralist polity. There are likely to be a larger number of parties and a certain degree of segmental autonomy, both of which encourage politicians to offer their members more selective goods and provide greater opportunities for rent-seeking amongst elites. More generally, the assumption that people will only do what it is in their interest to do risks corrupting those public-spirited souls whom one most wants to cultivate.

It is towards attracting these that the second set of mechanisms are designed.⁵³ Here the allotted task is to offer the sorts of rewards that only suitably motivated persons might be lured by, and to screen out unsuitable aspirants. Not paying MPs salaries, for example, was once thought to have the effect of ensuring politicians lived 'for' rather than 'from' politics.⁵⁴ Current suggestions that they be debarred from having outside earnings have a similar purpose. To the extent they render it less likely politicians will adopt an instrumental stance, they also serve our goal of encouraging figures that aspire to speak for the wider heterogeneous public of the whole polity, whilst still keeping faith with their more particular supporters. Even

more important, though, will be to ensure that only politicians with the desired qualities enjoy electoral success.

Once again, the aim is to achieve an appropriate balance between political equality and group representation, on the one hand, and engagement with the broader collectivity on the other. Plurality electoral systems, such as the First Past the Post or winner takes all procedure currently employed for national elections in Britain, pose obvious problems for minorities. Small parties are unlikely to be successful, particularly if a group is dispersed over several constituencies. By enhancing the power of the executive minority influence is reduced within the main parties as well. Unless the governing party's parliamentary majority is small, the exception rather than the rule given that a massive majority can be delivered by well under 50 per cent of the total vote, there will be little or no need for the leadership to compromise even with its own supporters. Proportional representation appears the obvious solution but has difficulties of its own. Allowing the proliferation of single-issue parties can militate against an appreciation of the concerns of the wider community. Government coalitions between such groups will tend to reflect a trader's rather than a negotiator's compromise. Party list systems make outcomes more proportionate to a party's share of the vote but do not necessarily guarantee party representatives will more proportionately reflect the range of public opinions.

To get around these problems we need a voting system for both selecting representatives and making policies in the legislature that builds in compromise to majoritarian decision-making. As Albert Weale has recently shown, Condorcet voting has just this feature.⁵⁵ Under this system voters rank their preferences for candidates or policy options. The Condorcet-winner is that ranking that could defeat every other in a pair-wise contest. Take the following example:⁵⁶

<i>Parties (% of the vote)</i>	<i>Policy or candidate preference rankings</i>
Party A (25%):	a b c d
Party B (30%):	b a d c
Party C (40%):	c a d b
Party D (5%):	d b c a

Here, a plurality vote would lead to option or candidate 'c' being chosen, since it, she or he gets the largest number of first preferences. However, the Condorcet-winner is 'a' since it emerges as the majority preference when its ranking is compared against each of the alternatives. Weale observes that the combined consequences of issue by issue majority voting coincides with the Condorcet-winner,⁵⁷ as this procedure likewise involves finding those alternatives that command majority support.⁵⁸ Thus, the Condorcet-winner 'both captures the idea of a majority

converging around a compromise solution where there are divergent ideal preferences and it can be construed as the outcome of a procedure by which members of a political community take issues one by one'.⁵⁹ As is well known, when there are three or more alternatives a Condorcet-winner may not exist, with pair-wise comparisons producing not an outright winner but a cycle. In candidate elections this result can be overcome by selecting the person who loses by the smallest margin(s) in one or more pair-wise comparisons. Weale argues that in the case of issues, so long as these are discreet so that voters' preferences on one issue do not depend on the outcome of a vote on another, then sequential voting is acceptable as a way of breaking the cycle.⁶⁰

While such methods promote the selection of compromise candidates and policies, they do not themselves ensure those chosen will possess the skills of deliberation and negotiation in formulating legislation. However, Condorcet voting will usually mean governments have to build a majority on many issues, thereby making such attributes desirable. Other devices can also be employed. For example, greater use can be made of smaller fora, like parliamentary committees. These tend to be more deliberative than debates in the chamber and encourage their members to acquire specialist knowledge.

Probably the most effective mechanisms, however, are those that improve the discrimination of the public in their choice of politicians and which oblige representatives to interact directly with the represented. Schemes that emphasise the calibre of politicians are open to accusations of elitism, not least because of the clearly elitist implications of past proposals with similar intent, such as J. S. Mill's plan for plural voting to boost the influence of the educated, or the Federalists' reasoning behind their ultimately ineffective device of indirectly electing the United States President. Their belief in the need to, in Madison's words, 'refine and enlarge the public views by passing them through the medium of a chosen body of citizens' makes the trade-off between political equality and deliberation within mass democracies too stark, however.⁶¹ Although greater time, expertise and smaller group dynamics ought to make debate in the legislature of a higher quality than at the hustings, legislators plainly do not avail themselves of those opportunities unless the electorate expect them to. Otherwise populist rhetoric will suffice.

Various measures are necessary to improve the quality of accountability of leaders to the led, therefore. Here, a more devolved political system can have decided advantages. Making sure the associations on which politicians draw their support are themselves democratic offers one important step in this direction. All organisations above a certain size have to cope with Michel's problem of the 'iron law of oligarchy'. This tendency leads parties to develop a centralised bureaucracy, adopt an instrumentalist approach to politics and enhances a managerial style of political leadership that reduces members and supporters to passive consumers of benefits and encourages rent-seeking by the political class.⁶² The retention of an

element of decentralised decision-making can be important in counteracting this trend. Party activists, for example, who are themselves unlikely to enjoy the benefits of office, tend to be motivated by more principled concerns and often take a more discriminating view of candidates than the party bureaucracy.

Even if many decisions regarding funding and the relationship between the different parts of the political system have to remain centralised, great scope exists for devolving power down to numerous local or functional bodies, and of democratising those non-state institutions which exercise authority over the individual's capacity for choice – most notably the workplace. Indeed, I have suggested that pluralism and subsidiarity of this kind go together. Although a representative system rather than direct democracy would almost certainly operate here as well, greater scope for participation would none the less exist and provide a political education to larger sections of the community. Provided these decision-making bodies themselves encompass a range of groups, then involvement in school and neighbourhood meetings, for example, can hone deliberative skills and broaden horizons in the ways participatory theorists have traditionally advocated.⁶³

A more thoughtful and active public sphere can also be created through measures such as wider freedom of information, an obligation on broadcasters to offer impartial news and documentary programmes, support for voluntary groups, deliberative opinion polls and the like.⁶⁴ Whereas a doctrine of non-interference can make such measures to promote a more deliberative political climate appear illegitimate interventions with the rights of media owners and consumers, a concern with non-domination focuses on the effects of not regulating on people's capacity to challenge and contribute to public decision-making.⁶⁵ As with political representation, the intention here is not to equalise opportunities for speech *per se*, but to further raise the standards of politicians by shedding a more discriminating light on their policies and utterances. Regulating donations to political campaigns and parties can have a similar effect, hindering the pressure-group activities of corporate rent-seekers and forcing them to argue their case on a more level playing field.

Though a political constitutionalism creates institutional rights, it is not rights-based. Rights derive their rationale either from legislation or from the requirements of the political system, both of which will be adapted to the circumstances and complexion of the political community and subject to change. Limited entrenchment, subject to some democratic process of constitutional amendment, might be advisable in some circumstances, as will judicial review to ensure consistency in application. But the system operates not by upholding pre-political rights but by encouraging their enactment through civility and a general duty to hear the other side. A political constitutionalism tries to foster the civic virtues rather than economising on them, as liberal constitutionalist schemes generally do. That has seemed too optimistic to

some, yet no polity can survive where all are knaves. Liberal traders, trimmers and segregators risk making that happen.

The purpose of this section has not been to offer a blueprint for a new set of political institutions. These have to be tailored to particular circumstances and elaborated on the basis of trial and error. Indeed, a political constitutionalism has the advantage of not being a programme that must be swallowed whole or not at all. Elements of it will prove compatible with a liberal constitutionalism whilst greatly increasing its efficacy and legitimacy. As such they may be adopted piecemeal as opportunities arise. I have merely attempted to indicate what sort of considerations should underpin the design of such political institutions. The chief of these is to ensure that the representation of difference serves rather than subverts civic freedom by leading to mutual acceptance in the making of collective decisions.

3 Back to the future? Two criticisms

Two criticisms are often ranged against schemes of the sort proposed. Critics argue modern complex societies make a more participatory and deliberative politics, together with any notion of agreement on common policies, not only impractical but also undesirable. A political constitutionalism only suits the small-scale and homogeneous communities that gave birth to the idea. These criticisms partly reflect a historically and substantively flawed understanding of the republican tradition – albeit one that certain communitarian thinkers have fostered.⁶⁶ Far from assuming homogeneity, the republican model was a response to social division and class conflict. As later republicans, such as the American Federalists, appreciated, this aspect meant that territorial size and social differentiation can be positive aids rather than blocks to republican government, since a plurality of voices and power centres is conducive to deliberation and a process of mutual checking.⁶⁷ Even so, doubts persist as to the viability of even a reworked republicanism that a democratic liberalism must dispel.

The first set of criticisms concern republicanism's practicality. These critics assume the complexity of large-scale societies can be handled only by the market or a centralised bureaucratic state or – more usually – some combination of the two, with both social democrats and moderate libertarians falling into this last camp. However, dispersed and more deliberative decision-making, far from being obsolete, has many advantages over these alternatives. Pluralism and complexity usually go together in the sense that what makes a problem complex is not simply its scale and the sheer number of factors involved, but the fact that it can be conceived and evaluated in numerous different ways. As such, complex problems resist decomposition into their component elements so that priorities can be hierarchically

ordered. Different actors and observers may not agree on what these are let alone on what, or whether, they can be ranked on any given scale.

It is precisely this kind of complexity that markets and bureaucracies often handle badly. Take the example of environmental issues, which typically display these characteristics.⁶⁸ When discussing how best to handle acid rain, for instance, experts dispute both its causes and consequences. It has been traced to a number of natural and humanly produced emissions and associated with various sorts of damage to a wide range of objects and entities. Yet the extent to which particular damage can be attributed to any given cause is far from clear. Additionally, the human actors involved as both potential contributors to and victims of pollution are similarly varied – from private motorists and consumers, to a whole host of industries and agriculturists of one sort or another. Their concerns will be similarly diverse, and it is highly likely that each may be to some degree both polluter and polluted. Since they will almost certainly hold differing beliefs and values, how even members of a given group appraise their interests is going to vary greatly.

We have here two basic aspects of political disagreement: namely cognitive indeterminacy and conceptual essential contestability.⁶⁹ Bureaucratic management will be highly inefficient and reductive in such instances, for there will be no clearly demarcated ends or interests to be served, and the relationships between the multifarious actors involved cannot be tracked. As Hayek noted, administrators would have to be omniscient, omnipotent and unwaveringly angelic to carry out such a task. Markets sometimes fare better in offering a system of dispersed knowledge, but not when public goods or bads are concerned for the well-known reason that the externalities involved are non-excludable. As we saw in Chapter 1, the price mechanism and the view that all values are mere subjective preferences are also insensitive to conviction-based or cultural difference. Moreover, market exchanges rarely involve individual consumers and entrepreneurs alone. They occur between private institutions that are themselves bureaucratically organised and suffer from the self-same managerial defects libertarians level at the state.

By contrast, a political constitutionalism attempts to confront this complexity head on by bringing together the actors concerned in an effort at mutual understanding and accommodation. Devolved and deliberative decision-making enables appropriate ends and means to be fixed on by fostering cooperation and coordination by multiple actors across a host of domains. Both the norms to be applied and their enforcement arise out of discussion, and could not be fixed in advance without introducing biases and oversimplifications of the problem with potentially disastrous knock-on effects. Dryzek cites the resolution of a dispute over the construction of a dam and water-supply system near Denver, Colorado as a successful instance of this approach.⁷⁰ A plethora of federal and local agencies

and groups were involved and produced an appropriate fair compromise in which the dam was built but substantial mitigating measures were instituted. The success of this 'Foothills' decision led to the institution of a Metropolitan Water Roundtable to mediate future cases.

It is of paramount importance that those involved in such decision-making negotiate a collective policy rather than engage in pluralist interest-group bargaining. Only then will they arrive at a full perspective on the dimensions of the problem and prevent stalemate or distorted solutions, such as a prisoner's dilemma. The way institutions operate are crucial, as we have seen. However, this feature of republicanism gives rise to the second set of criticisms. These critics worry such institutional design amounts to social engineering and reflects a misguided pursuit of an unobtainable agreement on an elusive common good that can only be attained through manipulation and covert coercion. The deliberative ideal is charged with both assuming unity to be a prior condition of reasonable discussion, and with having consensus as its goal.⁷¹

With regard to the first element, certain theorists have argued that a deliberative democracy assumes a demos bound by a common fate and shared understandings.⁷² They note how constitutional settlements motivated by this ideal – notably the United States Constitution – were simultaneously exercises in nation-building. Critics, however, point out the often exclusionary consequences of these projects, and in particular the marginalisation of those deemed not capable of joining in the conversation – such as women, workers and members of non-western cultures. For people to subject themselves to often onerous burdens to generate collective benefits for others, they have to feel bound to them in some significant way. How far such bonds must rely on a common culture as opposed to mere functional interdependence and territorial contiguity is difficult to say. States display a bafflingly wide variety of mixes of these and other elements. Historical contingency probably plays the major factor. Whilst starting from the status quo is inevitable, a political constitutionalism is not tied to any particular definition of the demos or the polity. On the contrary, both are explicitly seen as political artefacts fashioned by the people themselves. Moreover, it operates with a dynamic of inclusiveness that places the burden of proof on those wanting to exclude others or, via secession, themselves. They must show such choices to be consistent with a norm of equal worth and mutual acceptance, and that they do not cause even more damage to others than benefits to themselves. But that leaves ample scope for the renegotiation of the terms by which citizenship is defined and political structures operate. Indeed, once it is understood that the re-constitution of a polity is an ongoing process, there can be considerable openness and flexibility in how the constituent groups might relate to each other.

With regard to the second element, I have consistently argued that consensus need not be the goal of discussion, as certain theorists of deliberative democracy claim. They argue for a 'republic of reasons' in which the most compelling arguments prevail.⁷³ Pluralism renders such reasoning problematic, since more than one rationally compelling argument may be in play. That makes compromise necessary. Achieving a fair compromise also entails a change in the character of politics, but of a slightly different nature to one oriented towards consensus. It requires a move from a purely individualistic and instrumental politics to a more interactive and problem-solving model. Rather than viewing other people's interests and values as mere constraints on getting one's own way to which minimal concessions should be made, this approach leads to the search for solutions that attempt to integrate the various concerns of the parties involved. This possibility need not rely on transcendent criteria, however, merely a reciprocal understanding of the frameworks of other actors, the ability to engage with them, and to seek agreement on what is desirable even if this is based on differing views of why it might be.

At its heart, this conception of politics has an attachment to civic liberty, the guiding principles of which are non-domination, mutual acceptance and accommodation. What these conditions all point to is a vision of society in which all enjoy equal status. This implies universality and impartiality, in the sense that all persons must be treated as of equal moral worth and claims based on self-serving bias or prejudice should be ruled out. But that does not imply all citizens must be regarded as having identical needs or the same values – quite the reverse. This supposition appears to arise from the belief that only general rules can meet these criteria, and that these will be blind to people's particular concerns or convictions.⁷⁴ A claim for respect for one's particular practices, however, is perfectly consistent with a universal principle of equal moral worth, and particular rules may be applied in as consistent and unbiased a manner as general ones. Universality and impartiality in these senses protect particularity by insisting that any case for special consideration must avoid subjecting others to domination. Arguments, such as those of sexists or racists, that assert that certain people's views or interests count for less than others will be treated as *prima facie* unacceptable, for example. A request by a religious minority for public funding of its own schools will probably not be, since it asks for equal recognition rather than denying it.

A political constitutionalism also allows for different styles of argumentation and suggests as much attention should be paid to the different cultures of negotiation as to differences in the substance of what is negotiated.⁷⁵ This need has long been recognised by students of diplomacy looking at international negotiations across cultures.⁷⁶ Intra-national pluralism means domestic politics must also take such factors into account. Here, too, a problem-solving approach seems the most

appropriate, with symbolism and honour counting for as much as argument and strategic gains.

Nevertheless, it is doubtful that any process of negotiation would be possible unless people saw the political norms framing the discussion as generating some form of common good. Civic freedom operates in this context as what Joseph Raz has called an 'inherent public good'.⁷⁷ That is, a good the benefits of which are under the sole control of each potential beneficiary and which by their nature could not be voluntarily controlled and distributed by any single agency. For one cannot create such an environment except through active collaboration with others, nor control the beneficial externalities it generates so as to channel them only to certain others, though one could cut oneself off from them through one's own anti-social and intolerant actions. Put another way, the condition of living as equals has to be desired in and for itself – as an intrinsic aspect of a certain kind of society – rather than instrumentally, since that would allow selective domination to acquire personal advantage.

Though this argument goes beyond the proceduralism of thinkers like Habermas, who offer an entirely circular argument for constitutional norms via the self-validating character of democratic discourse,⁷⁸ none of this suggests agreement on substantive ends. Indeed at times it may be possible to do no more than agree to disagree, and accept the authority of the democratic procedure itself. In these cases the majority principle acts as a means for resolving conflict in an authoritative manner when a compromise on substance cannot be achieved. Authority here rests on neither claims to superior reason nor coercion but the simple acceptance of the procedure as authoritative (in the sense of being 'in' authority) for the disputing parties. Here the authority of law rests on the legitimacy of the political system which generates it. Parties acknowledge that in some cases there may not be any 'correct' or 'most just' way of resolving a clash between incommensurable plural values, but that the ways of ending the dispute are acceptable. The procedural fairness of the process of justice can be more important than the favourability of, or consensus about the outcome.⁷⁹

A more political constitutionalism does not turn on the existence of a homogeneous community, therefore, as some communitarian theorists maintain and certain critics complain. The political system can operate as a public good for a plurality of social groups, without assuming they share other values (indeed, perhaps for the very reason that they do not). Secession or conscientious objection may still have to be options for groups or individuals whose values and convictions prove totally incompatible with those of the majority. Their reasons could not be, however, claims to superiority – that their values and interests are worth more than those of others – as was argued by advocates of apartheid, for example. Rather, the

case must be that such drastic measures are necessary to ensure equal worth and that otherwise their cultures and concerns might be totally eroded, as indigenous peoples seeking protection against a dominant post-colonial community have contended. Even in these cases alternative solutions, such as greater autonomy or special rights, might be available to keep them within the polity.

4 Conclusion

Liberal democrats see democracy in instrumental terms as a means for individuals to pursue their private interests. A tension consequently arises between the exercise of natural liberty and the preservation of political equality and public goods. Consequently, an extra-political constitution becomes necessary to maintain the liberal balance by excluding or curbing activities that threaten the stability of the system, with all the above-mentioned difficulties that poses within a pluralist context. I have argued democratic liberalism offers a way around this dilemma. This model of democracy draws on the pre-liberal notion of a political constitution based around the separation and dispersal of power and the mixing and balancing of social classes. It incorporates the liberal concern with freedom and justice into the democrat's desire to ensure that citizens have an equal say in influencing and holding to account the rules and rulers governing them. As such, it offers a means of both recognising and reconciling differences through the negotiation of fair compromises that embody mutual acceptance and accommodation.

Democratic liberal institutions must reflect the political culture and character of the societies concerned. The final part of this book shifts from theory to practice and explores the contrast between liberal democracy and democratic liberalism in the context of contemporary Britain. I examine three policies associated with the theories of traders, trimmers and segregators, respectively. In each case I apportion the shortcomings of these proposals to the theoretical weaknesses noted in earlier chapters, and indicate the nature and merits of a democratic liberal approach to the issue.

III

Pluralism, liberalism and democracy in Britain

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6 Trading democracy for markets: the Citizen's Charter and the contracting state

The eighteen years of Conservative government between 1979 and 1997 witnessed a dramatic restructuring of the British state. Provision of services was gradually contracted out to the private sector, and market mechanisms introduced to deliver what remained in public hands. Drawing on libertarian theories such as Hayek's, examined in Chapter 1, the reformers argued that market trading responded to the plurality of individual preferences more efficiently and fairly than democracy ever could.¹

These changes broke with the broadly social democratic consensus of the post-war era. This had approved markets for economic transactions between private individuals and institutions, but believed the public good often demanded the political management of economy and society. Although political parties disagreed over the extent and nature of such control, few disputed that the democratic state served certain collective interests better than markets could, and that it had a responsibility to direct both macro-economic policy and provide particular social services for the sake of the common welfare. The New Right questioned this received wisdom. For them, the public interest was no more than the aggregate of individual interests. They argued globalisation and an increasingly complex division of labour had placed the scope and diversity of individual interests beyond the managerial capacity of governments, a belief apparently confirmed by the oil crisis of the mid-1970s. Consequently, the 'common good' upheld by the state was partial in the sense of being both incomplete and biased. At best it reflected the paternalistic values and prejudices of the political class, at worst the self-serving concerns of the professional and other groups employed within the various branches of the state apparatus. Though similar complaints had been expressed by elements of the New Left, the New Right argued that democracy exacerbated these state failings rather than attenuating them, as the Left had claimed. It was more exclusive than the market, offered relatively limited opportunities for voter choice and influence, and generally favoured not the general populace but those producer groups with most to gain from statist initiatives, such as politicians and civil servants. The public sector strikes of the 'winter of discontent' preceding the collapse of Callaghan's

Labour government in 1979, were believed to support these criticisms. Privatising hitherto state-run services and industries, it was now asserted, had the superficially paradoxical effect of rendering them more responsive to the full range of public preferences by allowing people to vote with their wallets. The collapse and manifest failings of state socialism in Eastern Europe and the Soviet Union were taken as marking a decisive shift towards a new paradigm of market-oriented governance. Advocacy of market democracy, whereby citizens were to be empowered as consumers by subjecting the state sector to the market disciplines of competition and contract came to replace the previous commitment to a democratically governed market.

The Citizen's Charter programme introduced by Mrs Thatcher's successor, John Major, provides a useful case study of the attempt to trade values by substituting markets for democracy. Whereas Thatcherism had largely developed in a piecemeal and pragmatic fashion, Major sought to give coherence to and consolidate the legacy of his predecessor, which had appeared to come to a dead end with the debacle of the Poll Tax. The first section outlines the programme's view of the citizen as consumer and traces its origins in the New Right critique of the social-democratic theory that predominated during the post-war period. This exercise forms a necessary preliminary both for understanding the objectives of the policy, the task of the second section of the chapter, and for assessing its coherence and plausibility, the aim of the third section. I will argue this attempt to displace politics by markets ultimately proved misguided. The trading view of human agency is incomplete and produces numerous problems of its own. The programme reflected these flaws. It ignored both the continuing need for political coordination, and the constraints placed on individual freedom and choice by the bureaucratic and largely unaccountable structures of private power. Section 4 shows meeting these twin challenges within the context of plural and complex societies requires a suitably pluralist conception of the state, as outlined in the last chapter, which extends democracy into civil society.

1 The New Right conception of citizenship

The concept of citizenship offers a way of relating the general claims of justice to the specific entitlements and obligations one has as a member of a particular community. Since different conceptions of justice give rise to divergent views of our rights and duties, they also promote correspondingly distinct understandings of the role of the citizen. In this connection we can contrast the New Right conception of citizenship that inspired the Charter with the social democratic conception which had hitherto prevailed in post-war Britain. Each conception has opposed views of how social and welfare rights relate to our civil and political liberties.

The social democratic conception finds its classic expression in T. H. Marshall's

essay, 'Citizenship and Social Class'.² Citizenship rights are interpreted as evolving through the development of capitalist relations and the parallel rise of modern nation states. As hierarchical social relations were displaced, so the equality of individuals was progressively extended. Thus, the eighteenth century saw the consolidation of civil rights in such spheres as personal property and civil liberties; and the late nineteenth century witnessed the granting of political rights to all adults. Finally came the creation of social rights extending 'from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society'.³ Although Marshall recognised these rights had been won through past political and class struggles, he saw the development in terms of a complete package. All three sets of rights reinforce one another within a mixed economy and welfare state. Social rights, he reasoned, enabled individuals to exercise their civil and political rights on a roughly equal basis to others. The three sets of rights amounted to the status of citizenship 'bestowed on all who are full members of a [modern] community'.⁴

The New Right view rests on a very different understanding of justice and its relation to social processes.⁵ As we saw in Chapter 1, libertarians condemn social justice of a Marshallian kind as both illegitimate and incoherent. The illegitimacy of social justice derives from its requiring interference with the individual's freedom to contract and exchange. The New Right contend that so long as such agreements are willingly entered into, without direct or intentional physical coercion by any person or agency, then justice and individual rights are preserved. If over time huge social inequalities develop as a result of these commercial transactions, no individual may be held responsible for bringing about this result. By contrast, any attempt to rectify this situation through redistributive taxation *will* involve an infringement of the liberty rights of individuals to dispose of their property and labour as they wish, and hence be unjust. Marshall's concept of social justice is seen as incoherent because no absolute scale of values exist whereby we might measure individual need or desert in order to allocate rewards justly. The latter, for example, could be interpreted in terms of either effort, contribution or merit. To allow any single agency the discretion to decide this issue will lead to arbitrary judgements which simply reflect the interests of those with political power. Moreover, to coordinate a complex economy according to a preconceived view of distributive justice proves impossible. Putting to one side the enormous computational difficulties of tracking all exchanges, there is the further epistemological difficulty that no good or skill possesses any inherent worth, its value can only be discovered through the processes of market exchange itself. Socialist systems can never do without the market, they merely distort its operations creating massive inefficiencies in the process. The only just and efficient distribution, therefore, is one which reflects the free exercise of individual choices and subjective preferences in the market.

The New Right employ this argument to make three main criticisms of the social democrat's conception of citizenship. First, they note that a tension exists between civil rights and, particularly, property rights, on the one hand, and political rights and social rights on the other. The conflict with social rights is direct, since if I have an unrestricted right to property and my freedom consists solely in an absence of intentional interference by others, then others cannot have social rights to welfare (and of course *vice versa*). The conflict with political rights is indirect. Although political rights partly develop out of and can help sustain civil rights, the New Right also believe political action can allow groups to use the coercive power of the state to constrain those civil rights for the purpose of funding various social rights.

Second, because certain groups can organise themselves better than others, the social rights granted by the state may reflect those people's interests more than those of less well-placed groups. In particular, they often mirror the concerns of the service deliverers not those of consumers. They claim, for example, that people end up with an NHS run for the benefit of the health care providers rather than to meet the demands of patients. These contentions draw on the thinking of public choice theorists who employ the trader's model of human agency. They maintain that political and economic behaviour essentially follow the same pattern, with individuals operating as rational utility-maximisers in these, and indeed all other, spheres.⁶ As a result, the politician's and bureaucrat's desire to serve the 'public interest' is likely to be only one incentive amongst others, and not by any means the strongest.⁷ The preoccupation with re-election will lead politicians to go for short-term and high profile projects. They will respond to those groups with most electoral clout or best able to exert political influence rather than the wider population. Such groups will tend to be those with more to gain from the distribution of state resources than increasing production, such as public sector unions and special interest groups.⁸ Their profligacy will be abetted by bureaucrats, whose own advantage lies in maximising departmental budgets rather than improving efficiency.⁹ Thus a vicious circle gets set up, ultimately leading to an 'overload' of government resources as the costs of public policies and wage claims come to outstrip the growth of GNP.¹⁰

Finally, New Right critics of Marshall contend that because citizens cannot influence the delivery of services, social rights also encourage passivity. Individuals become the passive recipients of what the state is prepared, in its paternalistic fashion, to offer them. Consequently, people come to look to the state to provide for their needs instead of taking responsibility for their own conduct and its consequences – both for themselves and others, especially those to whom they owe a special duty. This thesis links poor health, for example, to bad dietary habits; blames the growth of single-parent families on sexual license and distorted incentives deriving from the priority allocation of council accommodation to single mothers; and attributes the decline in community care to the establishment of professional social workers and the state benefits system.

The New Right draw on this critique in order to propose a very different conception of citizenship. Their model of the citizen stresses the exercise of civil rather than political or social rights. Civil society provides the chief public realm, the role of the state being restricted to upholding our rights to freely contract with each other. To a large degree this function entails reducing state interference as much as possible and withdrawing from the supply or management of particular industries or goods. In so far as market failure still makes it necessary for the state to take responsibility for providing certain services – either directly or indirectly, via regulated agencies – then citizens should be given the sorts of rights they would enjoy as consumers. In other words, the choice and guaranteed service delivery which we get when we contract in a free market ought to be made available to us when we pay for and use public services. To the extent that these public services can be opened up to competition when privatised, then no such state-provided guarantees are necessary. Of course, the choices available to us in a market correspond to our buying power rather than the degree of our need, and we only get the level of service we are prepared or able to pay for. In some respects, the new concept of citizenship reflects this harsh market reality too. Citizens should be offered plenty of opportunities to contract into extra, privately provided and funded services, and some attempts, such as the Community Charge, were made to bring home to consumers the costs of the services they demand. However, they contend a trickle-down effect will ensure that the improved services and increased wealth generated by market competition will benefit all. Relative disparities between the wealthiest and the poorest may widen, but the standing of both is raised in absolute terms.

Running through the whole of the New Right argument is the contention that the market is more democratic, harmonious and virtuous than the forum. Consumer sovereignty embodies the same values of freedom and equality associated with popular sovereignty, whilst realising them to a greater degree. Consumer-citizens can be more influential than their political counterparts because, as Enoch Powell once put it, whilst each voter only voices an opinion every few years, ‘everyone who goes into a shop and chooses one article instead of another is casting a vote in the economic ballot box’.¹¹ Individuals can buy or reject whatever they want, with all-effective demand counting equally regardless of who one is. Since no single individual’s decision to purchase or forgo a given good should affect prices, a genuinely free and well-functioning market operates as a mechanism of collective sovereignty with producers responding to popular demand. A market economy is also socially democratic in the sense that an individual’s worth depends not on status or some imposed standard of merit, but simply on the ability to deliver a service people will buy. That millionaires get more votes than paupers is regarded as entirely legitimate, so long as no legal or similar impediments stand in the way of entrepreneurship and good fortune possibly leading to an improvement of the poor’s position. Finally, the New Right believe that because they defend only civil

rights requiring minimal state support, there are no clashes between individual rights under their scheme.

Some commentators have nevertheless complained that this conception of the citizen as customer emphasises ‘individual rights to choice and to quality, with little reference to citizen’s duties’.¹² The New Right are accused of encouraging an egoistic and atomistic ethic which could prove self-defeating. After all, to work efficiently the market itself must be seen as a public good. Producers and consumers have an obligation to uphold the contractual rights of others and to refrain from practices, such as insider trading or the formation of secret price cartels, which might inhibit its true operation. The difficulties of policing such anti-market behaviour on the part of good capitalists was a central theme of the last decade, highlighting the need to instil an element of ethics into business activity.

New Right thinkers and Conservative politicians have been concerned to rebut this criticism. The then Home Secretary Douglas Hurd summarised their arguments in a number of much cited speeches and articles written between 1988–9.¹³ He accepted that ‘freedom can only flourish within a community where shared values, common loyalties and mutual obligations provide a framework of order and self-discipline. Otherwise, liberty can quickly degenerate into licence’.¹⁴ However, he contended that the moral bonds of social solidarity cannot be created by the state. They are spontaneous products of a free market order, which depend on individuals recognising their ‘voluntary obligations to the community’. As we saw above, a major element of the New Right’s attack on social rights is that they sap the individual’s sense of responsibility, both to him- or herself and to society at large. They claim that removing the state from the social sphere opens up a space for individuals to become involved once more in the running of their communities and to exercise the civic virtues so necessary to a flourishing society. Schemes such as Neighbourhood Watch, Care in the Community, the setting up of housing and tenants’ associations, and the institution of parent governors in schools are all said to help foster this activity. As Hurd put it:

Greater opportunities for active citizenship are being offered and taken up. Parents are having more say over the way in which their children’s school is run. Council tenants have new powers to share in the management of their estates. Our action against drugs relies increasingly on a partnership between statutory agencies, the relevant professions and public-spirited citizens.¹⁵

Hence, active citizenship in this new context does not entail political participation but voluntary service within the family, the neighbourhood and the wider society. The broader home and share ownership that results from their policies means that modern capitalism has democratised both the pattern of property holding and the responsibilities that traditionally went with it. ‘Public service’, Hurd opined, ‘may

once have been the duty of an elite, but today it is the responsibility of all who have the time or money to spare.¹⁶

The New Right maintain that privatising social provision and expanding markets increases rather than diminishes the powers and virtues associated with citizenship, therefore, whilst promoting social solidarity. To quote Peter Saunders:

The paradox of social cohesion ... is that the more governments try to sustain it through the extension of 'citizenship rights' (broadly defined) the weaker it becomes. The privatised society which is slowly emerging out of the ruins of the collectivist welfare system holds out the prospect not of social and moral disintegration, but of new and active forms of association and sociability springing up from below.¹⁷

The moral bond tying together members of a market society is no longer the communal identities invoked by Old Right conservatives, however, but freely negotiated contracts. Indeed the state itself was to become 'a contract state' with government simply 'a series of contacts'.¹⁸ Whereas the Burkean view of 'responsible citizenship' appealed to by Hurd rested on 'the great primeval contract of eternal society' and entailed duties to the whole community past, present and future, the New Right view with which he tried to combine it recognises only those contracts, and hence obligations, that have been explicitly entered into between individuals and their families.¹⁹

It is dubious whether this model can either capture the social obligations we owe to others, or the relationship holding between individuals and the state or indeed any bureaucratic organisation. Few of these ties have been individually or freely negotiated, nor is it clear that they could be. As Burke well appreciated, there is a world of difference between a social contract and a view of the state as 'a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties'.²⁰ Yet, the service contract model promoted by the Citizen's Charter conceives the relation between state and citizen in precisely these terms. Contracts of this kind suggest we have no duties over and above those we have undertaken with other individuals for purposes of mutual advantage. Collective responsibilities for public goods or for the poor, sick and infirm to whom we are unrelated prove hard to justify. Home and share ownership have no necessary connection with 'neighbourliness', as Hurd tried to maintain. Unless one acknowledges a contract with the rest of society, then love of 'the little platoon' is likely to mark the boundaries of one's affections, rather than spreading out to embrace the whole of humanity, as Burke believed. The temptation will always be either to free-ride on or defect from collective arrangements whenever it is in one's rational interest to do so. Nor can one count on an invisible hand to render an

explicit concern with the welfare and order of society unnecessary. Conflict between the exercise of different property rights within the market place is as likely as between civil and social rights. Such competition and conflict need not always be socially beneficial, and important values may often be sacrificed in the process. Environmental concerns, for example, not only often raise issues relating to clashes between different property rights, as when certain uses of property create pollution that damages the property of others, but also frequently require explicit legislative protection if competing businesses are to take them into account.

As Adam Smith for one recognised, similar problems arise with all public goods, which markets are notoriously poor at providing.²¹ With private services, payment can establish a contract between purchaser and provider that neatly resolves what should be supplied to whom and how. This logic rarely holds for public services. In such classic cases as defence, street lighting and the like, benefits are non-excludable and often diffuse, so that a direct relationship between consumer and producer proves harder to establish. It may be impossible for someone to 'exit' from a service he or she does not desire, and hard for individuals to 'voice' their views simply through payment.²² Parallel problems arise with those public services that allow for exclusionary provision but which it is thought necessary to make compulsory, such as education, or free to all, such as health. Here the crucial issues of who gets what, when, why and how will turn not on payment but on the ways a public decision to offer the good comes to be taken. In a short, politics not markets will be the decisive factor.

Following Ian Harden,²³ one can distinguish between public services that are in principle marketable and those (like public goods) that are not, on the one hand, and between consumers, citizens and customers, on the other. Many New Right theorists will accept that the state ought to ensure the provision of not only non-marketable services, but also certain marketable ones, such as education or health, where a public interest in them exists, even if they believe this provision should itself be contracted out. In both these cases the ideal of consumer sovereignty ceases to be appropriate. Certain services are to be regarded as entitlements provided to all, such as education, a fair legal system and an efficient police force, which individuals receive as citizens. Other services – such as training, public transport, driving tests or refuse collection – may only apply to, and often be partly paid for by, those specific individuals or corporate bodies who choose to use them. However, whilst such beneficiaries are customers, their willingness to pay has little or no role in setting the charge or in deciding whether the service should exist or not. In all such cases it is deemed that there are either public benefits that transcend those accruing to any individual consumer, or that consumers are for some other reason poor judges of quality or need. Consequently, consumer sovereignty in such areas might lead to poor provision of the goods concerned. The conflation of consumers with citizens and customers in these cases is misleading and potentially disastrous,

therefore. It may diminish rather than enhance responsiveness to the intrinsic and instrumental value of a plurality of goods.

Without a general contract between the individual and the state, it is hard to see how the New Right theory can assimilate the social concerns raised by market failure or correctly characterise our relationship either to each other or to the state. They may be correct in believing that the terms of a social contract between members of a community cannot be identified *a priori* in the manner of those social democratic theorists, such as Rawls, who appeal to some form of 'original' contact to define the basic structure of society. But politics may have a vital role to play in promoting a rolling social contract of the kind described in the last chapter. How far our activity in the market sphere can be isolated from the general social obligations which we incur through politics and which the state exists to uphold is a question that runs through the following assessment of the Citizen's Charter, to which I now turn.

2 The aims of the Citizen's Charter

The Citizen's Charter, introduced in 1991, was generally portrayed at the time as a quixotic gesture on the part of the incoming Prime Minister which had limited political aims. It fitted John Major's homespun image and down-to-earth style, which sharply contrasted with the increasingly regal deportment of his more charismatic predecessor. It also served to give the impression that the new government was doing something and taking the initiative. Unlike earlier reforms in Whitehall, it was given a high media profile with full-page newspaper adverts and ample publicity about such matters as the motorway cones hotline. It was designed for public consumption and couched in simple language with a complete absence of management jargon. It was directed towards specific service deliveries which affected the everyday lives of the average man or woman in the street, such as the time spent waiting for hospital appointments, or the inconvenience caused by excessively late trains. Major himself took a great interest in the production and the progress of the Charter, personally chairing the high-level, six-monthly meetings which analysed its progress.²⁴

However, the Charter was also rooted in the New Right conception of citizenship, examined above, and reflected its market and consumer orientation. In his forward to the Charter, Mr Major emphasised that it was the fact that 'all public services are paid for by individual citizens, either directly or through their taxes' that entitled them 'to expect high quality services, responsive to their needs, provided efficiently at reasonable cost'. Consumer choice within a market-oriented public service was favourably compared to democratic choice within a politically managed system. As William Waldegrave, the minister responsible for the implementation of the programme, put it:

there is no guarantee – indeed there may not even be a sporting chance – that by periodically expressing his or her democratic decision at the ballot box the citizen (by the use of that sovereign power) will necessarily obtain on a continuous basis efficient, properly accountable, responsive public services. ... The key point ... is not whether those who run our public services are elected, but whether they are producer-responsive or consumer responsive. Services are not necessarily made responsive to the public by giving citizens a democratic voice, and a distant one at that, in their make-up. They *can* be made responsive by giving the public choices, or by instituting mechanisms which build in standards and redress when they are not attained.²⁵

The Charter set out to put such a system in place. According to John Major, it saw:

public services through the eyes of those who use them. For too long the provider has dominated: now it is the turn of the user. ... The principles of the Citizen's Charter ... give the citizen published standards and results; competition as a spur to quality improvement; responsiveness; and value for money to get the best possible service within the resources that the nation can afford. They give more power to the citizen and more freedom to choose. And where choice is limited in some of the key public services like schools, social services, probation and the police, the Charter is bringing in independent inspection with a strong lay element to ensure the citizen's voice is heard.²⁶

Significantly, Major stressed that although the Charter 'is about giving more power to the citizen', it 'is not a recipe for state action; it is a testament of our belief in people's right to be informed and choose for themselves' – even to opt into the private sector where appropriate.²⁷ Moreover, he underlined Hurd's message that citizenship was 'about our responsibilities – as parents, for example, or as neighbours – as well as our entitlements'.²⁸ Citizenship referred solely to the protection of our contractual rights as consumers of public services, therefore. We had no social entitlements stemming from mere membership of the community.

The Charter not only attacked the social democratic model of citizenship but also the interventionist and paternalistic conception of the state that the New Right held went with it. In this regard, the Charter represented a further stage in the New-Right-inspired reform of public administration since 1979: from the programme of the Rayner scrutinies (1979) and the Financial Management Initiative (1983) to the Next Steps agencies (1988). As such, it aimed not merely to improve service delivery, but also to instil into government and the public utilities a culture of customer service. The goal, in the words of William Waldegrave, was to increase the individual

consumer's 'practical control over the public services provided to him or her. It has replaced a system where that control ... was routinely subverted in practice by producer interests'.²⁹ Change in the culture of the public service was presented as going hand in hand with structural changes. As the 1994 report on progress put it: 'The Citizen's Charter is not only about changing attitudes and culture but also about the structural and managerial reforms – privatisation, market testing, the establishment of agencies – that are changing the systems which deliver public services'.³⁰ From this broader context, the Charter can be seen as going beyond the narrow area of consumers' rights. It reflected a New Right conception of the work of government, which was treated less as a provider of services and more as a regulator. The Charter was regarded by its protagonists as an instrument for important administrative and political change. It 'is a dynamic programme of reform and improvement which the Government sees as a ten year programme'.³¹

The White Paper introducing the Charter emphasised four interlocking themes for the improvement of the public services: quality, choice, standards and value. These criteria were embodied in the six principles of the Charter, requiring in all areas of the public service and the utilities (i) that precise standards of performance should be laid down; (ii) that there should be transparency and openness about these standards; (iii) that where possible the consumer should have choice; (iv) that service should be courteous and responsive; (v) that there should be opportunities for the redress of grievances; and (vi) that services should represent value for money. This last point is important. The government sought to improve the quality of public services whilst simultaneously reducing their cost to the taxpayer. This policy was in sharp contrast to the dominant thinking of the post-war period, where improvements were seen as going hand-in-hand with the provision of higher resources, secured either through politically-inspired redistribution or by means of general economic growth. According to the New Right, competition is a far more effective dynamo to drive forward improvements. Hence the Charter was accompanied by the introduction of market testing in government departments and other devices to cut costs.³² Similarly, the Charter process itself was presented as an evolving mechanism, whereby the citizen can demand higher services 'rather as commercial competition puts consumer pressure on the performance of private sector organisations'.³³

The importance accorded to the Charter was indicated by the fact that the Charter team was located in the Office for Public Service and Science within the Cabinet Office and that the minister in charge was given Cabinet status. Nevertheless, it is equally striking that the team was small and that, in line with its anti-statist stance, the Government implemented the Charter by devolving it among the various agencies rather than by using centralised direction. The idea was that this would be a 'guerrilla warfare element in Whitehall rather than an enormous division of troops'. The primary responsibility for the charters was to reside in the departments. As William

Waldegrave observed, ‘top-down command structures in the old-fashioned way, which I might describe as the socialist way’, were eschewed in favour of trying ‘to work with the grain of people; and the way to do that is to make clear what your ideas are at the centre and then find the people in the service delivery organisation, who want to work with you and change the culture that way’.³⁴ In that sense there was no single Citizen’s Charter as such, but thirty-eight individual charters. The task of the central unit was seen as conducting a dialogue with the departments or agencies. This involved analysing, sharpening up and occasionally rejecting the specific proposals which came from the agencies themselves. In the initial White Paper, 150 specific commitments were listed – another 80 in the second in November 1992 and a further 122 in that of March 1994.

3 Assessing the Charter: politics or markets?

The scale of the Charter was impressive, with some five million employees in the public sector being affected and around 14,000 organisations involved. The visibility of the Charter initiatives had a public impact, with the Rail Passenger’s Charter and the Hospital Patient’s Charter being particularly conspicuous. After three years, seven out of ten citizens were aware of the Charter’s existence. In certain areas there have been dramatic benefits to the consumer, for example, in the speed of issuing passports or the clarity of literature produced by the Inland Revenue. The Charter was particularly effective in promoting and publicising grievance and complaints procedures. However, surveys have suggested that many of the public regard it and the much-publicised ‘Charter Mark’ awards as essentially public relations exercises; indeed John Major was forced to admit in October 1994 that the Charter initiative had failed to capture the public’s imagination.³⁵

In some public services the Charter encouraged quite a radical shift in the culture of staff. As G.B. Doern has shown, this varied according to the prevailing ethos of the organisation concerned. The Employment Service had long been used to seeing itself as meeting the requirements of both clients (unemployed) and customers (employers); so the Charter reinforced existing cultural imperatives. By contrast, the Inland Revenue had previously seen itself as essentially performing a policing function, thus ‘organisationally and culturally it was prone to under-emphasise the fact that the vast majority of its clients were compliers with the tax law’.³⁶ The Charter encouraged the department to take more cognisance of the needs and interests of ordinary taxpayers. Even in bodies which already possessed an explicitly consumer orientation, however, there have been changes. Before 1991, British Rail, for example, did not even make public its own reliability or punctuality targets. When linked to the freedoms provided by the Next Steps reforms, the cultural change in particular offices could be striking as staff felt empowered to meet the demands of their customers.³⁷

However, the actual fulfilment of the targets has come in for considerable criticism. The Second Report in the Spring of 1994 revealed the patchy performance of the agencies concerned. The *Financial Times* audited fifteen of the English Charters. In some cases it found examples of improved standards promised without specific standards of performance. Thus, the Tenants Charter said ‘good councils will have answering machines when there is nobody in the office’. The Child Support Agency promised 80 per cent of phone calls will be answered in twenty seconds, but there is clearly no way in which the individual caller knows if he or she is in the unlucky 20 per cent. Only six of the fifteen had actually raised their standards, a key feature of the initiative, and the newspaper found ‘some [charters] have been revised more in style than content’. Only six of the fifteen offered financial compensation for failings.³⁸

There was also criticism that the standards were not sufficiently audited. The *Financial Times* found that only four of the fifteen charters surveyed had independent checks on whether they were meeting performance targets and only three had independent bodies that would take up users’ complaints. In keeping with the anti-statism of the project the Charter was not justiciable, in the sense of it being a legally binding set of codes. Those involved saw this as a positive advantage, since, apart from difficulties caused by the absence of a framework of administrative law, large-scale law-making leads to inflexibility.³⁹ Indeed, they claimed judicial auditing of government performance is alien to British constitutional practice. However, the absence of a legal framework for the Charter undermined the citizen’s right of redress and weakened the government’s power of implementation, making it essentially dependent upon the goodwill of heads of agencies who may mouth the rhetoric of the Charter without ensuring that it is effectively adhered to.

These criticisms point to fundamental difficulties with the whole approach to public service represented by the Charter. In some respects, they reflect the restricted extent to which the reforms have genuinely introduced the market into the public sector. One should note the limits as to how far such extension is possible. As we have already observed, goods that are public in the technical sense of being non-excludable cannot be provided in this way. Although various ingenious schemes, involving the formation of separate enclaves offering rival packages, have been suggested as a means of getting around this problem, externalities and limited social mobility make these ideas largely utopian. Many currently non-excludable goods could be rendered excludable, however, and provision related to consumer demand. Road tolls and water metering are examples. In these cases, however, market freedom often remains constrained by the fact that suppliers retain a monopoly. Moreover, the government has not yet become so hard-nosed that it is willing to deny those without sufficient funds any access at all to goods such as education or health. However, they have rejected voucher schemes in these areas, which might have provided customers with some direct purchasing power. At best,

public agencies have been set up whose budgets are at least partly dependent on their success in attracting clients. In general, though, markets are internal to the public sector and involve only limited use of either price mechanisms or free exchange with individual customers.

A number of consequences follow from the imperfect nature of this public sector market. The main gain to the citizen has been information, rather than any real ability to shift the way central government or privatised monopoly agencies allocate resources. The choices offered have been to a large extent controlled by the supplier, as has the ability of citizens to obtain their preferred option. Schools, for example, still retain a high degree of control over admissions. Moreover, the standards are set either by the government, the agencies themselves, or the regulators, and need not reflect customer preferences. School curricula are overseen by the Department of Education, for instance. In many cases the charters do little more than lay out existing levels of service, with vague promises for improvement in the future. Relations of consumption, as opposed to production, have changed little, therefore.

These criticisms suggest that, far from diminishing the power of central government to determine the extent and character of service provision offered to citizens, the reforms associated with the Charter often increased it. Whilst the Charter emphasised public choice concerns about the tendency of bureaucrats and professionals to run services in their own self-interest, little or no attention was paid to parallel worries about politicians – at least so far as central government was concerned. In fact, many commentators have complained that the targets which the government formulated for various agencies tended to be those which were convenient for the government itself. A classic instance was the case of the Benefits Agency, where the targets related to the promptness and accuracy of benefit payments and the like, but there was no target relating to the take-up rate: one estimate is that as much as £2 billion may have gone unclaimed by those entitled to it.⁴⁰ Indeed, it is hard to resist the cynical suggestion that the charters were actually a means of diverting attention away from the question of the public funding of services which were savagely cut by Conservative administrations during the 1980s. When services are underfunded, however, the Charter approach may prove counterproductive by directing providers' efforts into window dressing rather than genuine improvements, as when British Rail altered its timetables to 'improve' the percentage of trains arriving on time. Even an ardent, but independent, enthusiast for the reforms, Peter Kemp, viewed politicisation as its chief deficiency. Politicians, he complained, wanted 'instant results' and liked 'the Charter to highlight horror stories about standards of service but this should not be its primary function'.⁴¹

An ironic result of the politically manipulated public sector market, introduced by the New Right, is that it risks creating the very problems characteristic of command economies. Internal markets have brought into being a burgeoning and largely unaccountable surrogate consumer bureaucracy, for instance, that sets prices or

purchases on our behalf. As New Right thinkers ought to have predicted, the task of aping the market not only creates a high degree of administrative overload, it also introduces a number of distorted incentives into the system. In the Employment Agency, for example, making targets and performance-incentives for clerical staff relate to their success in getting 'clients' off the unemployment register led to the scandal in 1993 that they were being placed on the invalidity benefit register.

Similarly, the drive for efficiency and value for money meant that performance targets that are quantifiable took precedence over those that are unquantifiable or relate to quality. An example from the Immigration Service, highlighted by the Labour MP, John Garrett, illustrates this problem. Here the Charter concentrated upon the number of minutes entrants were made to wait at points of entry. But it could be argued that the true nature and quality of such a service should be measured not by the number of minutes a returning car-load of holiday makers waits, but by the equity and sensitivity of the treatment meted out to the minority of entrants who are detained: yet this was missing from the performance indicators and in any case comprises many unquantifiable factors.⁴²

In the case of complex services, performance indicators may undermine the operation of the whole service. There is the well-known effect that the selection of an indicator will tend to steer resources to meet its fulfilment. But many sectors of public administration have complex and potentially competing goals. A hospital or a school, for example, is very different to a passport-issuing agency. In the case of the former, quantifiable performance targets may be harder to devise, and concentration on those areas where they can be set may produce distortions in the overall working of the organisation. In its audit, referred to earlier, the *Financial Times* highlighted exactly such a knock-on effect in the case of the Health Service. In their efforts to meet the Charter's promise to reduce waiting times of certain operations from two years to eighteen months, many hospitals had increased the waiting time of other operations that used to have shorter waits.⁴³

Political control, however, may be difficult to avoid. Even a voucher scheme will involve determining what they can be used for and how much they are to be worth. Substantive political decisions will therefore need to be made about the relative importance of goods such as education and health, and the extent to which they ought to be publicly supported. Market mechanisms may also be inappropriate or inadequate ways for delivering certain sorts of goods or assessing how efficiently or satisfactorily they have been provided. Public services tend to be in areas involving the quality of life and influence the range of opportunities available in a society. They provide the background conditions against which social activity, including that of the market, take place. As we saw, in a number of instances public services exist to protect against market failures in the form of negative externalities, such as pollution or unemployment (often arising from competing exercises of property rights). Deciding how and what should be done in these cases is not a

matter of simply satisfying individual preferences but of coming to a consensus on core social values, a process that involves conscious political deliberation and action. The Charter's service-contract approach loses this collective dimension by individualising the right to be served.

If my earlier criticisms of the Charter stemmed from the fact that it involved the state vainly attempting to act in a market manner, these points suggest that its approach also leads to an abdication of the state's proper function as a mechanism of public decision-making and coordinated action and a regulator of market activity. A prime example of this abnegation of responsibility is the attempt to divorce the government from the service provider. As Norman Lewis remarked, the programme concentrated on outputs, for which managers are responsible, but ignored or blurred their relationship to inputs and outcomes, where responsibility must in part be shared with politicians.⁴⁴ The Charter typically set targets related to managers achieving a given output, for example that so many trains will arrive on time. However, this measure assumes that managers have either received the necessary input of resources to achieve this goal or are also responsible for obtaining them. Similarly, the relationship of such outputs to wider objectives or outcomes, such as the overall mix of transport in the UK, also remains obscure. Again, there are ways in which efficient managers may influence the overall result, but only government policy can determine how far. Once more, the Charter avoided such wider issues. It ignored, for example, various externalities that have a major bearing upon the actual performance of services. If we take transport, the concentration on immediate consumption and narrow service delivery screens out all the external benefits which an efficient and affordable transport system should bring to the community at large, such as less pollution, lower consumption of scarce fuel resources and the reduction of congestion. A similar analysis could be applied to the fields of health and education.

This failure to link the monitoring of outputs to either inputs or outcomes reveals the limits of a market approach that fails to engage with the broader political context within which policy decisions are made. A parallel weakness stems from the absence of any citizen involvement in setting the standards or deciding what sorts of service ought to be provided. As Kieran Walsh argued, the 'challenge to the Citizen's Charter is where the standards come from. The issue is that of how the citizen can be involved in the setting of standards and character of public services, and not simply be allowed to complain after the event about what they get'.⁴⁵ The original guidelines were laid down from on high. Much play was made of the need for consultation, but as Norman Lewis has pointed out, the 'regular and systematic consultation' with the service users came in fact to mean market research supplemented by discussions with insider or favoured interest groups.⁴⁶ It is noteworthy in this regard, that the introduction of the charters coincided with the erosion or even elimination of institutions of representative democracy. This is most obviously true of the removal of powers of local government, but it equally

applies to bodies which had a more direct, consumerist *raison d'être*, such as Transport Users Consultative Committees. Similarly Community Health Councils, which were set up in 1973 as patients' watchdogs, have withered on the vine.⁴⁷ Once again, therefore, the reforms ended up replicating and intensifying precisely those problems they claimed arose out of the social democratic state and aimed to end, in this case the power given to organised interests and bureaucrats as against ordinary individuals.

Using the distinctions made at the end of the first section, we can identify the Charter's failings with its treating all goods as both theoretically marketable and actually marketed, and the associated assumption that our relationship to the service is that of a consumer rather than that of a customer or a citizen, as is standardly the case. In fact, services tend to be placed in the public sector precisely because the use of market mechanisms to deliver them is impossible or ill-advised – not least because consumer sovereignty either cannot be exercised or is likely to be a poor indicator of the public or even personal benefit a good confers, and hence of the level and quality at which it ought to be provided. It remains to be seen whether there are political mechanisms which prove better in this regard than markets, and can avoid the evils of misguided paternalism and self-seeking factionalism to which New Right analysts believe them inherently prone.

4 Democratising public services

Both public services and elected authorities in Britain have been guilty at times of unresponsive professional control. To this extent, the New Right critique of the social democratic conception of citizenship has some force. The organisation of welfare services and nationalised industries often assumed an undue compatibility between the interests of producers and consumers and invested too much confidence in the benign power of the state. However, New Right thinkers and politicians also overlook potential conflicts between the rights and interests of different individuals, and between them and the wider society. In their case, they place too much trust in the invisible hand of the market, believing the state need merely protect rights to contract and exchange and can leave social duty up to citizens themselves.

The preceding analysis has suggested that in the area of public services the market does not always operate so beneficially. For a start, it tends to respond only to those wants that are either most easily satisfied or affect most people. In the NHS, for example, improvements in minor surgery may be at the expense of chronic patient care. There is also a danger that the public-choice tendency to treat everyone as essentially self-interested may create the very dangers it seeks to remedy.⁴⁸ Citizens may try to free-ride and end up underfunding services by paying too little tax, or they may simply exit from the system into private schemes, leaving the public sector an impoverished service for the poor. For analogous reasons, providers may

lose any sense of the public service ethos and cooperative ethic necessary for the public sector to work efficiently. There is some evidence that performance pay and marketisation in the NHS and the civil service have had this effect. Indeed, marketising the supply of goods and services that have an intrinsic and not simply an instrumental value may radically alter the nature of those goods and services, and not simply their mode of delivery. If education or research cease to be treated as valuable in themselves, then ironically their worth for other purposes may also be diminished, since the practices that sustain the pursuit of knowledge may require a degree of disinterestedness that market incentives subvert. I have also noted the difficulties of creating a genuine market in public goods. By and large, the Conservatives created quasi-markets in which the power and lack of accountability of central management was increased rather than diminished. Many schools and hospitals may have become locally managed, but the funding framework remained ever more firmly in the hands of central government. Teachers and health workers had little say in the running of these services, whilst parents and patients often found their 'choices' more severely constrained than before, with locally managed schools able to set restrictive entry requirements and Hospital Trusts deciding purchasing strategies without any consultation with their customers. Even if market choice were to be established, however, such arrangements would prove problematic. For consumers have difficulties in placing their preferences within a wider context of how they would like resources allocated and services organised. In the terminology I employed earlier, they may have some influence over outputs in a given service, but not over how these relate to inputs and outcomes.⁴⁹

These criticisms suggest that the Charter programme and the New Right thinking that inspires it go too far in their criticisms of politics and the public role of the state. First, attempts to yoke the self-interest of service providers to the public good involve an impossible degree of central control. A public service ethos, geared to securing citizens certain social rights, can often prove more efficient and less prone to self-serving paternalism than its critics suppose. Such attitudes are themselves institutionally inculcated, but rest on 'screening in' those with the appropriate motivations and excluding those who lack them, rather than assuming all are knaves and applying sanctions indiscriminately.⁵⁰ Indeed, the scarcity of evidence to support the public choice view of pervasive knavery amongst bureaucrats suggests that civil services have operated fairly effective screening mechanisms in the past.⁵¹ Second, political participation in local authorities, consumer bodies and the like, need not promote the views of unrepresentative organised interests alone. It can also allow groups without much economic bargaining power to present their concerns. Indeed, democratic 'voice' offers consumers their only means of influence when the 'exit' mechanisms of the market are not available, as is generally the case with public services.⁵² Finally, politics plays a role in raising the awareness of both citizens and providers of each other's values and interests, and so helps them to

appreciate the worth of certain public goods and services. Unlike the market, politics not only promotes the instrumental exercise of freedom by citizens. It also educates them through participation and discussion into a perception of the dependency of their social relations and individual autonomy upon collective rules and arrangements – discouraging free-riding and other self-defeating forms of self-interest. Moreover, by providing a forum for public discussion it enables preferences to be transformed and not just aggregated, allowing opposing interests to find agreement on shareable values.⁵³

The pluralist and deliberative democratic scheme outlined in the last chapter fosters all three of these elements. It aims at fairer and better-informed decisions, that help construct, and motivate concern for, a public good that is acceptable to a plurality of agents. It employs more equitable representation and the devolving of power to balance the various values and interests of citizens against the overarching requirements of the collectivity. Such a political system need not be inherently prone to the evils the New Right associate with democracy *tout court*. As I noted, membership and the scope of decision-making have to be as encompassing as possible, and the leadership kept accountable to those they represent, if the factionalism feared by liberals is to be avoided, and compromises across the full range of relevant interests and values achieved. However, the diffusion of power and emphasis on deliberative reasoning make it far less prone to the dangers of interest-group bargaining than standard pluralist theories of democracy. I now wish to argue that it also offers a suitable alternative to both statist and market-oriented approaches to the management of public services.

Instead of privatising the state, this strategy publicises civil society. To employ the distinction made in the last chapter, it does not involve the unloading of state responsibilities onto partial and private civil associations – a policy that merely reinforces social inequalities. Instead, it disperses statist functions amongst a plurality of civic bodies by devolving both service provision and funds to a system of social and political organisations. The precise details of such a scheme necessarily vary according to context and the function involved, and can only be elaborated *in situ*. For various reasons general principles of what can and cannot be devolved in this manner are hard to devise. Most functions are complex and different aspects might be best managed by different tiers of government. Thus, schools have a neighbourhood base and have traditionally been locally managed, universities have a more regional and national constituency. Technologies can change local into transnational problems – as has occurred in numerous areas, most notably the environment. Proposals for implementing this scheme range from radical plans for citizen's vouchers which would allow individuals the maximum degree of choice between service deliverers,⁵⁴ including the possibility of clubbing together to create new bodies, to a more reformist strategy that seeks to enhance the powers and democratise the large number of existing local and regional governmental and quasi-

governmental bodies, and to recruit the various groups and voluntary bodies already present within many policy areas to a more active administrative and decision-making role.⁵⁵

Though both have their strengths and weaknesses, the latter is preferable in my view. The reformist path aims to supplement rather than supplant the more centralised, territorially based, and encompassing forms of politics and administration. Thus, fiscal policy and permitted tax levels may have to be decided at a central level, but budgets and certain revenue-raising powers can be devolved down. This scheme has the advantage of being both more realistic in the short term, and in its continued stress on the wider community less likely to fall into the problems of free-riding and rent-seeking to which – as we noted in the last chapter – highly voluntaristic and particularist radical proposals are prone. It would involve measures such as giving regional government greater responsibility for economic policy and selective investment decisions; replacing unaccountable nominees on the management boards of bodies such as NHS trusts and locally run schools with elected representatives drawn from their personnel and consumers; drawing on factory committees and groupings of unions and employers' associations in the setting and monitoring of health and safety legislation and the devising of training programmes; and ensuring green groups and community organisations play an active role in drawing up and implementing local and national environmental legislation.

The potential benefits of distributing state functions amongst a plurality of devolved bodies stem from this scheme's capacity to harness cooperation and compliance, thereby reducing transaction costs, and to allow services and the standards and means for their delivery to be formulated and tailored to specific circumstances. As I observed above, participation in democratic fora fosters a civic consciousness and develops an attitude of reciprocity amongst citizens. These social resources can be employed by a variety of service agencies in order to supplement the governance of markets and state bureaucracies. First, the possibility for continuous political collaboration and communication between employers, workers and consumers facilitates the achievement of mutually acceptable compromises amongst them, and establishes the background of trust required to secure their voluntary acquiescence in collective decisions. Second, associations operate as sources of local knowledge and power that enable legislation and the mix of services to mirror the diversity and complexity of modern societies and respond in a flexible manner to change and diversity. Thus, a government may need to set general health or educational standards but has to allow for wide variations in their mode of fulfilment according to the place and operation involved and the value systems of the local population. A village school works in a different way to a much larger inner city one, a preponderance of Catholic or Protestant schools may be appropriate in some areas and not in others, and so on. Central government may

also not be capable of monitoring or securing the implementation standards because the sites are too numerous and dispersed. Likewise, government may need to enlist the support of actors in specifying certain standards, because the elements involved are highly disparate and the coordination of all relevant parties beyond the capacity of any central agency. Much environmental and health and safety legislation has this character.

The Labour administration relaunched the Citizen's Charter as 'Service First' on 30 June 1998.⁵⁶ At a rhetorical level at least, the new policy acknowledges many of the criticisms of the original programme made in this chapter and tries to address them. For example, the document notes the need to involve consumers and front-line staff in the setting of standards, to encourage a partnership between users and providers, and to have legally backed procedures for making complaints and obtaining redress. Much of the policy remains to be implemented, so its effectiveness cannot be assessed. None the less, from the perspective offered here these proposals have a major weakness. Citizen involvement remains passive, with funds and policy being tightly controlled from the centre. The main mechanism for user involvement is a People's Panel of 5000 randomly selected citizens from across the UK, backed by research from the National Consumer Council and Consumer Congress. The Panel will operate to some degree as a citizen's jury or deliberative opinion poll.⁵⁷ Unlike standard polling, which simply registers the unreflective preferences of consumers and voters, these techniques involve lengthy discussions with other panel members and relevant experts before their views are taken. Hopefully, these preliminaries make their preferences more informed and considerate of the values of others, and the technical intricacies of the case. Even if successful – and the current evidence is mixed⁵⁸ – this approach has a number of drawbacks compared to the democratic liberal scheme outlined above. It remains a centrally administered system concerned with setting general standards. It has a limited capacity to reflect the diversity of local situations and particular cases. Nor does it address issues of dominance and disempowerment. How far people will or can respond to complexity and plurality unless required to do so on a daily basis when making real decisions with others is a moot point. In sum, the new programme does not offer a new form of governance and so fails to tackle the structural problems of the current political system.

5 Conclusion

Markets cannot substitute for politics in the manner aspired to by the Citizen's Charter. In numerous areas of economic and social life, public standards and services are necessary which markets either cannot or will not provide. However, central government often lacks the information and reach either to devise or to enforce a suitably nuanced and consensual regulative framework, or to establish a sufficiently

responsive and diverse set of services. In such cases, the use of devolved democratic agencies avoids the inadequacies of collectivist planning identified by the New Right. They can improve both the commitment and accountability of the personnel responsible for delivering services; promote citizen choice and voice; and reduce the bureaucratic discretion and regulative burden of the state. They achieve this through establishing a rolling contract between each and every citizen, on the one hand, and between citizens and the state, on the other. Unlike the market contract between individual consumers and producers, this political contract allows the collective dimension of public services to be appreciated, and gives the state the legitimate authority to act in the common interest. Unlike, the universal and pre-political rights-based contract favoured by social democrats, however, this approach also allows the mediation of competing values and goals. It is to the implications of this aspect of democratic liberalism for proposals for constitutional reform that we now turn.

FOR EDUCATIONAL PURPOSES ONLY

7 Trimming democracy: the Human Rights Act

Incorporation of the European Convention on Human Rights into the United Kingdom's domestic law was heralded as an overdue 'modernisation' of British politics.¹ Proponents of the measure believe it places much needed constraints on parliamentary sovereignty and the inherent threat that doctrine poses to individual civil liberties. They point to Britain's unenviable record before the European Court of Human Rights and argue the reform will motivate legislators to take rights more seriously in future.² By contrast, opponents lament the transfer of power from politicians to unelected judges. They claim bills of rights involve far more than a justifiable brake on tyrannous majorities. By making policy subject to substantive judicial review, they undermine democracy and substitute an atomistic litigiousness, in which individuals insist on their rights at the expense of all else, for the mutual give and take of the political process. Incorporation will indeed change British political culture, but for the worse.³

This debate goes to the heart of our discussion of the liberal response to pluralism. Those favouring a rights-based constitution often adopt Rawlsian arguments similar to those examined in Chapter 2. They assume human rights provide a framework for democracy, setting out its basis and limits. Instead of threatening pluralism, these rules of the democratic game form an 'overlapping consensus' amongst all reasonable agents that allow their differences to be amicably resolved. Certain views are trimmed off the agenda, but only those making unreasonable and unjust claims could be unhappy with this arrangement.

This chapter disputes this thesis. The first section discusses the inadequacies of rights as a framework for politics. Whilst some critics of bills of rights are not only anti-liberal but occasionally illiberal as well, within pluralist societies liberals also have reasons to object. There are a plurality of potentially conflicting rights that are themselves subject to numerous interpretations. Thus, rights cannot offer the uncontentious foundation for politics their advocates suppose. Individual autonomy may be harmed rather than protected if citizens cannot choose amongst these competing values and views. The second section argues that rights must be

placed within rather than outside democracy, therefore. Democratic procedures offer the only fair way for autonomous citizens to specify and resolve conflicts between rights. In consequence, we need a more political approach to constitutionalism, of the kind explored in Part II. The third section illustrates the foregoing argument by analysing the debate over incorporation of the European Convention, and considering the difficulties the decision to do so is likely to engender. As the experiences of the United States, Canada and New Zealand testify, constitutionalising rights will not remove the tensions between rights and democracy by handing the trump card to the former. Indeed, the clashes may become ever sharper as the judiciary perform the hitherto democratic job of balancing the relative weights of different rights and other values when reviewing government legislation.

1 The constitutional rights project

Talk of rights implies that some principle or rule gives a person or class of persons an entitlement to the aid or forbearance of others in the pursuit or enjoyment of some good; or the ability to bring about such an obligation on others; or an immunity from being subject to such an obligation by others⁴. To understand the reasoning behind the constitutional rights project, however, a distinction has to be made between institutional rights and human rights. Institutional rights exist within any legal system which confers particular entitlements on specific groups of people. They are the product of legislation implementing government policy. As a result of the Representation of the People Act, for example, all British citizens aged 18 or over have a right to vote in elections, with the exception of certain specified categories of persons – such as convicted criminals serving prison sentences, certified mental patients and hereditary peers. Similarly, all mothers of young children within the British Isles have an institutional right to child benefit.

Human rights have a different status to institutional rights. They define the moral parameters within which all legitimate governments must operate, and that all states and peoples everywhere should seek to uphold in their relations with each other. Although differences exist amongst their advocates over the justification and content of human rights, they are generally held to be basic or fundamental and universal in form – that is, as applying to all individual human beings, regardless of their country of origin or residence. Whilst human rights may be institutionalised in numerous ways – the right to self-determination, for example, being compatible with a number of electoral systems – given institutional rights may be deemed to conflict with, or fail to provide for, certain human rights. In these latter instances, proponents of human rights believe that the offending laws, and in some instances a country's entire political system, have to be reformed, possibly radically.

Human rights, therefore, purport to offer a metapolitical moral framework for

politics and social interaction more generally that is compatible with a wide variety of political and legal institutional arrangements. The appeal of adopting a charter of rights akin to the European Convention as the basis of a pluralist polity should now be clear. Such a device is claimed to set certain common standards whilst allowing space for a large degree of diversity.

To attain this goal, human rights must be able to lay claim to a degree of universality and objectivity that places them above political debate. As a result, they must meet two fairly stringent conditions. First, to achieve widespread support, human rights must be capable of appealing to a plurality of different people and types of institution motivated by often diverse principles and goals. In particular, they must be able to sustain in a plausible manner their claim to be fundamental and universal conditions of a just social order that are capable of applying equally to all individuals. To meet this condition, a distinction needs to be drawn between the 'right' and the 'good', between the framework of basic rights and the conceptions of the good people may pursue within that framework. Human rights cannot themselves be based on any particular ethos or conception of the good. Second, whilst being sufficiently general and abstract to satisfy the first condition, rights must also be precise enough for us to be able to apply them to concrete circumstances, and the criteria defining what counts as a right stringent enough to prevent each and every goal or preference we have becoming the subject of a human right. Those who doubt the usefulness of rights language have usually been particularly critical of it being too abstract to be institutionalised in a determinate fashion, on the one hand, and have attacked the tendency for the class of human rights to expand seemingly indefinitely to include each and every person's favoured cause, on the other.

It is doubtful that any charter of rights can satisfy the second condition and still meet the first. However, without the second, any code of rights must be regarded as entirely vacuous. Unfortunately, essential contestability and the lack of compossibility, the two defining characteristics of pluralism identified in the Introduction to this book, make it difficult for any definition of rights to satisfy either condition. The first fuels social and political disputes as to what rights we have; the second leads to debates over how to resolve conflicts between rights. A consensus upon our basic civil and political liberties, for example, is vital to the whole constitutional rights project. These rights are supposed to define the minimal parameters within which normal political argument can be undertaken. If, as I shall show below, they cannot be isolated from the problems associated with these two aspects of pluralism, then the whole programme is in trouble.

To take the problems raised by essential contestability first. It is often assumed that debates over social justice can be contained within a general agreement about basic constitutional arrangements.⁵ The proponents of welfare rights are held merely

to wish to add social rights to the traditional liberal package of civil and political rights, whilst their opponents simply seek to prevent such an extension. However, the argument cuts far deeper than this. Those who argue for a more positive conception of liberty that includes a right to welfare, education, shelter and so on, usually do so at least in part because they contend that our effective exercise of our civil and political rights demands that certain essential basic social conditions be met. They commonly contend, for instance, that participation in the political process involves more than just the possibility of voting in regular elections. Amongst other factors, it also requires that individuals have the educational background to be able to make informed judgements of their own and a minimal degree of economic independence from others.⁶

Libertarians deny such claims. They believe that civil and political rights can be understood entirely in terms of negative liberty. For them, these rights are secured as long as individuals are protected from the intentional interference of others, and particularly the state, so as to be free to engage in economic activity, to express their opinions, and to possess and to transfer their property. Moreover, they claim that the granting of social rights would necessarily conflict with these civil and political rights properly understood. Taxation would be required if rights to education and welfare, say, were to be met in state-supported schools and a system of social security and health care. However, this would interfere with the right of individuals to do what they wish with their rightfully acquired property.⁷ Robert Nozick even goes so far as to argue that such taxation is the moral equivalent of granting property rights in another person and 'is on a par with forced labour', and hence an infringement of our most fundamental civil rights.⁸

The important point to stress is that these two views of liberty give rise not just to two different interpretations of our basic rights but to two incompatible views. To the extent that this disagreement affects the interpretation of our civil and political rights, it cannot be treated simply as a debate within a settled understanding of 'normal' politics. For the dispute raises vital issues about how we conceive the political realm. The rights in question, therefore, cannot be removed from the political agenda by being encoded within a constitutional schema that demarcates the sphere and character of legitimate politics.

The difficulties posed by competing evaluative considerations arise not simply between conflicting conceptions of liberty but even within a particular conception. Some negative libertarians have attempted to avoid this dilemma by adopting physicalist accounts of liberty that define coercion in the narrowest terms as a direct, intentional, absolute, and practical hindrance to our performing a given action, such as imprisoning someone. Adjudicating between different forms of liberty can be achieved in quantitative terms, and so need not invoke contentious qualitative judgements.⁹ However, outside the realm of metaphor, the view of the

individual sheltering behind a barricade of rights within an ‘inviolable moral space’ proves very hard to sustain.¹⁰ To be remotely plausible, this conception has to rely on a number of debatable empirical assertions, such as the view that people’s choices are not constrained by prevailing social prejudices or fears, for example, or that the effects of market transactions can neither be intended nor foreseen. But even if we grant these usually unargued assumptions, evaluative difficulties will still crop up about defining when the individual’s physical space has or has not been infringed. Thus, is the loud music emanating from the flat below mine a hindrance to my freedom or not? If so, to what degree, and at what point does it cease to be so? At the very least, these considerations will lead to the second problem of how to make on balance judgements between conflicting liberty rights. After all, stopping my noisy neighbours surely will entail some interference with their property rights? It seems hard to answer these questions without getting embroiled in knotty arguments concerning the various degrees to which different physical acts impose on people. Such issues involve making some sort of appeal to highly contentious notions such as basic human interests and our differential capacity for protecting them.¹¹

The problems raised by the essential contestability of definitions of freedom give rise to and are further compounded by a lack of compossibility between rights.¹² Unless rights dovetail in such a way that the upholding of one right need not involve the contravention of another, then there will be conflicts between rival rights claims and the interests they are held to protect. Scarce resources, for instance, mean that proponents of welfare rights have to accept that there may well be clashes both between individuals seeking to claim a particular benefit, as when two patients vie for access to a certain expensive treatment, and between different sorts of welfare goods, as when governments have to decide how much to allocate to education relative to health care.

Libertarians have often wished to argue that they can escape these sort of disputes too. They maintain that since rights based on negative freedom merely require restraint on the part of others, they are capable of being universally applied to all and generate perfect duties on everyone and do not infringe any other negative liberty rights. In this respect, they are held to present a sharp contrast with rights grounded in a more positive conception of liberty, which require action on the part of individuals, which is often costly, frequently conflicts with other of their rights, and are in some instances impossible to extend equally and universally to all.¹³ However, this contrast is only apparent since negative liberty rights give rise to the self-same problems.¹⁴ After all, my negative rights to security of my person and possessions, a fair trial and so on, require a police force, prisons, and courts of law if they are to be upheld, all of which are just as costly to keep up and lead to a similar need to weigh up the claims of different rights and persons. Indeed, the cost of total

security is probably as beyond our resources as meeting everyone's welfare needs, and could only be achieved at a similarly unacceptable moral price. For as most attempts to increase security lead to clashes and trade-offs with other rights, such as the right to privacy or free speech, a totally secure society would not only bust the exchequer but have to be an extremely coercive police state as well.

The two problems identified above place the constitutional rights project in crisis. If no uncontentious view of freedom exists, then the proposal to make universal equal rights to civil and political liberty foundational runs into grave difficulties. Faced with differing and often conflicting views of freedom, it may not be possible even to agree when collisions between liberties occur, let alone to rationally resolve such disputes. Moreover, we have seen that this dilemma arises even within attempts to deduce rights from a single conception of liberty. The disagreements raised by the essential contestability problem are further fuelled by the need, due to a resulting lack of compossibility, to strike a balance between not only rival individual rights but also rival claims to a given right.

The essential contestability and the lack of compossibility problems remove two of the main supposed theoretical advantages of constitutional rights: namely, their ability to remain distinct from and 'trump', in Dworkin's phrase,¹⁵ communitarian and utilitarian considerations respectively, both of which locate the individual's good to some degree within that of the community as a whole. For the sorts of disputes examined above will only be resolved by making reference to social considerations of either a communitarian or a utilitarian kind.

Take the example of freedom of speech. All societies are forced to draw boundaries around this right in ways that involve making contentious decisions as to how it is defined and the lexical priority to assign it when it comes into conflict with other rights. In the United Kingdom, for instance, these limitations range from laws against slandering another person, to censorship of obscene or violent material, and restrictions on the reproduction of classified information. Similarly, American lawyers interpreting the first amendment normally treat certain ways of expressing yourself, such as maliciously shouting 'fire' in a crowded room or incitement to racial hatred, as falling outside the constitutional right to free speech. These restrictions are frequently contested but plainly unavoidable. In part, they reflect communitarian considerations. Freedom of speech is valued, at least to some degree, because of its place within a complex set of collective structures and practices, from clubs to political institutions, which are held to foster the development of a certain quality of human flourishing and interpersonal relations. In part, they reflect utilitarian considerations, since we value freedom of expression primarily for communication and the benefits deriving from the unrestricted exchange of information, feelings and ideas.

Any theory of freedom of speech will draw on both sorts of consideration – they

are plainly evident in J. S. Mill's *On Liberty* (1858) for example. Similarly, both will play an important role in weighing up any practical implementation or curtailment of this right. Thus, if we uphold the right of the political dissident to speak, we do so not simply because it is in his or her interest that we do, but largely because we regard the practice of criticism as both good in itself and as being in the interests of all individuals living in a political society which depends for its openness on the free discussion and criticism of the policies and opinions of those in power. However, if in certain circumstances the dissident's views appear to threaten the character of that society, then his or her right to express them becomes called into doubt. Such considerations clearly operated in the deliberations of successive British governments over whether or not to restrict the freedom of speech of members of Sinn Fein. In this way, a ban that seemed appropriate when bombs made dialogue impossible became inappropriate once the peace process started.

It may be objected that these criticisms are recognised and to some degree catered for within most declarations of rights. Like most rights charters, for example, the European Convention adopts two forms for the enunciation of rights. Some rights are listed in the form of 'no one shall be ...', others in the form of 'everyone (or everyone in a certain category) shall be entitled to (or has the right to) ...'¹⁶. Whereas rights framed in the first manner are usually to be regarded as absolute and unconditional (e.g. Article 3 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'), many of those formulated in the second manner (e.g. Articles 8–11) are subject to such limitations or conditions 'as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. In some instances the protection of national security, territorial integrity, economic well-being, and the prevention of crime and disorder are also added.

Rights of the first sort are to be regarded as fundamental and 'inalienable', with no trading off between them and other considerations.¹⁷ Rights of the second sort, by contrast, form part of what Rawls calls a 'scheme' of liberties which define the various elements necessary to human flourishing within a liberal democratic society.¹⁸ Communitarian and utilitarian considerations are relevant to specifying the scope of the rights within this scheme only to the extent that they enable us to align these rights into a coherent ordering when they clash. In Rawls's terminology, they enable the 'regulation' as opposed to the 'restriction' of rights.¹⁹ However, once a stable scheme has been arrived at, and the boundaries delimiting the range of each of these rights has been fixed, then these rights, too, will be absolute within their respective domains. Thus, freedom of speech will be limited by notions such as incitement and defamation, but within a core area fixed by explicit exceptive clauses and a body of case law this right will enjoy an absolute and unrestricted

constitutional protection.²⁰

This argument certainly reveals the constitutional rights project to be more sophisticated than my earlier analysis may have suggested, but does not I think avoid the criticisms I raised above. Both sets of rights are claimed to be compossible and capable of a non-contestable interpretation. In the case of the first set of supposedly unconditionally 'absolute' rights, these criteria are said to be met by virtue either of their essentially negative character, or because they refer to positive goods which it is believed cannot be by their very nature in scarce supply.²¹ However, as we have already seen, specifying the content of negative rights is no less contentious than with positive rights. To appreciate this difficulty, one has only to ponder the debates in the United States as to whether capital punishment counts as a 'cruel and unusual punishment', for example, or to consider the very diverse perceptions of what retribution or effective deterrence justifiably demands within different cultures. In addition, as we also noted earlier, negative rights can and do clash, in part because their enforcement involve costs which are potentially just as great as those required for positive rights to welfare.

The attempt to delineate a core domain for the second set of rights is similarly contentious. For these rights are not simply being weighed up against each other and brought into balance in an unproblematic way, they are being defined and identified in the process. Moreover, as the references to a democratic society, public order, public safety, morals and so on reveal, these rights are not being treated as primordial 'inalienable' benefits and advantages of individuals. Far from being 'individuated political aims' that cannot be subordinated to the 'general interest',²² their point and value derives from, and is limited by, their securing an individual's involvement in a common good in which all share. After all, many individuals have little interest in personally exercising most of the key rights of liberal democracy, such as freedom of speech and assembly. The benefit ordinary citizens as opposed to journalists and politicians derive from protecting such rights arises from the diffuse benefits of living in a society characterised by the free flow of information and political competition.²³ This fact subverts the whole attempt to make the scheme of rights foundational, albeit in a restricted sense. In a pluralistic society, in which people hold differing conceptions of the good, there will be not only competing understandings of these rights but in some instances, such as disputes between socialists and capitalists over private property, even disagreements about what rights a democratic society requires to sustain it.²⁴ According to circumstances and cultural priorities, both of which change over time, societies can justifiably promote different forms of human flourishing and hence different systems of rights.

Once the 'right' can no longer be separated from either the 'good' or a concern with social consequences, then, in all but the most culturally homogeneous communities, one will be faced with a number of rival and incommensurable assertions

of rights between which no mediation on grounds of pure principle is possible. In such circumstances, to entrench even the most general and seemingly uncontested rights within a written constitution may prove unwise. Such entrenchment makes it appear that in principle the essentials of central government initiatives should not vary, and that at a certain point trade-offs between competing goods are non-negotiable. However, such constraints are unreasonable and unrealistic. They fail to take into account either the complexity of human flourishing in all its manifold varieties, or the social character of the pursuit of most human goods. Both these characteristics make compromises between rival goods inevitable and warrant a fair degree of variety in the patterns of human interaction and fulfilment fostered by societies. Consequently, there will be a similar diversity amongst not only the scope but also the content of any system of rights. Any set of constitutional rights will be the constant object of deep contestation as attempts are made to extend, curtail and interpret it in ways that correspond to the current state of society. Think, for example, of the heated debates over the nature of 'speech' within the American constitutional tradition. Codification has prevented neither grave disputes over what counts as freedom of expression and what sorts of free speech are protected, as in discussions over whether pornography is covered by the First Amendment, nor has it stopped debates over when speech (however defined) clashes with other rights and interests, including other forms of speech, as in arguments about public security. Instead, the Supreme Court has been faced with the task of adjudicating between different forms of speech and between speech and other values and interests.

Three consequences follow from this situation of a theoretical and practical nature which will form the subject of the next section. First, given that the whole difficulty arises out of validly competing conceptions and requirements of rights, such disputes cannot be settled by appealing to supposed expert authorities on the nature of justice to provide the right answer. Since each side in such a dispute will regard his or her own position as offering the only just solution, this way of seeing the question merely reproduces the problem it purports to solve and renders it intractable. Consider the manner in which the debate over abortion degenerates once it is conducted in these terms. Between the 'right-to-lifers' and the defenders of the mother's right to control her own body, little or no compromise has been possible without what has usually been felt to be an unacceptable infringement of one or the other side's principles.

Second, as a result we have seen that rights have to be weighed up in the context of communitarian and utilitarian considerations concerning the good of the collectivity, rather than simply on the basis of the inalienable basic rights of the individual. Indeed, the latter largely derive from the former. This balancing assumes a theory of authority that entitles an institution to mediate between rights and to assign burdens and benefits amongst the population. Moreover, as I noted above,

the basis of such authority cannot be a substantive conception of justice, since this is precisely what is in dispute, but must rest rather on considerations of justified legitimacy which authorise some person(s) or institutions(s) to make decisions that resolve such fundamental value conflicts.²⁵

Third, rights assume duties to be operative. Behind this point lies more than the correlativity of rights and duties. Rights in themselves are frequently too general and abstract to reveal either on whom the duty of upholding it falls or what its safeguarding entails. If I recognise that humans have a right to welfare, for example, does that mean that I must impoverish myself helping the first needy person I meet, send money to Oxfam, pay taxes that go to the National Health Service, take out a private insurance scheme to cover myself and my dependants, or some mix of all of these? And, given that other rights are also important, how much should I give towards social rights compared to the police, army, Nato and Securicor in order to protect the security of persons and their property from physical assault? Any authoritative decision that fixes some balance between these competing claims will involve at the very least imposing upon some individuals an obligation to do something they feel conflicts with a more essential right and, in certain cases, may even oblige them to do something they feel to be unjust. In other words, the realisation of rights may involve a reduction in a citizen's moral autonomy and sense of self-respect through their having to submit to duties imposed by authorities.

In the light of the above, the demos would appear a better forum to decide these issues than a court. One of the main sources of authority of a court is its claim to expertise on legal matters. But when it comes to the fundamental principles held to underlie the political constitution, such expert knowledge would appear not to be available (at least in an unambiguous form) because of the need to compromise between these foundational values. Indeed, if the aim is to find collectively binding agreements that are recognised as legitimate, reflect the interests and values of the wider community, and can engage the active support of the populace, then democratically arrived-at decisions will surely prove more plausible in this role than those of any group of judges, no matter how learned and respected.²⁶ It is to a defence of this proposal that I now turn.

2 Rights and democracy

Liberals commonly argue 'there is no necessary connection between individual liberty and democratic rule'. Whilst they may grant that the second is unlikely to flourish without the first, they do not necessarily believe the reverse to be the case.²⁷ On the contrary, they standardly regard the view that freedom requires participation in the political process as confused.²⁸ By contrast, I have suggested that since rights are subject to utilitarian considerations and reflect the moral

traditions and understandings of the community, then our freedom will be best guaranteed, and our rights rendered legitimate, through democracy. This observation does not entail a rejection of human rights *per se*. I merely insist that our concepts of rights are so imprecise and difficult to ground that their codification outside of democratic arrangements is inadvisable. However, rights and liberties are nevertheless intimately tied up with the democratic process, which gives them their force, form and content.

Two objections are usually brought against this sort of argument: (1) that democracy itself presupposes certain rights, and (2) that rights are necessary to guarantee minorities against the tyranny of the majority.²⁹ Proponents of the first argument point out that any democratic system involves certain rights, such as rights to free speech, to a vote in regular elections, to freedom of association and so on. Surely, they contend, a democrat should have no difficulty in upholding at least these rights as preconditions of a democracy? For if someone is committed to the democratic ideal, as opposed to just democratic procedures, then they will regard the possibility of democratically choosing to diminish or abolish democracy itself as simply self-contradictory. As a result, a true democrat must desire that those rights that are intrinsic to democracy be constitutionally entrenched and so immune to curtailment even by the demos itself.

Unfortunately, matters are not so clear cut as this objection makes them appear. For a start, who should be able to vote, where and when are all debatable matters. Should, for example, all residents within a region get the vote, or ought the franchise be limited to nationals; is local and industrial democracy necessary for democratic accountability, or do periodic elections to a national parliament suffice – indeed how democratic is any form of representative democracy? Democratic theorists have debated these and related questions for centuries without coming to any agreed view. There are clearly numerous plausible models of democracy available that will define both the membership of the demos and the nature of its rule in a variety of often incompatible ways.³⁰ Consider, for example, the difficulties the Supreme Court has faced when ruling on whether the equal protection clause either requires or legitimates such electoral initiatives as race-conscious redistricting, quotas for women and proportional representation.³¹

In addition, there may well be occasions when the exercise of one set of democratic rights comes into conflict with democracy as a whole. Various forms of incitement and potential threats to state security are frequently exempted from the protection of the right to free speech, for example. Once again, we are faced with the problems of essential contestability and a lack of compossibility and the related need to include considerations of a communitarian and utilitarian nature in any assessment of what rights are entailed by democracy in any given circumstances. A general list of putative democratic rights risks proving either too generic to provide much

guidance in deciding whether a system is democratic or not, or too stipulative, falsely idealising a particular model of democracy as appropriate to all times and places. Not surprisingly, in practice democracy has been defined largely through the democratic process itself – be it in constitutional conventions at moments of dramatic change; in the struggles of democratic movements to gain recognition for excluded groups, as was the case with the various extensions of the franchise throughout the nineteenth and much of the twentieth centuries: or within the established institutional channels of intergovernmental negotiations, parliamentary elections and votes, as occurred with the expanded voting rights accorded to EU citizens under the Maastricht Treaty.

This brings us to the second liberal worry, noted above, concerning the danger of a tyrannous democratic majority oppressing a minority. Rights, it is argued, ought to be able to ‘trump’ collective decisions that involve unacceptable infringements of the fundamental freedoms of individuals or (according to some theories) groups. However, if the argument of the first section is correct, and the definition and specification of rights cannot be isolated in this way from utilitarian and communitarian considerations, then the force of this proposition is considerably weakened. The protection of vital human interests cannot be settled simply by asserting that certain rights have to take precedence over all other matters of collective concern. As we have seen, people not only disagree about the nature of the human good, and hence about what is necessary to secure it, they also find that even when they agree they are forced to confront conflicts between different aspects of what they regard as essential components of human well-being. In these circumstances, the issue becomes one of deciding who is entitled to engage in the complex balancing of the differing values in play and how this process is to be achieved – a total ban on all such questions is not an option.

Proponents of constitutional rights partly acknowledge this point but suggest that these difficulties should be settled by a special court. They prefer authorising judges over the demos to make such tricky decisions because they believe the first are more likely to deliberate on grounds of principle, whereas the second will decide on the basis of a preponderance of personal or group interest.³² As a result, there is a greater danger of a sacrifice of minority rights to social utility in the latter case. This argument is open to a number of objections.

First, the opposition in this account between moral principles, on the one hand, and social utility, on the other, is overdrawn. Our framing and attachment to most principles generally contains at least some sensitivity to their consequences in particular circumstances, just as our sense of our interests is in part dependent on the principles we hold. As a result, both elements will be present in our understanding of rights and hence in our weighing up of their relative merits.³³

Second, for similar reasons the characterisation of democracy as simply concerned

with the pushing and shoving of vested interests is extremely partial. In most people, considerations of interest and principle are inextricably mixed, each helping to define the other. Moreover, we are normally capable of distinguishing between those issues which are primarily matters of personal preference and those which involve more vital and generalisable human interests.³⁴ Consequently, our deliberations on matters such as abortion or the death penalty take a different form to a decision about the positioning of a road, say. In cases of the first kind, our aim is almost wholly to identify and weigh up the vital interests and values involved, rather than with satisfying the narrower concerns of particular groups and individuals. British parliamentary parties, for instance, give MPs a free vote when legislating in these sorts of areas for precisely this reason. In cases of the second kind, far more emphasis will be given to individual satisfactions, with the main aim being to secure the greatest possible happiness with the minimal amount of pain. Of course, in almost all issues some vital interests will be affected so that the difference between the two sorts of cases will be one of degree rather than of kind. Majoritarian decisions are usually based around some sort of compromise, therefore, rather than a total capitulation by the losing side. To the extent that positioning a road, for example, involves environmental concerns, and dangers to the health, privacy and property rights of residents, then some modifications are usually introduced into the scheme.

Third, since principles themselves clash and no obvious hierarchy can always be established amongst them, then some kind of democratic procedure may well be the only way to decide between them. Indeed, judges themselves are often forced to adopt the democratic procedural device of majority rule to resolve matters of principle upon which no normative consensus can be reached. In which case, the objection of rights-based theorists ceases to be to democracy *per se* and is rather to the demos. Such an objection, however, seems at odds with the very rationale of rights, which, in liberal theories at least, standardly derive from a defence of individual autonomy. To advocate such a limitation on ordinary people's self-determination suggests that its proponents fear that not all individuals are fully worthy of the rights they wish to ascribe to them – a curiously paradoxical position for a rights theorist to take.³⁵

This reflection brings me to my fourth and last point. Modern constitutions themselves, together with the limitations that they normally impose on popular sovereignty, have generally been the outcome of democratic politics. At their most democratic, they have been enacted by popularly elected constitutional conventions. At a minimum, they have standardly received the assent of popular referenda. It is unlikely that any stable democratic constitution could be brought into being and sustained without the consent of at least a majority of the demos.

The force of this observation can be drawn out by using H. L. A. Hart's distinction

between a legal system and a ‘society with law’.³⁶ According to Hart, only the administering officials have to *actively* endorse the values and apply the rules of a legal system for it to function effectively. Passive obedience is all that is needed of the mass of citizens.³⁷ A ‘society with law’, however, entails that most citizens ‘look upon [the legal system’s] rules from the internal point of view as accepted standards of behaviour, and not merely as reliable predictions of what will befall them, at the hands of officials, if they disobey’. Indeed, without such acceptance on the part of the majority it would be necessary to impose legal standards through force or the threat of force, with the result that the society will ‘be made continually more repressive and unstable with the latent threat of upheaval’.³⁸ Once the *Rechtsstaat* is conceived in terms of a ‘society with law’ as opposed to simply a society possessing a legal system, then the attempt to see rights (along with other constitutional rules) as somehow outside politics rather than a form of political practice seems misconceived. Not only does it involve an unwarranted bracketing off of the democratic origins of constitutional rights, it also ignores the role to be played by democracy in maintaining a commitment to upholding them.

Some rights theorists attempt to equivocate over this last point by arguing that if the demos has chosen to bind itself through certain constitutional rules, then these can hardly be called undemocratic.³⁹ Rather, their purpose is to uphold democracy. Such thinking undoubtedly inspired the framers of the European Convention, for example, who believed that setting out the liberties that ought to be respected within any democratic society would act as a brake on any future descent of the countries of western Europe into fascism.⁴⁰ We have seen matters are not so clear cut as this proposal makes out. Apart from the dubious validity of arguing that a demos bound by its predecessors continues to bind itself, this thesis overlooks that these rights will still need to be interpreted and at times modified or even curtailed when applied to particular cases. The contention of this chapter has been that the authority and legitimacy of such interpretations and modifications will be greatly enhanced when they are negotiated by the demos itself rather than legal experts. For a detailed knowledge of the law does not entail a greater claim to the possession of a sense of justice than that of ordinary citizens.

Taken together, these arguments suggest that substantive, rights-based constitutional constraints on the abuse of power by either governments or the legislature can and should be replaced by procedural democratic checks and controls. These procedures stress the importance of openness in decision-making and the participation in the formulation of policy of those most deeply affected. Within such a system, justice designates a *modus vivendi* achieved through a balance of power between interlocking democratic institutions, rather than an overlapping consensus on certain core constitutional values that may be upheld by a court of putative moral experts. This scheme involves the creation of counterbalancing

centres of decision-making that devolve power up or down to the most appropriate level in order to ensure that different values and interests get heard within the policy-making process. As a result, institutional rights can emerge that reflect the changing concerns and needs of groups and individuals. Whilst certain rights might reflect particular special contexts and only be approved by and refer to certain groups or localities, others might be intimately tied up with the practices and procedures of the whole system. These last would be the preserve of a wider democratic body, such as a federal legislature, and might require special democratic protection, such as approval by a higher-than-average majority, or even, in cases of radical reforms, the calling of a constitutional convention or a referendum. Of course, the design of such institutions will not be easy and raises difficult issues of substance in its turn. However, as we noted, the reform and development of democracy has itself been (and could only have been) a matter of democratic politics.

As I remarked at the start, the purpose of this section has not been to set up a dichotomy between rights and democracy. On the contrary, my aim has been to insist that, in the words of the French social theorist Claude Lefort, rights form one of the 'generative principles of democracy'.⁴¹ However, as Lefort goes on to note:

Such principles do not exist in the same way as positive institutions, whose actual elements can be listed, even though it is true that they animate institutions. Their effectiveness stems from the allegiance that is given them, and this allegiance is bound up with a way of being in society that cannot be measured by the mere preservation of acquired benefits. In short, rights cannot be dissociated from the awareness of rights.⁴²

The fact that rights are implicit within democratic practice does not mean that they can be abstracted from it.⁴³ In part, this is because the establishment and definition of rights is necessarily an on-going process, as when new rights become insisted upon or old rights come to take on new meanings. Democracy facilitates this process because, as Lefort pithily puts it (borrowing an expression from Hannah Arendt), it embodies 'the right to have rights'.⁴⁴ Democracy gives expression to the autonomy of individuals and the recognition of their entitlement to equal concern and respect that provides the foundation for most contemporary theories of rights. However, democracy not only provides the best form of justification for rights claims, it also offers the most authoritative mechanism for mediating between them, something which we saw in the first section to be inevitable. The specific enactments, numerous modifications and occasional curtailments of rights, necessary in any system of positive law, cannot be expected to please everybody. But individuals are more likely to accept the legitimacy of decisions they disagree with if they feel they have been to some degree involved in making them, that their interests have been explicitly

consulted and that there are opportunities for re-opening the debate in the future. In this regard, as we saw in Chapter 4, the great merit of democracy lies in its offering the possibility of a fair compromise for the resolution of issues which allow for reasonable disagreement. Finally, as Chapter 5 illustrated, democracy provides the most effective protection for rights. It achieves this through institutionalising procedures and dispersing power so as to allow individuals to fight for their rights themselves.

3 The rights debate in Britain

The Labour government claims incorporation of the European Convention will bring rights 'home'.⁴⁵ Sensitive to criticism of the measure for undermining parliamentary sovereignty, the White Paper stresses both its links with the native civil rights tradition from Magna Carta to 1688, and Britain's role in drawing up, and early ratification of, the Convention after World War Two.⁴⁶ Debate over the character of these rights and their relationship to the British political system is as long lived, however, and turns on many of the issues raised in the last two sections. Most of them surfaced in the famous clash between Tom Paine and Edmund Burke over the respective merits of the French Declaration of the Rights of Man and the Citizen and the unwritten British constitution, for example.⁴⁷ Also, advocates of incorporation admit it involves a shift to a rights-based system of law, with profound effects for the British judicial and legislative processes. This section outlines the discussions of the 1970s and 80s that provide the context for the current policy,⁴⁸ and explores some of its likely consequences. As we shall see, the move may prove far more controversial than it presently appears.

At different times over the past two decades, reformers on left and right have expressed the two traditional liberal fears about over powerful executives and tyrannous majorities. On the right, this took the form of a critique of pluralist, interest group politics derived from Hayek and the public choice school.⁴⁹ Writers such as Lord Hailsham,⁵⁰ Keith Joseph⁵¹ and Sam Brittan⁵² argued that certain groups, notably trade unions, were better able to organise themselves and militate for the promotion of their interests than others. Within a political system that gave unlimited power to the executive, this circumstance produced the danger that certain well-organised but minority interests would wield a disproportionate degree of influence, distorting the political agenda to promote state activity that benefited them rather than the well-being of the population at large. They interpreted the public sector strikes of the 1970s in this light, and argued that as a result state spending in these areas had dangerously spiralled to the detriment of the tax payer and the economy with no appreciable improvement in services.

With the return of successive Conservative governments during the 1980s, this

critique was taken up by the left.⁵³ However, they focused not on the rights of consumers and capitalists but on the way the political process can marginalise certain disadvantaged economic groups, such as women and the unemployed. They pointed out that powerful interest groups might organise not only to inflate state spending but also to cut it to dangerously low levels. Moreover, they have voiced a more conventional liberal anxiety about mass politics leading to populism and a pandering to the prejudices of the lowest common denominator, as in the treatment of ethnic minorities. Last, and far from least, the experience of an unprecedentedly lengthy period of single-party government enhanced the fears, expressed in the 1970s by the right, of the potential danger to civil and political liberties posed by an executive largely unrestrained by any formal constitutional checks and balances.

Incorporation of the European Convention into British law, possibly with certain amendments, became a natural starting point for their very different proposals. The belief was (and remains) that this measure will prevent incursions into basic civil, political, economic and social rights, whilst at the same time laying the basis for a new constitutional settlement capable of meeting the challenges of modern democratic politics within an increasingly international economy and society. Not surprisingly, unlike Labour's programme for regional assemblies for Scotland, Wales, Northern Ireland and possibly certain parts of England, the decision to incorporate has proved relatively uncontroversial. Although it is too early to assess the precise effects of the Human Rights Act, a number of general observations arising out of the analysis of the previous two sections can be made.

The first observation follows from the argument concerning essential contestability. Reformers on the right and left propose not just different but to a large degree incompatible constitutional schemes and interpretations of these rights. On the one hand, Conservatives such as Joseph and Hailsham argued that a Bill of Rights would, for example, protect private property to the extent of preventing both nationalisation and redistributive taxation, that freedom of association would render closed shops and much trade union activity illegal, and that freedom of conscience would uphold a right to private education. Indeed, commenting on the Labour government's programme of the 1970s, Lord Hailsham remarked that much of it 'would almost certainly be caught by any Bill of Rights legislation, however formulated'.⁵⁴ On the other hand, supporters of reform on the left have not only argued that nothing in the existing convention would stop a government from nationalising industries or redistributing income,⁵⁵ they have insisted that a Bill of Rights ought to have a social dimension securing a certain level of welfare and economic protection.⁵⁶ For this group, the Social Charter provides the basis for such an extension of the Convention. The implication here is that much of Mrs Thatcher's legislation would also have been 'caught' by a Bill of Rights 'however

formulated'.⁵⁷

The potential for such differing interpretations of rights places the constitutional rights project in a dilemma. The framers of any bill must either specify a given understanding of these rights, or accept that a wide range of different political programmes can be accommodated within them. The first possibility goes too far, the second not far enough. Within a healthy democratic system, debate between libertarians and socialists is both inevitable and desirable. To allow such discussion, however, clearly will not satisfy either of the camps described above, since a rights bill becomes irrelevant in such circumstances. Only time will tell which of these possible interpretations the judiciary will end up adopting.

The second observation arises out of the non-compossibility of rights. For once specified, almost any set of rights is likely to generate certain conflicts. I noted how Articles 8, 9, 10 and 11 of the European Convention allow that rights to privacy, freedom of thought, expression and assembly, respectively, may need to be restricted in the interests of national security or public safety, for the protection of health or morals, or in order to secure the rights and freedoms of others. As I indicated, it is hard to weigh up the competing claims of different rights without making reference to certain considerations stemming from utility and the common good that are best arrived at through various democratic processes that involve the whole of the relevant population.

Unlike the contestability issue, rights enthusiasts acknowledge non-compossibility as a problem. For example, Britain has a derogation from Article 5 (3), which the European Court of Human Rights (ECHR) ruled in 1988 went against the Secretary of State's detention powers under the Prevention of Terrorism (Temporary Provisions) Act 1984.⁵⁸ Derogations from specified articles are permitted in time of war or other public emergency, and Britain's was upheld by the ECHR in 1993. More interestingly, Britain also has a reservation in place against Article 2 of the First Protocol of the Convention. A later addition, this Article guarantees that all have a right to education, and that 'the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions'. Britain accepts the first part of the Article, but reserves 'that pupils are to be educated in accordance with the wishes of their parents so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure'. Whereas derogations are temporary measures for exceptional times,⁵⁹ and hence subject to periodic review, reservations have no such limitation. Finally, Britain has not ratified Protocols 4 and 7 and proposes to maintain that position, at least for the time being. Protocol 4 concerns contractual obligations, liberty of movement and the rights of aliens. Protocol 7 further elaborates on the rights of aliens against collective expulsion and includes rights relating to criminal cases and the equality of spouses. The view of the present

and past British governments has been that these rights reflect principles already inherent in British law, but that there are some exceptions, such as rights of entry, where domestic legislation weighs matters differently and these conflicts with the Protocols may not be resolvable. The point to be made here, is that these exceptions apply to all the other rights as well. Any interpretation of the rights enumerated in the Act will have to give some weight to extenuating circumstances, special costs, allowable differences of moral judgement and the like.

At the time of the White Paper, the government had intended to maintain Britain's non-ratification of Protocol 6, too. This requires the abolition of the death penalty, a matter that the White Paper stated 'is not one of basic constitutional principle but is a matter of judgement and conscience to be decided by Members of Parliament as they see fit'.⁶⁰ However, the government changed its mind during the committee stage, and Protocol 6 now forms part of the Act and the liability of members of the Armed Services to suffer death for an offence has been removed in consequence.⁶¹ Though the death penalty may no longer be contentious for most legislators, it has majority support amongst the populace. So far, this change has gone completely unmentioned upon. However, the original grounds given for not ratifying Protocol 6 were surely correct. Treating it as a matter of 'constitutional principle' sets an unfortunate precedent, which could store up trouble for the future in areas such as abortion.

This brings us to my third observation, which concerns the suitability of judges to decide the problems thrown up by the incommensurability and non-compossibility of rights. The standard suggestion of rights theorists is to refer disputes to a special group of judicial officials, such as the European Court of Human Rights or some form of Constitutional Court. The main justification for this device is that the general population cannot be trusted, for the two reasons outlined above. However, given that appeal to principle alone will not resolve such dilemmas and even judges have to resort to democratic procedures to resolve their disagreements, why should we assume they are any less prone to expressing the concerns of sinister interests than ordinary citizens? As J. G. A. Griffith famously revealed,⁶² the British judiciary comprise a distinctive social grouping, and there are numerous affinities in both form and substance between judicial and political decision-making that undermine the claim of judges to be a special forum. Moreover, the decisions of judges, no less than of politicians, will lack legitimacy and support unless they gain the active consent of the population at large by addressing their concerns.

Proponents of bill of rights standardly meet such objections by arguing that the selection of judges can be made more representative and that the presence of such a bill will have the effect of raising both popular and judicial awareness of rights issues, and generally improve the standards of legal and political argument⁶³ Implementation of the Act has been delayed, for example, pending giving judges

appropriate training in handling rights issues. These suggestions, however, largely concede the democratic argument. For they boil down to attempts to introduce more democracy into the judicial process. Their accuracy may also be doubted. Evidence from the United States Supreme Court, for example, suggests that judicial decision-making can be every bit as populist as the worst kind of politics.⁶⁴ For popular pressure on the judiciary tends to come through informal channels as interest groups mount test cases and employ normal lobbying techniques. In other words, one gets the very vices of the democratic system the measure was supposed to block, without the virtues of open debate in the legislature.⁶⁵

Because of the British tradition of parliamentary sovereignty, the Labour government has proposed a novel tack aimed at avoiding these problems. With the notable exception of Parliament, all public authorities broadly conceived will have to comply with the Convention and can be challenged in the courts at any level.⁶⁶ There will be no special Constitutional or Human Rights Court. This approach is designed to ensure rights get ‘applied from the outset against the facts and background of a particular case’ and allows people ‘to obtain their remedy at the earliest possible moment’.⁶⁷ The Convention, the White Paper stresses, is a ‘living instrument’, that the European Court interprets ‘in the light of present day conditions and therefore reflects changing social attitudes and changes in the circumstances of society’. British judges will now ‘contribute to this dynamic and evolving interpretation of the Convention’, most particularly in the case of Articles 8–11 where ‘our courts will be required to balance the protection of individuals’ fundamental rights against the demands of the general interest of the community’.⁶⁸

All past and present legislation is to be read and given effect ‘in a way which is compatible with the Convention’, at least ‘so far as it is possible’.⁶⁹ Courts will not be bound by precedent, but ‘build a new body of case law, taking into account the Convention rights’.⁷⁰ However, they will not be able to strike down an Act of Parliament if it is deemed incompatible with the Convention, although they can set aside secondary legislation unless the terms of the parent statute makes this impossible as well as laws emanating from the Scottish, Welsh and Northern Irish assemblies. Instead, higher courts may issue a formal declaration of incompatibility, which the government may choose to ignore.⁷¹ However, a fast track procedure will exist for changing legislation in response to an adverse judgement by either British courts or Strasbourg. Finally, new legislation must be accompanied by a rights audit and a written statement of compatibility by the Minister concerned, or an explanation of why such assurance cannot be given.⁷²

The British system aims to avoid the problems associated with the US, Canadian and New Zealand approaches.⁷³ As we have seen, there is no Supreme Court and the Human Rights Act is not entrenched but remains a standard Act of Parliament. In keeping with Britain’s organic approach to constitutional matters, reference to rights is intended to become part of the evolving jurisprudence of the courts and the legislative thinking of politicians. Unlike the Canadian system, courts will not

be asked to strike down legislation, nor legislators empowered to issue a formal 'notwithstanding' clause.⁷⁴ By contrast to the New Zealand model, the courts will not have to simply find in favour of the government whenever legislation cannot be reconciled with rights.⁷⁵

Will the British approach succeed in squaring the circle between rights and democracy? I doubt it, though much depends on how it operates in practice. To signal a few problems. The 'rule of construction', whereby legislation must be read 'so far as is possible' in ways compatible with the Convention, is open to a generous and a more narrow interpretation. The former invokes a principle of charity and assumes compatibility whenever plausible, the latter takes a much stricter view and could have far-reaching effects. The difficulty lies in both interpretations being possible, with the chance that judges might go in different directions.⁷⁶ Likewise, it is unclear how far the courts should accept at face value Ministerial declarations of compatibility or the arguments they give for departing from the Convention. It would be perfectly logical to read a statement of incompatibility as the equivalent of the Canadian 'notwithstanding' clause, for example. Relatedly, it is also not obvious whether the courts should attend to Parliament's views when ruling on restrictions to rights under the sub-clauses of Articles 8–11. The Canadian Charter contains a general limitation clause inviting the judiciary to rule on the reasonableness of such restrictions, for example, that has been a source of considerable tension (and confusion) between the Supreme Court and provincial and Federal legislatures.⁷⁷ The White Paper suggests the courts might be dragged into such a process: for instance, any attempt to regulate the Northern Ireland marching season would certainly provide ample opportunities. Finally, it remains uncertain how far the courts can promote legislative innovation by seeing implications in the convention that the legislature does not. The potential for such creativity has been demonstrated by the United States Supreme Court, as in its discovery of various 'penumbral' rights. Already there has been a lively debate over whether the Convention implies a right to privacy. Successive parliaments have regarded such legislation inadvisable for fear that it might unduly restrict freedom of speech, but a judicial decision that this right was inadequately protected might force a change.

These ambiguities strongly suggest that the British Human Rights Act will be no more successful than others in avoiding tensions between the judiciary and the politicians. Though one can expect judges to be cautious at first, the reform has a dynamic of its own. Thus, the Lord Chancellor, Lord Irvine, may have advised the judiciary to steer clear of political controversy when in opposition,⁷⁸ but he now envisages a fully fledged 'rights-based system' as producing 'far reaching changes in future judicial decision-making' and inaugurating a 'major shift ... away from a concern with form to a concern with substance'.⁷⁹ The result will be a more proactive role for the courts. For example, he believes the approach to statutory construction will become more purposive and that courts will apply the Convention principle of proportionality when reviewing legislation. Consequently, 'court's

decisions will be based on a more overtly principled, and perhaps moral, basis'. When considering the reasonableness of a restriction on a Convention right, the court 'will not be limited to a secondary review of the decision-making process', or apply 'a common law test of rationality' akin to the currently prevailing *Wednesbury* doctrine that 'an administrative decision ... be struck down only if it is so bad that no reasonable decision-maker could have taken it'. Instead, courts will address 'the primary question of the merits of the decision itself'.⁸⁰ Moreover, this approach will have 'a spillover into other areas of law', such as tax and statutory control of leases (to cite Lord Irvine's examples).⁸¹ Indeed, the scope of the Convention could be extremely broad given the wide definition of public authorities in the Act. These are currently defined as 'a court and tribunal and any person certain of whose functions are functions of a public nature', thereby including the public actions of private bodies.⁸² Attention here has focused on churches and the Press Complaints Commission, though other examples spring to mind, areas where the Courts could become mired in quite delicate issues of press and religious freedom. The Act also goes beyond *Strasbourg* in allowing all public authorities and not just governments to be sued, and damages may be awarded against them.

Though Parliament and its proceedings are excluded from the provisions relating to public authorities, this exclusion may well prove difficult to sustain in practice.⁸³ Thus, Article 6.1 of the ECHR provides for a right to a fair hearing, Article 13 the right to an effective remedy and Article 8.1 the right to respect for private and family life. All could clash with the parliamentary privilege of free speech recognised in Article 9 of the British Bill of Rights of 1689, which allows, subject to certain largely conventional constraints, MPs to breach an injunction or some other type of court order prohibiting the publication of names of litigants, witnesses, or confidential materials. For example, an Early Day Motion of 1996 breached an injunction against naming Child Z, and was later reported in the press. Even if British courts recognise the parliamentary privilege (though the European Court of Human Rights might rule differently), they might argue the press could be prosecuted if they reported matters that conflicted with the ECHR – thereby effectively undermining it. Issues such as these suggest that the clear boundary between courts and parliament, that hitherto has been central to the British constitution, will come under severe strain in future.

The Human Rights Act will almost certainly transform legal thinking, therefore, and inevitably take the courts into controversial areas. Notwithstanding the government's disclaimers, the Law Lords are already being regarded as a 'supreme court' and calls being made for a more open and democratic process of appointment.⁸⁴ To a large extent, whether the courts be active or conservative is ultimately immaterial to the problem. The crux lies in the very nature of rights. Once it is acknowledged that rights are neither self-evident nor absolute, but can conflict and are legitimately susceptible to competing and conflicting interpretations that result from different moral and social judgements, then the problem arises of who has the authority to decide – the judges or the demos.⁸⁵ Judicially enforceable bills of rights may not be

the best way of protecting the liberties of citizens. Certain styles of democracy may tackle the balancing and interpreting of rights with greater legitimacy and justice than the courts can aspire to.

My fourth observation comes in here. If the Human Rights Act reflects preoccupations with the inadequacy of our current democratic arrangements, then those worries might be better met by more democracy rather than less. These concerns suggest that for various reasons the voice of the people is not fully heard, either because minorities are excluded or because unrepresentative groups are able to dominate the setting of the political agenda. However, such weaknesses need not lead to a retreat from democracy as such, since they can be remedied by the strengthening of democracy through the redesign of political mechanisms so as to facilitate the influence and scrutiny of policy-making by all relevant groups and individuals. Reinforcing democracy in this way leads to the replacement of substantive constitutional constraints on majority rule and government action with procedural democratic checks and controls. As we saw in Chapter 5, this approach has the threefold advantage of allowing the more effective protection of rights, of involving people in their framing and specification, and of securing popular allegiance to them.

Each of these three factors is important, showing why rights cannot be separated from democracy. For a start, formal statements of rights establish very little. After all, even under Stalin the USSR boasted a written constitution guaranteeing the rights of its citizens. Individual freedom is not protected by written statements, however worthy, but by the existence of agencies which enable agents to act in certain ways and which offer them a means of defence against being hindered by others. Without a differentiation of political functions which recognises the plurality of society by preserving the autonomy of different spheres and levels of social life, separating, for example, judicial and executive functions and local from central government, constitutional rights will be worthless. Once disproportionate power falls into the hands of a restricted group or a single agency, individual freedom will soon be curtailed. As a result, they are best secured by a democratic institutional structure which distributes power within the community. On this scheme, the protection of minority groups is served by having a variety of different loci of power and decision-making which restrict the possibilities for any one agency or group to dominate all others.

Second, the legal rights which emerge from the deliberations of such bodies involve none of the drawbacks I have associated with notions of basic human rights. Instead of representing inherent ontological attributes, they reflect socially determined purposes which are capable of reformulation to meet changing circumstances and attitudes. Legislation can be used to mediate between competing claims, granting rights which reflect the divergent requirements of different areas of social life rather than conforming to some idealised image of the human subject which imposes a particular pattern of human agency upon a society.

Last but not least, such an institutional framework not only promotes the instrumental exercise of freedom by citizens, it also educates them through participation and discussion into a perception of the dependency of their social relations and individual autonomy upon collective rules and arrangements – discouraging free-riding and other self-defeating forms of self-interest. Moreover, by providing a forum for public discussion it enables preferences to be transformed and not just aggregated, allowing opposed interests to find acceptable compromises on shareable values which can offer new forms of individual expression to all. In these ways, it promotes a ‘society with law’, creating the common political culture without which no polity lasts for long.

In certain respects, the prior Labour plan to provide statutory protection for rights was in line with the above proposal for placing rights within democracy.⁸⁶ This scheme would have allowed rights to be specified in ways responsive to particular needs and problems, allowed change to reflect evolving social values and conditions, and taken account of particular local legal frameworks. Had such a rights bill been enacted following quite radical democratic reforms, it would have fitted the democratic model precisely.

My final observation relates to Europe. Many proponents of incorporation perceived European integration as exacerbating the failings of the British political system. In particular, it appeared to increase the scope for unaccountable executive and bureaucratic decisions.⁸⁷ The White Paper is curiously silent on this issue. Indeed, the only mention of the EU is to assert that giving ‘priority to directly effective EC law’ ‘is a *requirement* of membership’.⁸⁸ Potential tensions between the Convention and EC law do exist, however. The Union has not acceded to the Convention, although the European Court of Justice (ECJ) has been pushed into taking it into account where relevant.⁸⁹ An interesting possibility is thereby opened up, in which a British court might challenge a European regulation on the grounds that it conflicts with the Convention as it has come to be understood in Britain. In other words, one could get a similar stand-off to those between the ECJ and the German and Italian Constitutional Courts, which have disputed the former’s authority to decide rights issues in the past.⁹⁰ If the ECHR supported the British interpretation, the ECJ would probably back down even though the ECHR has no standing in such a dispute. One wonders also at reactions to the ECHR overturning a British court’s view of the Convention. Although it is completely entitled to do so, there are circumstances where such a decision could appear arbitrary, reflecting a failure to understand peculiarities of the British legal and political traditions.⁹¹ I suspect that in each case the success of such challenges would depend to a large degree on their popularity with the British population and politicians. In other words, it would be their democratic legitimacy that would carry the day. The point to make here, followed up in the next chapter, is that the legitimation problems posed by the impact of Europe on the British political system stem not from an inadequate protection for rights *per se*, so much as a lack of mechanisms for reconciling

competing views of rights or of involving people in the decision-making process more generally. Regrettably, this problem is not even recognised, let alone tackled.

4 Conclusion

Bills of rights do not provide the focus of an ‘overlapping consensus’ in the Rawlsian manner. Within a pluralist society, they prove both contestable and competing. Rights may comprise a shared stock of values, but they serve more to define the terms of political conflict than to provide a foundational agreement above politics. Debate in mature democracies usually turns not on the existence of rights but on their relative weight when determining concrete policies, such as the regulation of pornography and demonstrations, or the allocation of health care. Judicial mechanisms lack the authority and legitimacy to resolve these clashes satisfactorily. Principled compromises cannot be imposed by legal institutions. They will only emerge from democratic arrangements capable of generating mutually acceptable interpretations of rights, of sustaining popular support for them, and of adapting them to specific circumstances. Although the Human Rights Act belongs to a programme of constitutional reform that includes devolution for Scotland, Wales and Northern Ireland, an elected Mayor for London, a referendum on the voting system for the House of Commons, and changes to the House of Lords, it has not been adequately integrated into these other improvements and risks subverting the scope for democratic renewal they promise. Meanwhile, the impact of Europe on democratic accountability within Britain is conspicuously absent from the present government’s proposals. The European challenge to conventional liberal conceptions of politics is the subject of the next, and final, chapter.

8 De-segregating democracy: whose Europe, which community?

Communitarian liberals advocate segregating democracy within culturally homogeneous nation states or regions. They contend nationality and territory define the demos and link them to specific liberal institutions that are sovereign within their domain. Liberal democracy's standard political shell since the nineteenth century, the nation state remains a background assumption of most contemporary theories. However, pluralism within and outwith the state now questions its centrality within liberal thought and practice. States confront two countervailing forces stemming from the related processes of globalisation and social differentiation respectively. The one involves greater interconnectedness at an international level, the other leads to enhanced heterogeneity at the local and regional levels. These have eroded the state's capacity not only to forge a common identity able to sustain a shared sense of the public good, but also to provide its citizens with adequate systems of defence, welfare and economic regulation.¹

This chapter explores the consequences for liberalism once democracy cannot be contained within the nation state. Many liberals have responded by unshackling liberalism from its communitarian roots and emphasising its cosmopolitan aspect.² They claim universal principles of rights and justice suffice to create a global political and economic culture compatible with, and detachable from, other more specific commitments. The creation of particular polities is a matter of administrative convenience rather than emotional attachment. This response may be appropriate for global interconnectedness. It is less clear whether it can cope with the accompanying trends making for greater pluralism and complexity. As we have seen, these have promoted a diversity of value spheres and interpretative communities that unsettle agreement on shared political norms. *Pace* Walzer, political and economic communities may no longer be located within homogeneous nation states, rendering a state-centred communitarian liberalism implausible, but particularist attachments have not been transcended by a universal humanism either. The communitarian ghost of pluralism lurks within the cosmopolitan machine of global liberalism.

This chapter presents the politics of compromise as a suitable way of reconciling

these two processes in a political form that goes beyond both the nation state and liberal democracy. To focus discussion, the argument is organised around an analysis of the European Union.³ The EU manifests the mix of cosmopolitan and communitarian features that increasingly characterise advanced industrial societies. Often described as somewhere between an emerging federal cosmopolitan polity and a consociational confederation of nation states,⁴ the Union has begun to develop new patterns of governance that transcend both.⁵ Though possessing many statist features and capacities, such as its own bureaucracy, judiciary and political system, and the consequent ability to regulate much public and private behaviour, the EU has not evolved into a supranational state. The defining attributes of a congruence of territory, functional authority and national identity; a monopoly of legitimate violence within its borders; exclusive control over the movement of goods and persons within its domain; a clear locus and hierarchy of power and offices; and pre-set limits to its area of competence, are all absent. At the same time, the member states can no longer claim exclusively to represent the communitarian affiliations of their citizens. States contain a wide variety of linguistic, cultural, religious and ethnic groups that cut across a range of other social cleavages and associated political movements organised around gender, class, ideology and a host of special interests. These operate at both subnational and transnational levels, and increasingly contest the standard liberal democratic modes of civic participation and government. As a result, the EU is not a purely intergovernmental organisation either. Rather, it is evolving into a multi-level system, the competences, participants and decision-making structures of which vary according to the policy under consideration.⁶ The plurality of individual affiliations and the differentiation of functional tasks are producing a multiplicity of loci, forms and degrees of governance, and a consequent proliferation of *demos* to which people belong. Liberal democrats of either a communitarian or a cosmopolitan persuasion find this set-up messy: it defies the segregationist logic of the first without embracing the universalism desired by the second, and involves more politics than either believe healthy. However, it proves perfectly coherent from a democratic liberal perspective grounded in a moral ontology that I shall term 'cosmopolitan communitarianism'.

The first section of this chapter outlines the cosmopolitan and communitarian political moralities proposed by contemporary theorists and indicates their relationship to the main positions in recent debates about Europe. Each of these broad schools of thought involves a distinctive account of democracy, rights and citizenship. Both are found wanting in respect to pluralism, however, and their visions of Europe are correspondingly flawed. Cosmopolitans either believe we can trade values within a common market, or advocate trimming to produce a consensus on European constitutional values. Communitarians propose segregating the national from the international. None of these strategies works. Cosmopolitans ignore the importance of cultural differences, communitarians misidentify the levels

at which they operate. I explore two attempts to overcome their respective weaknesses whilst preserving their strengths, namely communitarian cosmopolitanism and cosmopolitan communitarianism. The one offers the worst of both worlds, the other the best. Section two then employs these models to illuminate the character of the European Union. Focusing on the policy of European citizenship, I identify a tension between communitarian and cosmopolitan concerns that cannot be resolved in favour of either one or the other. Instead, the two positions have to be combined. I conclude that when due weight is given to communitarian as well as cosmopolitan considerations in the manner proposed above, then a less harmonious and more pluralistic view of the Union becomes both normatively attractive and empirically plausible. The model of a pluralist polity is thereby revealed to extend to a rethinking of the boundaries as well as the internal structure of the conventional liberal democratic state.

1 The communitarian ghost in the cosmopolitan machine

Cosmopolitanism and communitarianism offer distinct accounts of rights, democracy and citizenship, reflecting different views of morality and politics. This section evaluates their response to pluralism within and beyond the nation state, and describes how their respective views relate to Europe.

Cosmopolitan globalists vs. communitarian nationalists

Cosmopolitanism is liberalism on a global scale. Its normative foundations lie in a theory of human rights that combines individualism, universality and generality.⁷ Rights are essentially self-standing, their justification independent of social or cultural recognition and democratic endorsement. The moral implications of respecting rights may be cashed out in either interactional or institutional terms, as pertaining to either the actions of individual persons and agencies, or the rules and procedures of any schemes that might link them. The first approach makes it hard to assign a global responsibility for very much, and so is favoured by libertarians. So long as no individual has directly coerced any other, trade is free and the inequities that result the product of bad luck rather than design, for which nobody is to blame. The second approach focuses on the justice of the practices and arrangements within which people are involved and jointly and severally responsible. Proponents of the institutionalist thesis argue world markets involving the globalisation of distribution, production and exchange, and the emerging system of international law, diplomacy and security mean we all participate to some extent in such a global institutional scheme, and hence have a responsibility for rights violations across the world.⁸ There are few if any self-contained communities, and even local rights infractions may have global macro explanations of their incidence.

Both types of cosmopolitanism regard the scope and location of political institutions as entirely conditional on how far they promote human rights and welfare. They are generally suspicious of national sovereignty, since it ties rights to membership of a particular state, but even institutional moral cosmopolitanism need not imply world government.⁹ Both versions are also wary of democracy. Though democracy partly embodies the notion of equal rights, its procedures cannot always be counted on to uphold them. At best, it operates as a mechanism of imperfect procedural justice. Within the governmental and constitutional system, therefore, democracy has essentially instrumental uses as a means of allowing individuals to voice and protect their vital interests by controlling the decisions which affect their lives, usually indirectly via influence over their makers. To the extent those decisions have passed beyond or, in certain cases, below the nation state, then so must democratic institutions. What defines the *demos* is largely functional, making the parcelling-out of popular sovereignty theoretically unproblematic even though there are numerous practical difficulties. Where democracy fails to offer the best protection for rights, or even endangers them, non-democratic mechanisms, such as judicial review or regulative agencies, are to be preferred. Thus, membership of a polity depends on convenience and ultimately consent.¹⁰ Citizenship rests on civil rights rather than an individual's affective relationships to particular cultural communities or other kinds of group. The first define our public, political identity, the second a purely private, social self.

By contrast, communitarians believe that universal human rights exert only a limited claim on our attention. We can invoke such notions in extreme situations, such as famine or genocide, when our very humanity is at stake. But the rights of human beings *per se* will always be 'basic'.¹¹ Their fuller, everyday meanings derive from their location within a specific local culture. Since principles of rights and justice get reiterated in a variety of ways within different communities, appeals to a universal core shared across all societies rarely apply and even then only in a highly restricted and undeveloped manner. Beyond the establishment of a low base line, the 'thin' minimal humanitarian morality of exceptional circumstances has little bearing on the 'thick' maximal morality we possess as members of a given society.¹²

Community is defined in terms of a nation state or, in the case of national minorities, a self-contained region. Nationality provides citizens with 'a common world of meanings' that are explicitly linked to a political unit capable of acting on them. When linked to a state, this common culture helps citizens identify with each other and commits them 'to dividing, exchanging and sharing social goods' amongst themselves according to agreed principles.¹³ Citizenship turns on a sense of belonging together as participants in a common ethical life, albeit one open to change and new inputs from those willing to assimilate.

Communitarians believe their account fills a motivational and justificatory lacuna within the cosmopolitan theory.¹⁴ In practice most rights and duties have to be spelt

out in detail, so we know who owes what to whom, when, where and why. They contend the answers to these questions can all be traced back to community. Rights cannot be separated from and frame the pursuit of various goods, as cosmopolitans maintain. Rights to property or to free speech, for example, belong to particular forms of life, the market and democracy, respectively, that embody some good, such as prosperity and truth, that provides their justification, and hence limits their application. Likewise, conflicts of rights can only be adjudicated within the context of the goods and practices of the society concerned. For rights defend the interests not of this or that isolated individual, but of the quality of human flourishing and interaction available to all individuals living within a given community.

Community also provides the moral cement needed to facilitate human interaction. Most social, economic and political practices operate on the basis of reciprocity and trust between virtual strangers. Markets rely on fair dealing and promise-keeping between traders, public goods provision assumes that beneficiaries will not free-ride, welfare that I have duties to others, and so on. Respect for rights alone does not account for such moral bonds. For they entail acts of supererogation, virtue and the disinterested pursuit of excellence that go beyond those duties that are merely correlative to another's rights.

Democracy, in the guise of national self-determination, plays a pivotal role in this argument. On the one hand, a national community makes democracy possible. It defines a demos who feel bound together by a sense of a shared fate and mutual responsibility. Such sentiments lead minorities to accept majority decisions and, more importantly, motivate majorities to take into account the opinions and concerns of minorities rather than tyrannising over them. For compromise and the avoidance of a purely self-regarding stance are far more likely amongst a people who identify reasonably strongly with each other. On the other hand, democracy enables the communal good to be debated, defined and defended. If a naturalistic ethnic nationalism is to be avoided, nationality must be seen as a political construct which allows different claims and values to be accommodated. For this reason, communitarians standardly adopt a deliberative as opposed to a purely aggregative model of democracy. Whereas the cosmopolitan citizen is a bearer of private rights and employs politics to defend them and pursue personal preferences, the communitarian citizen is an active participant within a collective enterprise.

When rights and obligations are nested within particular political communities, their cosmopolitan reach will clearly be affected. To the extent our understanding of basic rights is coloured by the culture of our community, there are likely to be conflicts between the priorities and publicly recognised needs of different societies. State support for certain religions or languages may be important in some communities and regarded as illegitimate in others, for example. Even when the same rights are acknowledged, variations in local context may lead them to being interpreted and balanced in contrasting and not always compatible ways. In addition,

there will be a feeling that ‘charity begins at home’ that sets limits on how much people commit themselves to helping outsiders when that clashes with programmes, also motivated by rights considerations, of a domestic character. Thus, communitarians regard it as legitimate that a more generous national social security system, say, might be established at the cost of less spending on foreign aid overseas.

Support for national sovereignty need not entail a view of international relations as an anarchic and amoral Hobbesian state of nature. Claims to self-determination for one group imply recognition of similar rights by others – including non-aggression and limited aid. To the extent global interdependence links states within institutional networks, they will have the sorts of obligations cosmopolitans advocate. However, communitarians dispute the degree and consequences of globalisation and interconnectedness. They note global processes usually have a differential impact and rarely produce a shared interest; that multinational corporations mostly have a national base; and that international organisations are for the most part intergovernmental.¹⁵ Moreover, the absence of agreed metrics for the value of resources or the relative worth of various rights and liberties make arguments for a global redistribution of goods and services hard to cash out – especially as such schemes can conflict with as well as support the autonomy of national communities. Though globalisation will produce forms of interstate cooperation in areas such as defence, the environment and the economy where the capacity of states to act in autonomous ways has been seriously impaired, these cooperative schemes are mechanisms for preserving rather than undermining national interests and self-determination, with transfers of decision-making power being largely conditional on the extent to which involvement in the relevant international body makes that possible.

Meeting the global pluralist challenge

Do these two theories offer appropriate models for globalising yet pluralist societies? As we noted, globalisation not only fosters supranationalism, it also promotes cross-cutting transnational, multinational and multicultural allegiances as well. Unfortunately, the respective attempts of cosmopolitans and communitarians to reconcile the resulting diversity of commitments produced by this circumstance prove as unsatisfactory within an international context as they were at the domestic level.

Cosmopolitans adopt the standard liberal strategies of trading and trimming. Thus, libertarians contend we can combine respect for particular attachments with a universal framework via a minimal package of negative rights: namely, freedom of association, including an implied right of exit, and rights against cruel, inhuman or degrading treatment.¹⁶ Legitimacy, on this account, depends on ‘whether the individuals taking part in [a way of life] are prepared to acquiesce in it’.¹⁷ The

assumption here is that jurisdictional competition will ensure a mixture of cultural and political environments that corresponds to the popular willingness to support them. However, what counts as freedom of exit is not uncontentious. If exit involves high costs, then it is disputable that simply living under a regime indicates acquiescence to it. Arguably, exit will only be a genuine possibility if people are adequately informed about other alternatives and have ample opportunities to assess them. A right to exit then becomes dependent on a whole host of other entitlements and liberties. That would undercut the minimalist strategy for preserving pluralism by forcing all regimes to adopt a fairly extensive set of rights.¹⁸ Either way, a right of exit cannot provide a guarantee of pluralism, since what counts as exit is itself open to a plurality of views. Moreover, like other trading solutions, this voluntarist approach overlooks that certain ideals, interests, cultures and ways of life have intrinsic value and that their survival, in some cases their very essence, is independent of, and even requires protection against, the choices of outsiders and even insiders.

Political liberals espouse a broader conception of rights, which they see as the medium for a transnational public sphere. However, the success of this scheme rests on the degree to which a distinction can be drawn between the universalism of the principles that supposedly provide the moral and legal framework for human interaction and discussion, on the one hand, and the particular cultural and ethical views individuals and groups may hold, on the other.¹⁹ I showed in earlier chapters the difficulties of maintaining this divide. As communitarians have argued, the search for unexceptional, 'free-standing' and 'neutral' rules of the political game proves a chimera. Since these can only be justified and interpreted from the perspectives of the values different people hold, they are themselves within politics. Demands for various kinds of self-rule by particular groups cannot be judged simply by their utility in realising universal rights, therefore. They issue from a desire to interpret those rights in different ways that reflect divergent ideals and interests that are integral to the identities of those involved. Nor is Habermas's claim that the universalism of legal principles rests on 'a procedural consensus' rather than a 'substantive consensus' any more tenable than Rawls's search for an 'overlapping consensus' on political values.²⁰ There can be no purely formal set of procedures capable of guaranteeing the fairness of political debate. Certain substantive conditions related to the sorts of outcomes these procedures produce and the style of debate they entail are also important. Debates about the form politics takes, be it discussions about the electoral system or the composition and powers of the various legislative bodies, are always linked to views on the purposes politics should pursue. As in the past, therefore, current struggles for recognition within liberal politics do not consist solely in claims to be included on the same terms as existing citizens. They involve a wish to change the very character of citizenship and the practices of government as well. Indeed, such demands follow from the liberal concern with

autonomy which ultimately grounds most theories of rights. Consequently, the legitimacy of a polity, and the allegiance of its members to it, cannot be based in agreement on, or the assumed rectitude of, the general principles it upholds alone.

Unfortunately, the communitarian assumption that political institutions and principles can be segregated within a strong national culture is equally contentious. Not only are most countries culturally diverse,²¹ there are numerous other sources of pluralism and diversity such as social differentiation that also generate competing values and interests. Though globalisation has been exaggerated, it has had an impact and can produce transnational alliances that often operate against national concerns. Environmental movements frequently display this characteristic, for example, even when locally based. Political legitimacy cannot arise out of a polity's principles and institutions expressing a shared culture either, then. Moreover, cosmopolitans rightly worry that a purely conventionalist approach to rights and justice could lead to the endorsement of some highly unsavoury and coercive practices.

A middle way?

Both cosmopolitanism and communitarianism have difficulties coping with diversity. In different ways, each risks the prevailing set of principles simply reflecting the ideals and interests of hegemonic groups. Cosmopolitans risk an imperialism of the dominant view of liberal values, communitarians a relativism that endorses the highly illiberal practices of certain national ruling classes. If cosmopolitans underestimate the degree of identification required to motivate active support for a given political settlement, communitarians exaggerate and simplify it, overlooking the multiplicity of our allegiances. Somehow we need a way of combining a communitarian sense of attachment with a cosmopolitan respect for diversity.

Will Kymlicka attempts a communitarian cosmopolitan approach to difference that addresses some of these concerns. He argues liberals should have no difficulty accepting a 'weak' communitarianism which sees culture as offering the 'context of choice' through which individual autonomy is fostered and expressed.²² A 'societal culture' provides individuals with meaningful options 'across the full range of human activities', 'both public and private', through which they can construct a fulfilled life.²³ When they are deprived of these cultures through no fault of their own, they suffer a morally arbitrary disadvantage akin to involuntary unemployment or sexual discrimination. Group rights for minority cultures follow from standard social liberal notions of equality and justice. They offer compensation and external protection against the erosion of their culture by the majority, and so allow minorities the same chance as members of the larger society of preserving the cultural resources on which their individual liberty depends.

Kymlicka's argument was formulated with the issue of the Québécois and

aboriginal peoples of his native Canada very much in mind. It turns on a crucial distinction between national and ethnic groups, and is specifically geared towards the former.²⁴ Not only do they possess a 'societal culture' of the requisite kind, since this tends to be territorially concentrated and based on a shared language, their disadvantages usually result from conquest rather than free choice. Ethnic groups, on the other hand, arise out of immigration that is mainly voluntary. Although he accepts some polyethnic group rights may be warranted, his focus is on self-government rights for minority national groups, therefore.

Unfortunately, this perspective results in the worst of both worlds, not the best. Kymlicka accepts the communitarian view of political culture as centred on a self-governing nation and adapts it to justify autonomous regions for national minorities. In so doing, he ignores the diversity and heterogeneity of these cultures. Polyethnicity is largely circumscribed to the 'private' sphere, with ethnic groups having to assimilate to the public political culture of their adopted country or region. At the same time, the relationship between community values and cosmopolitanism remains largely unaddressed. Slavery and genocide apart, he allows wide scope for different nations and regions to adopt illiberal policies. Interference to prevent all but the most extreme suppression of their minorities is treated as an illegitimate interference with collective autonomy.²⁵

Even in its own terms, Kymlicka's argument proves problematic. The extent to which ethnic groups other than refugees chose to immigrate is debatable, since social and economic push factors usually operated to some degree or another. Second and subsequent generations of immigrant parents had no say in the matter, though often they retain a distinct cultural inheritance and frequently suffer because of it.²⁶ Such groups may be territorially dispersed, yet their capacity to enjoy self-governing rights within a whole range of services, such as schools, need not be diminished. Like other groups with distinct interests or ideals, they seek a rethinking of the dominant forms of political community and by implication the liberal norms underpinning them. Kymlicka's thesis overlooks this process. It simply extends the segregationist approach of communitarians and runs the same risk of drawing the boundaries in morally arbitrary ways. Those cultural differences that defy containment in this manner are trimmed away.

A cosmopolitan communitarianism takes a different tack. This approach starts from below with the struggles for recognition of diverse groups and spheres of life. Global pressures promote greater contact between them, but have hitherto allowed sufficient spaces for them to resist, however inadequately, being amalgamated into a homogeneous cosmopolitan culture. Contrary to certain neo-liberal claims, globalisation has not made politics impossible. Not only national but also local groups can exert pressure on multinational corporations or international bodies, usually linking up with other groups in transnational networks to do so. Lobbying on issues such as deforestation, global warming, poverty, race and gender

discrimination increasingly takes these forms.

In different ways, both communitarians and cosmopolitans shy away from such multicultural and inter-group interaction. The first seek to preserve diversity by segregating these communities within their respective domains. The second use rights to drive a wedge between the public and the private, and impose a uniform pattern on political behaviour. The democratic liberal model offers an alternative perspective. Interaction is actively encouraged but in a manner that promotes reciprocity through the avoidance of domination. Demands for more diverse levels and forms of governance foster that goal by mixing the voices engaged in political dialogue and dispersing power. This combination of heightened social communication and an absence of hegemony cultivates unity whilst respecting diversity. Cosmopolitan norms of equal concern and respect inform the democratic process whereby communities and groups negotiate the terms and character of their coexistence, constraining without determining the outcome of their deliberations. There are common political institutions but a multiplicity of people who use and relate to them in different ways. By taking part, citizens acquire an attachment to the polity without necessarily forming a political community bound by a common culture.

Visions of Europe

These various views of rights, democracy and citizenship inform different visions of Europe. Cosmopolitans of a libertarian hue see the four freedoms of labour, capital, goods and services as the Union's main rationale.²⁷ Integration has a primarily negative purpose – the removal of all barriers to trade, although some positive regulation is required to ensure this occurs. Consumption, production and exchange are the prime attributes of citizenship. Workers and capitalists of the world unite by freely participating in a global market. Libertarians are distinctly lukewarm about political integration. Useful to remove troublesome rulers, when uncontrolled democracy allows organised interests to inflate state expenditure for their own benefit. A European political system must incorporate mechanisms such as judicial review to keep politics in its place and protect property rights, therefore. Opposed in many respects to state sovereignty and enthusiastic about enlargement to the east, they are wary of a federal Europe preferring confederal arrangements. These make an escalating European budget less likely, particularly if financial decisions require unanimity. Combined with open borders, they also give individuals a choice of political cultures whilst putting pressure on states to lower taxes to lure the rich and avoid costly benefits that might attract the poor.

Political and welfare liberals take a more positive view of rights and have a correspondingly fuller picture of the EU.²⁸ They welcome its evolving social dimension and would like much more trans-European redistribution. They support

federal arrangements in so far as they make such policies more likely by giving richer nations less opportunities to block redistributive measures. Similar reasons lead them to prefer majoritarian ‘demos-cracy’ over a ‘demoi-cracy’ based in group or special rights.²⁹ However, they favour a monitoring role for the European Court of Justice (ECJ) and strengthening the position of the European Court of Human Rights (ECHR) so as to ensure efficient rights protection and promotion. A liberal political culture provides a ‘common denominator’ for the different national cultural traditions and the basis for what Habermas has called a purely ‘constitutional patriotism’.³⁰ Anchored in ‘universalistic’ principles rather than a communitarian ‘ethical-cultural form of life’, European citizenship is but a stepping stone to world citizenship. Open to all, it requires the ‘political acculturation’ of immigrants and the member nationalities but not their socialisation into European culture in any deeper sense.³¹

This proposal rests on a distinction between ‘a Europe-wide *political* culture and the various *national* traditions in art and literature, historiography, philosophy and so on’,³² that communitarians doubt is possible. Ethnic nationalists contend modern nations have their roots deep in the past. They see the EU as limited to a Union of Peoples by the lack of credible or deep European cultural, linguistic and historical ties.³³ A view with potentially racist implications for immigrant populations, it suggests a European identity will always have to compete with the much stronger existing national sentiments. By contrast, civic nationalists accept that national communities are fabrications, with no genuine grounding in ethnicity. Theoretically, therefore, political elites could construct a pan-European nationalism, and attempts have been made in this direction – most notably by Jacques Delors.³⁴ However, most doubt that the established historical identities of the member states can be overcome.³⁵ Both schools see cooperation at European level in largely instrumental terms. It may be necessary to preserve or ‘rescue’ national economic interests in a globalising world economy,³⁶ or for mutual defence and security. However, they insist any transfer of powers must be regarded as provisional, with nations retaining a residual claim to reappropriate them whenever vital national concerns are at stake.³⁷ An argument frequently employed by the member states, it lies behind the Luxembourg Accords. Although the greater use of majority voting within the Council of Ministers has undercut this agreement to a large extent, the ability of member states to derogate from common provisions on these grounds has increased.

Parallel reasoning underpins the claims of national minorities within semi-autonomous regions. At present, they may be more favourable towards Europe than state-centred nationalists, but there are good grounds for regarding this enthusiasm as strategic. The more state sovereignty gets undermined, the fewer the objections to granting them greater autonomy. Once achieved, however, the desire to defend their distinctiveness within the EU would be no less (and possibly even more) than that of the member states now. Just as they have wanted

independence or at least confederalism within their current states, so one would expect them to demand similar arrangements for the EU. That view would seem to be substantially endorsed by Kymlicka's communitarian cosmopolitanism, according to which Europe would remain substantially multinational, though with a greater role for increasingly self-governing minority national regions such as Scotland or the Basque country.

A cosmopolitan communitarianism breaks the nation state mould. I remarked earlier how this fits recent multi-level governance approaches.³⁸ These have stressed how public policy-making within both the EU and the member states is more fragmented and decentralised than is often supposed, involving a wide range of actors. In consequence, both state-centred perspectives and supranational accounts prove inadequate. Neither the member states nor Brussels can control the policy agenda. EU organisations lack the capacity to push a European view, with the Commission having to vie with the other EU bodies whilst being split into numerous competing directorates and surrounded by a variety of specialist committees. Within this set-up, purely national interests also prove hard to push, partly because the complexity of the issues often makes it unclear where these lie, and partly because they have to compete for a voice with policy experts, regions and transnational interest groups. As the next section shows, though all the above models shed light on key debates and difficulties currently besetting the European Union, only this last provides a normatively satisfactory solution to them.

2 A European community?

The European Union lies at a cross-roads. The community method of incremental and instrumental, elite led integration has reached an impasse, raising fundamental questions about the Union's purpose and nature. Instead of silently emerging as a federal system through the progressive accumulation of tasks, as Jean Monnet and his followers hoped, the EU's acquisition of functions has become increasingly piecemeal, subject to variation between the member states, and politically charged. As the troubled referenda ratifying Maastricht in France and Denmark indicated, national populations and politicians now question the EU's legitimacy to act as an entity in its own right.

Between cosmopolis and community? the challenge of Maastricht

A hybrid entity, displaying features of both a supranational polity and a confederation of states, the EU draws on normative justifications of both a communitarian and cosmopolitan kind. On the one hand, it operates as an intergovernmental organisation and its mode of governance is likened to a form of consociational confederalism. All four of Lijphart's consociational principles of

grand coalition, segmental autonomy, proportionality and minority veto have typified deliberations in the Council of Ministers and negotiations surrounding the various treaties, for example.³⁹ Moreover, these consociational mechanisms have had the aim and effect of rendering the integrative process consistent with the protection and, to some degree, the enhancement of national identities and interests. These characteristics are basically compatible with a communitarian perspective. On the other hand, the EU embodies an extraordinary number of apparently supranational features – most particularly the European Court of Justice, and to a much less extent the European Parliament. These bodies claim a new European constitutional order has come into being possessing supremacy over national law and direct effect upon individuals and agencies within the national jurisdictions of member states. The court asserts its judicial competence—competence as the authoritative interpreter of a ‘higher’ European law that embodies basic human rights.⁴⁰ This development has been accompanied by calls for the European Parliament to have a greater role in the legislative process and the view that intergovernmentalism fails adequately to represent the interests of individual citizens – the so-called democratic deficit thesis. These arguments draw on cosmopolitan notions to underpin them.

Up until the Maastricht Treaty on European Union (TEU) the potential stresses between these two dimensions of European integration rarely manifested themselves. The jurisdictional and legislative expansion of the Court of Justice was largely controlled, and to a high degree abetted by, the member states – not least through a generous interpretation of Article 235 EC to allow a significant extension of the scope and powers of the community. The shift to majority voting, combined with renewed worries on the part of national courts as to the integrity of their own position as guardians of their distinctive constitutional orders, has changed this situation and made governments far more sensitive to the Court’s jurisdictional boundaries.⁴¹

These tensions were manifested in the Maastricht Treaty itself, which introduced the new pillar structure of the Union. This novel architectural arrangement distinguishes those matters that form part of the community proper (the first pillar), which are decided by the established institutional mechanisms and come under the jurisdiction of the European Court of Justice, from Common Security and Foreign Policy (second pillar) and Co-operation in Justice and Home Affairs (third pillar) where intergovernmentalism prevails. Though modified at Amsterdam, with the third pillar now restricted to the cumbersomely designated Police and Judicial Co-operation in Criminal Matters, this arrangement institutionalised variability into the integration process. So did the various Protocols attached to both Maastricht and Amsterdam. These allow numerous derogations from common policies – with Britain’s opt-out from stage three of EMU and the Amsterdam Protocol (Article 73Q) on ‘freedom, justice and security’ being notorious instances.

Such variations offend the emphasis on uniform and equal rules typical of liberal

democratic theories. Most legal analysts have seen these innovations as threatening the central legal tenet of the Union, the *acquis communautaire*, and reducing the capacity of the Court to produce a coherent legal order. One prominent legal commentator denigrated the resulting constitutional structure as a patchwork of ‘bits and pieces’, displaying ‘more of a *bricoleur*’s amateurism than a master bricklayer’s strive for perfection and attention to detail.’ The result, she continued, jeopardised ‘the cohesiveness and the unity and the concomitant power of a legal system painstakingly constructed over the course of some thirty odd years’, and put in doubt ‘the whole future and credibility of the Communities as a cohesive legal unit which confers rights on individuals and which enters into their national legal systems as an integral part of those systems’.⁴² However, political *bricolage* rather than architectural design offers the only coherent strategy within a pluralist multicultural polity. In which case, liberal democracy must give way to democratic liberalism.

The policy of European citizenship brings out these conflicts between cosmopolitan and communitarian concerns in the post-Maastricht and Amsterdam climate particularly well. As we shall see, its conception and inadequacies reflect the contrasts between the two models of rights and democracy discussed earlier.

European citizens in search of a nation?

Articles 8 to 8e of the Maastricht Treaty established ‘citizenship of the Union’ and extended it to ‘every person holding nationality of a member state’. The commitment to freedom of movement and residence within the EU was reiterated, a European Ombudsman and the right to petition the European Parliament established, citizens residing outside their own state given the right to vote in the European Parliament and local elections on the same basis as nationals of their adopted country, and reciprocal diplomatic protection arrangements agreed for member-state nationals travelling outwith the EU.

Many commentators greeted the move as a first step towards the creation of a European demos, albeit a highly inadequate one. The chief criticisms from this cosmopolitan perspective focused on its limited nature, notably the relative lack of political content given the weakness of the European Parliament, and the huge anomalies arising from its link to nationality as that is variously defined by the different member states – especially with respect to immigrants resident within the EU.⁴³ They hope European Citizenship will displace nationality as a public identity, rendering people’s Frenchness or Britishness akin to more depoliticised attachments, such as support for a particular football team. Notwithstanding the official commitment to place ‘citizen rights at the heart of the Union’, Amsterdam proved a disappointment. The one significant change to the citizenship provisions, a supposed clarification to Article 8 (1) TEU, added the rider that ‘Citizenship of the

Union shall complement and not replace national citizenship'. This neatly captures the continued dual character of the EU, as both inter-national and supranational. The key questions are whether two (or potentially more) political identities can be held simultaneously and, if they can, how do they relate to each other?

The neatest solution would be for Europe to become a new source of communitarian national identity. However, empirical evidence, such as the findings of the Eurobarometer poll, indicate a low level of identification with Europe *per se*. Though more Europeans (49 per cent in a 1997 poll) favour integration than are actively opposed to it (14 per cent), this correlates relatively closely with a sense of its having benefited their country (44 per cent as against 35 per cent).⁴⁴ When asked how they describe themselves – by nationality only, nationality and European, European and nationality, or European only – citizens polled in Autumn 1997 divided 45 per cent, 40 per cent, 6 per cent and 5 per cent, respectively. Not surprisingly, a European Opinion study carried out in 1995 revealed that a majority of Europeans (52 per cent) favoured an 'à la carte' Europe – a view held by over 70 per cent of the population in Austria, Britain, Denmark and Sweden.⁴⁵

These findings suggest a European national identity is unlikely. Economic integration alone cannot produce a convergence in civic attitudes and allegiances. Though the intensification of trade, transport and communication links, greater labour mobility, and an equalisation of social conditions were important elements in the development of national identities in nineteenth-century western Europe,⁴⁶ they were never sufficient. In the case of the European Union, the crucial role played by centralised political institutions in unifying the economy is also missing, since the common market has been more the product of deregulation than regulation. Moreover, the growth of economic and social interdependence is by no means centred solely on Europe, even if trade amongst the member states has increased more than commerce between them and the rest of the world. Earlier nation-state building projects had reasonably well-defined territorial ambitions that were linked to certain pre-existing historical, linguistic and cultural boundaries. Though these sentiments were usually held by a dominant social group alone and had to be diffused amongst the rest of the population, there was a sense of who was being united and where. No core-cultural or geographical reference point exists for the EU. It is remarkably open-ended in terms of geographical scope, and could include the most varied cultural and political traditions. The European flag, passport, and anthem, have proved largely empty symbols. Significantly, the Euro has had to rely on a purely abstract symbolism of imaginary bridges since real European bridges, personalities and other cultural images have a primarily national resonance.

Post-nationalist cosmopolitans, of course, regard the absence of a sense of European consciousness as highly desirable. A constitutional patriotism centred

upon universal liberal democratic values ought to be enough to unite all peoples around common political institutions, and avoids the exclusionary connotations of a form of citizenship based on a territorially and culturally specific national identity.⁴⁷ Some such view animates the Amsterdam Treaty.⁴⁸ The cosmopolitan principles of ‘liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’ are declared to be ‘principles which are common to the member states’ and requirements for the accession of new members (Treaty of Amsterdam (TA) F1). Consequently, the Union’s respect for both ‘fundamental rights’ (TA F2) and ‘for the national identities of its member states’ (TA F3) should not be in tension.

However, this belief comes unstuck for many of the reasons highlighted by communitarian nationalists. As we saw, communitarians contend national identities legitimately affect how we interpret rights. Even if all the member states endorse broadly the same set of rights and democratic principles, they can have legitimately different views that reflect valid cultural differences about their scope and relative weighting with regard to both each other and equally important values and interests. This position finds confirmation in a number of jurisdictional disputes between the ECJ and national constitutional courts.

Since the late 1960s the Court has claimed fundamental rights form ‘an integral part of the general principles of law’ it has a duty to uphold.⁴⁹ This declaration was supposed to forestall challenges to its decisions by national courts on grounds of an infringement of the fundamental rights embedded in their domestic constitutional orders. However, the Italian and German courts that raised the issue remain unsatisfied. It is easy to see why. The right to freedom of expression is accepted by all member states, for example, but in certain countries is interpreted in Kymlickean fashion as warranting the special protection of linguistic minorities or a national language on the grounds that a people’s culture provides the necessary context within which they express themselves as possessors of a specific identity. However, these limitations can place restrictions on the free movement of goods, services, capital and labour which the Community is pledged to uphold. This conflict has been at the heart of a whole series of key cases, with the ECJ consistently ruling against such restrictions and adopting a libertarian view of rights.⁵⁰

A similar clash is evident in the notorious Grogan case. This involved an injunction brought by the Society for the Protection of the Unborn Child against various office-holders of student unions of the Republic of Ireland to prevent them disseminating information about British abortion clinics on the grounds that this action infringed the Irish Constitution’s proclamation of a ‘right to life of the unborn’ (Article 40.3.3.3), an article overwhelmingly endorsed in a referendum.⁵¹ The court ruled that abortion was simply ‘a medical activity which is normally provided for remuneration’ and hence constituted ‘a service within the meaning of Article 60 of

the Treaty', rendering the issue justiciable by the ECJ. The only reason the injunction did not contravene Article 59, prohibiting any restriction by member states on the freedom to supply services throughout the Community, was because the connection between the students' unions and the British clinics was 'too tenuous'.⁵² Ireland subsequently obtained a Protocol (17) to the Maastricht Treaty guaranteeing the Irish position on abortion.

Given this background, the German Federal Constitutional Court's equally infamous ruling in the *Brunner* case is unsurprising. Asked to decide whether Maastricht infringed Article 38 of the German Constitution guaranteeing German citizens a right to participate in elections to the *Bundestag*, the Court ruled that it did not but that further integration might do so. According to the Court, it had a duty to watch over the integrity of the German constitutional order and ensure the German people retained 'sufficiently important spheres of activity' through which they could politically legitimate, control and 'give legal expression to what – relatively homogeneously – binds [them] spiritually, socially and politically together'.⁵³ The lack of a European demos meant that involvement in a European Parliament was no substitute. National sovereignty has to predominate, limiting the EU to an association of sovereign states. Moreover, the German Court challenged the ECJ's claims to decide the limits of its own competence, implying that the legitimate sphere of European relative to domestic law could only be determined by the appropriate national bodies. Though in this like the other cases a stand-off between the ECJ and the national court was ultimately fudged, at least one prominent commentator believes outright war cannot be ruled out in the long term.⁵⁴

In a debate with Dieter Grimm, the main author of the Maastricht judgement, Habermas returned to his distinction between political and ethical-cultural integration, arguing Grimm mistakenly believed the first depended on the second. He accepted 'there can be no European federal state worthy of the name of a democratic Europe unless a Europe-wide, integrated public sphere develops in the ambit of a common political culture: a civil society with interest associations; non-governmental organisations; citizens' movements, etc.; and naturally a party system appropriate to a European arena', but contended social and economic integration had laid the foundations for such a European political system.⁵⁵ The same legal principles might still be interpreted with reference to particular national cultures, but each group would have to relativise its position vis-à-vis the others, with the aim of coming up with the 'best' understanding of them.⁵⁶ The evidence for such autonomous political integration appears slim, however.

Though the new status of citizen of the Union (Article 8b EC) gave member-state nationals the right to vote and stand in European elections on the basis of residence alone, and 'political parties at European level' were solemnly declared to be 'important

as a factor for integration within the Union', that 'contribute to forming a European awareness and to expressing the political will of the citizens of the Union' (Article 138a EC), there has been little popular enthusiasm for these developments and some active antagonism. Far from being steps towards a pan-European political system, uptake of European political rights remains significantly lower than in national elections and Eurobarometer polls indicate that citizens would prefer the Parliament to be organised around national rather than ideological criteria.⁵⁷ Political integration is not an autonomous process. Strengthening European democratic institutions such as the parliament will increase, not lessen, the EU's democratic deficit unless such bodies possess social and cultural legitimacy in the eyes of those they govern.⁵⁸ Indeed, Habermas himself tacitly acknowledged this fact when he asserted that 'a common cultural background' including English as a 'common second language' and 'the shared historical experience of having happily overcome nationalism' add to the plausibility of his thesis.⁵⁹ If true, these factors would certainly do so. But they involve a quite different type of reasoning to the one he invokes against Grimm.

Stricter segregation might be thought the answer, with a strict demarcation between national and European jurisdictions, with the latter tightly controlled by the former. The weasel word 'subsidiarity' has sometimes been employed to suggest some such set-up, though others use it as a synonym for federalism. However, a deepening of the consociational federal system currently operating is also inadequate. The national and the European prove hard to disentangle both in theory and in practice. The legitimacy of national politicians to represent their citizens in deciding this issue is highly contentious. European issues rarely determine national elections, leaving voters with little or no influence on the integration process. Moreover, people's commitments are increasingly diverse and poorly represented as national. This system has all the democratic shortcomings critics level at consociationalism in domestic arenas: namely, elitism, conservatism and the stifling of dissent and new voices. It makes the peoples of the Union the subjects of European law – and paradoxically recipients of the status of citizenship it has conferred – without allowing their participation in its enactment.

To get beyond this confrontation between a European and a national demos, we need a workable concept of *demos* that builds on the multiple and varying communitarian attachments of European citizens, some but not all of which either transcend or operate below the national community.⁶⁰ Whereas the cosmopolitan and communitarian approaches see conflicts of values and interests as threats to the coherence and authority of the legal and political system, a democratic liberalism seeks to harness that diversity by creating multiple sites for decision-making that reflect the plurality of our political identities, and the complexity and diversity of the

problems requiring regulation. The purpose of dispersing power in this way is not so much to protect minority voices by allowing their selective withdrawal from, or veto of, collaborative ventures, as to ensure that they get heard, so that common policies reflect the appropriate mix of the interests and ideals affected. The aim is fair and reciprocal compromise, in which all give and take.

Allegiance within this system builds neither on a cosmopolitan overlapping consensus, nor a communitarian sense of historical belonging. By contrast to Habermas, adjustments between different communitarian ethico-cultures do not occur around a shared cosmopolitan core. However, political integration does not build on a pre-existing European culture or set of values either. Instead, culture and politics develop in tandem as reciprocal exchanges between different communities of diverse sorts fosters a more cosmopolitan perspective and helps shape new political forms. By dispersing power amongst multiple overlapping civic associations and political institutions, a range of mutually acceptable agreements can be negotiated amongst different perspectives and interests. These will be fair and so consistent with the rule of law, without invoking universal legal principles embedded in a written constitution. Contrary to the expectations of many critics of non-unitary systems, this scheme aids rather than inhibits integration. While the process may be more differentiated, greater legitimacy and efficacy will render it deeper too. For example, the developing social agenda of the EU, with its focus on exclusion, uneven economic development and employment opportunities, and the rights of workers and immigrants, cries out for just such an approach. To make headway, the domination of vested interests needs to be overcome through the democratic involvement of minority voices.

There are encouraging signs of movement in this direction. As noted, the framework for this neo-republican approach can be found in the emerging system of multi-level governance within the EU. Joanne Scott, for example, believes the 'partnership' principle employed within Community structural funding can be interpreted in these terms.⁶¹ Partnership demands that Community development 'operations':

be established through close consultations between the Commission, the member state concerned and the competent authorities and bodies – including within the framework of each member state's national rules and current practices, the economic and social partners, designated by the member state at national, regional, local or other level with all parties acting as partners in pursuit of a common goal.⁶²

She argues that partnership shares power across different levels of government, with the Community recognising that member states are not single units and that actors outside the official public sphere also merit a political voice. Thus, it ‘does not involve the parcelling out of limited pockets of sovereignty, but a genuine pooling of sovereignty’. In other words, it ensures the mixing of voices that is distinctive to the democratic liberal approach, promoting dialogue by dividing power. At the same time, the example shows how international solutions to global problems can build on local initiatives.

A similarly neo-republican rationale has been given for the EU’s central institutions by Paul Craig and Neil MacCormick.⁶³ They see the division of legislative power between the Council, European Parliament and Commission as embodying the notion of institutional balance typical of a mixed commonwealth. They argue this set-up represents the various interests and constituencies involved within the EU far better than making the European Parliament the principal legislative body could, noting the same weaknesses with this last option to those we explored earlier. Of course, European political development may not continue down this path. But that would be a lost opportunity given the present possibility for a multiple, democratic liberal mode of citizenship that neatly combines both the communitarian and cosmopolitan pressures that currently bedevil the Union.

3 Conclusion

This chapter has explored pluralist politics beyond the nation state. Liberal communitarians doubt this is practicable or desirable, and when conceived in cosmopolitan liberal terms we have seen it is not. Yet globalisation without the state and multiculturalism and other types of pluralism within make a move in this direction unavoidable. However, taking this step involves going beyond liberal democracy as well, and adopting a democratic liberalism. This approach lays to rest the communitarian ghost within the cosmopolitan machine. Developments within the EU suggest citizens can construct community whilst recognising diversity, negotiating differences in ways suited to the new global politics. Here too, liberalism meets the challenge of pluralism by dropping political forms fashioned in the nineteenth century and creating new ones appropriate for the circumstances of the twenty-first.

Notes

Introduction: the challenge of pluralism

1. For a full exposition and defence of the following characterisation of liberalism, see my *Liberalism and Modern Society: An Historical Argument*, Cambridge: Polity Press, 1992. Those seeking full chapter and verse should look there, I offer only a few indicative references here.
2. Gender-neutral language is generally used in this book. However, this usage is sometimes historically inaccurate (as it would be here) and often represents (albeit unwittingly) what Susan Muller Okin calls 'false gender neutrality' (*Justice, Gender and the Family*, New York: Basic Books, 1989, pp. 10–13), wrongly implying a fair balance of power exists between men and women. One of the criticisms of contemporary 'neutralist' liberalism made below is that it inadequately tackles this problem of structural domination.
3. For example, the French Declaration of the Rights of Man and the Citizen of 1789, especially Articles 1, 2, 4, 6, 14 and 16, I. Kant, 'On the Common Saying: "This May be True in Theory, But It Does Not Apply in Practice"', in H. Reiss (ed.), *Kant's Political Writings*, Cambridge: Cambridge University Press, 1970, p. 73 and J. Rawls, *A Theory of Justice*, Oxford: Clarendon Press, 1971, p. 60.
4. For an excellent example of such thinking, see E. Durkheim, 'Individualism and the Intellectuals', trans. S. Lukes and J. Lukes, *Political Studies* 17 (1969), pp. 19–30.
5. See, for example, J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995, especially Ch. 3, and B. Parekh, 'Superior People: The Narrowness of Liberalism from Mill to Rawls', *Times Literary Supplement* (25 February 1994), pp. 11–13.
6. James Mill's *A History of British India* offers the classic example.
7. For example, J. S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, ed. H. B. Acton, London: Dent, 1972; *On Liberty*, p. 73; *Considerations on Representative Government*, pp. 178–80.
8. J. Raz, *The Morality of Freedom*, Oxford: Clarendon Press, 1986, pp. 369–70, 394.
9. Parekh, 'Superior People', p. 12.
10. For example, F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, New York: The Free Press, 1995.
11. Raz makes a good case for seeing multiculturalism as part of the more general pluralist challenge in his 'Multiculturalism: A Liberal View', in *Ethics in the Public Domain*, Oxford: Clarendon, 1994, pp. 178–83, though his expectation that certain illiberal cultures will simply die strikes me as too neat and somewhat at variance with the tenor

of much of his argument.

12. Tully, *Strange Multiplicity*, Ch 1 makes this point well.
13. See J. Tully, 'The Agonic Freedom of Citizens', *Economy and Society*, forthcoming.
14. See R. Vernon, 'Moral Pluralism and the Liberal Mind', in J. M. Porter and R. Vernon (eds), *Unity, Plurality and Politics: Essays in Honour of F. M. Barnard*, London and Sydney: Croom Helm, 1986 and G. Crowder, 'Pluralism and Liberalism', *Political Studies* 42 (1994), pp. 293–305, who show that the liberal belief in autonomy, toleration and diversity does not necessarily follow from a commitment to pluralism.
15. This definition of pluralism follows J. Kekes, *The Morality of Pluralism*, Princeton, NJ: Princeton University Press, 1993. The ensuing discussion also draws on I. Berlin, *Four Essays on Liberty*, Oxford: Oxford University Press, 1969; *Idem, Against the Current*, Oxford: Oxford University Press, 1979; *Idem, The Crooked Timber of Humanity*, London: Fontana Press, 1991; J. Gray, *Post-liberalism: Studies in Political Thought*, London: Routledge, 1993, pp. 287–306; *Idem, Isaiah Berlin*, London: HarperCollins, 1995, Chs 2 and 6; S. Hampshire, *Morality and Conflict*, Oxford: Blackwell, 1983; *Idem, Innocence and Experience*, Harmondsworth: Penguin, 1989; C. Larmore, *Patterns of Moral Complexity*, Cambridge: Cambridge University Press, 1987, Ch. 6; *Idem, 'Pluralism and Reasonable Disagreement'*, *Social Philosophy and Policy* 11 (1994), pp. 61–79; T. Nagel, *Mortal Questions*, Cambridge: Cambridge University Press, 1979, Ch. 9; B. Williams, *Moral Luck*, Cambridge: Cambridge University Press, Ch. 5; S. Lukes, *Moral Conflict and Politics*, Oxford: Clarendon Press, 1991, Chs 1 and 3; Raz, *The Morality of Freedom*, Ch. 13; J. D. Moon, *Constructing Community: Moral Pluralism and Tragic Conflicts*, Princeton NJ: Princeton University Press, 1993, Ch. 2; and R. Chang (ed.), *Incommensurability, Incomparability and Practical Reason*, Cambridge Mass.: Harvard University Press, 1997.
16. For this distinction between primary and secondary goods, see Kekes, *Morality of Pluralism*, p. 18.
17. M. Walzer, *Spheres of Justice*, Oxford: Martin Robertson, 1983, p. 8.
18. Berlin, *Against the Current*, pp. 70–9.
19. M. Weber, 'Science as a Vocation', in H. H. Gerth and C. W. Mills (eds), *From Max Weber*; London: Routledge, 1948, p. 148.
20. C. Larmore, *Patterns of Moral Complexity*, Cambridge: Cambridge University Press, 1987, Ch 6; T. Nagel, *Mortal Questions*, Cambridge: Cambridge University Press, 1979, Ch. 9.
21. N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio* in *Il Principe e Discorsi* ed. S. Bertelli, Milan: Feltrinelli, 1960, Bk 1, Ch. IX, p. 153.
22. H. L. A. Hart, 'Between Utility and Rights', in A. Ryan (ed.), *The Idea of Freedom*, Oxford: Clarendon Press, 1979.
23. Weber, 'Science as a Vocation', pp. 147–8.
24. J. Rawls, *Political Liberalism*, Columbia: Columbia University Press, 1993, pp 56–7.
25. See W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1955–6), pp. 167–98.
26. Lukes, *Moral Conflict*, p. 14. Lukes places Marxists in this category.
27. Raz, *Morality of Freedom*, p. 352, emphasis in the original.
28. Larmore, *Patterns of Moral Complexity*, p. 140 and Raz, *Morality of Freedom*, p. 328 on 'marginal' and 'significant' incommensurability.
29. Raz, 'Multiculturalism: A Liberal Perspective', p. 179.
30. Raz, 'Multiculturalism: A Liberal Perspective', p. 179. J. Gray attributes a similar 'agonistic liberalism' to Berlin and has adopted it himself: see his *Berlin*, Ch. 6 and *Enlightenment's Wake*, Ch. 6.

31. I have examined Weber's argument in detail in *Liberalism and Modern Society*, Ch. 4.
32. Martha Nussbaum makes a similar error with her 'Aristotelian Social Democracy', in R. Douglas *et al.*, *Liberalism and the Good*, New York: Routledge, 1990, pp. 234–7. Recognition that human flourishing draws on a diversity of goods is different to an acceptance of pluralism, and in Aristotle's case was consistent with a ranking of goods that is inconsistent with the notion of incommensurability. See Hampshire, *Innocence and Experience*, p. 34 and, for a more detailed critique of Raz along these lines, Bellamy, *Liberalism and Modern Society*, pp. 244–8.
33. What follows draws on many of the essays in Chang, *Incommensurability, Incomparability, and Practical Reason*, including the editor's introduction and the chapters by Charles Taylor, Steven Lukes, Michael Stocker and, especially, Elizabeth Anderson.
34. Lukes, 'Making Sense of Moral Conflict', p. 20.

1 Trading values: Hayek and the dethronement of politics by markets

1. J. Gray, *Hayek on Liberty*, 2nd edn, Oxford: Blackwell, 1986, Ch.1.
2. F. A. Hayek, *Rules and Order*; London: Routledge, 1973, p. 5.
3. Hayek, *Rules and Order*, Ch. 1.
4. A. Ferguson, *An Essay on the History of Civil Society*, (1767), quoted in Hayek, *Rules and Order*, p. 20.
5. F. A. Hayek, *The Mirage of Social Justice*, London: Routledge, 1976, Ch. 10.
6. Hayek, *Rules and Order*, Ch. 2.
7. Hayek, *Rules and Order*, p. 6.
8. F. A. Hayek, *Studies in Philosophy, Politics and Economics*, London: Routledge, 1967, pp. 113, 116–7, 168.
9. Hayek, *Mirage*, Chs 7 and 9.
10. Hayek, *Mirage*, pp. 65, 69. Conversely, those who prove successful are simply lucky – a conclusion Hayek feels slightly uneasy with because he fears that unless people believe that hard work always gets its just reward the market will lose legitimacy in people's eyes, so that a 'noble lie' may be in order to defend it (*Mirage*, p. 74).
11. For a detailed examination of these concepts, that fully reveals their indeterminacy, see David Miller, *Social Justice*, Oxford: Clarendon Press, 1976, Part I, especially Chapters 3 and 4.
12. Gray, *Hayek on Liberty*, p. 73.
13. F. A. Hayek, *The Road to Serfdom* (1944), London: Routledge, 1976.
14. Hayek, *Rules and Order*, p. 2.
15. F. A. Hayek, *The Constitution of Liberty*, London: Routledge, 1960, p. 103.
16. F. A. Hayek, *The Political Order of a Free People*, London: Routledge, 1979, p. 5.
17. Hayek, *Mirage*, p. 24; *Rules and Order*, p. 118.
18. Hayek, *Constitution*, p. 106.
19. Hayek, *Political Order*, p. 17.
20. Hayek, *Political Order*, p. 10.
21. Hayek, *Political Order*, p. 13.
22. Hayek, *Political Order*, p. 32.
23. Hayek, *Political Order*, p. 6.
24. Hayek, *Political Order*, p. 23.
25. Hayek, *Political Order*, p. 14.
26. Hayek, *Political Order*, p. 16.
27. Hayek, *Political Order*, p. 31.
28. R. Nozick, *Anarchy, State and Utopia*, Oxford: Blackwell, 1974. N.B. Nozick has

- since changed his mind, see his *The Examined Life*, New York: Simon and Schuster, 1989, Ch. 25.
29. Hayek, *Political Order*, Ch. 14.
 30. Hayek, *Political Order*, p. 127; *Constitution*, Ch. 20.
 31. Hayek, *Political Order*, p. 38, Ch. 17.
 32. Hayek, *Political Order*, pp. 132–3, 146, 149.
 33. Hayek, *Political Order*, pp. 119–20.
 34. Hayek, *Political Order*, p. 116.
 35. Hayek, *Political Order*, p. 113.
 36. Hayek, *Political Order*, pp. 117–19.
 37. Hayek, *Political Order*, p. 112.
 38. Hayek, *Political Order*, p. 139.
 39. Hayek, *The Road to Serfdom*, pp. 62–3.
 40. Gray, *Hayek on Liberty*, p. 69.
 41. Hayek, *Political Order*, Ch. 18.
 42. Hayek, *Political Order*, p. 135.
 43. My analysis of this thesis is indebted to the work of Onora O'Neill, 'The Most Extensive Liberty', *Proceedings of the Aristotelian Society* 80 (1979/80), pp. 45–59 and John Gray, *Liberalisms: Essays in Political Philosophy*, London: Routledge, 1989, Ch. 9.
 44. Hayek, *Studies*, p. 162; *Rules and Order*, pp. 36–7.
 45. See Desmond King, *The New Right: Politics, Markets and Citizenship*, London: Methuen, 1987, pp. 97–100 for a brief discussion of this problem.
 46. Hayek makes these points particularly clearly in *Political Order*, Ch. 14, especially pp. 41–4.
 47. Hayek, *Political Order*, p. 152.
 48. Hayek, *Mirage*, p. 28.
 49. See C. Kukathas, *Hayek and Modern Liberalism*, Oxford: Clarendon Press, 1989.
 50. Hayek, *Constitution*, p. 398.
 51. Hayek, *Constitution*, pp. 18–19.
 52. Hayek, *Constitution*, p. 19.
 53. Hayek, *Constitution*, p. 21.
 54. Hayek, *Constitution*, p. 136.
 55. R. Hamowy, 'Law and the Liberal Society: F. A. Hayek's *Constitution of Liberty*', *Journal of Libertarian Studies* 2 (1978), pp. 287–97.
 56. Hayek, *Constitution*, p. 142.
 57. Hayek, *Constitution*, p. 142.
 58. Hamowy, 'Law and the Liberal Society', p. 290.
 59. Hayek, *Constitution*, p. 21.
 60. Hayek, *Constitution*, p. 153.
 61. Gray, *Liberalisms*, p. 91. See also Kukathas, *Hayek and Modern Liberalism*, pp. 142–3.
 62. Hayek, *Constitution*, pp. 153, 210.
 63. Gray, *Hayek on Liberty*, pp. 63–5.
 64. For criticisms to this effect, see J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1983, pp. 210–32 and Hamowy, 'Law and the Liberal Society'.
 65. For example, C. Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, Mass.: Harvard University Press, 1987, p. 44.
 66. Gray, *Hayek on Liberty*, pp. 59–61.
 67. For example, Hayek, *Constitution*, pp. 31, 44, 48, 259.

68. Kukathas, *Hayek and Modern Liberalism*, pp. 191–201.
69. Hayek, *Constitution*, p. 41.
70. Michael Rosen, *Hegel's Dialectic and its Criticism*, Cambridge: Cambridge University Press, 1982, Ch. 2.
71. See, for example, the 'Epilogue' to *Political Order*, and his final book, *The Fatal Conceit: The Errors of Socialism*, Chicago: University of Chicago Press, 1989.
72. Hayek, *Constitution*, p. 136.
73. See R. Plant, *Modern Political Thought*, Oxford: Blackwell, 1991, pp. 91–3.
74. J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, Lecture VII.
75. B. Williams, 'Conflicts of Values', in his *Moral Luck*, Cambridge: Cambridge University Press, 1981, p. 75.
76. For further criticism along these lines, see R. Keat, 'The Moral Boundaries of the Market', in C. Crouch and D. Marquand (eds), *Ethics and Markets*, Oxford: Blackwell, 1993, pp. 6–20 and R. Bellamy, 'Moralizing Markets', *Critical Review* 8 (1994), pp. 341–57.
77. Hayek, *Political Order*, Ch. 14.
78. See Iain McLean, *Public Choice*, Oxford: Blackwell, 1987, Part I, for an exposition of this theory.
79. A. Downs, *An Economic Theory of Democracy*, New York: Basic Books, 1957, Ch. 14. See Leif Lewin, *Self-Interest and Public Interest in Western Politics*, Oxford: Oxford University Press, 1991, for a detailed empirical assessment of the public choice account of democratic politics, that reveals citizens, politicians and bureaucrats to be motivated by far broader considerations of the long-term common good than the theory allows.
80. Although this distinction runs through liberal thought, Hayek's analysis is indebted to Carl Schmitt, see Hayek, *Rules and Order*, p. 71; *Political Order*, pp. 138, 194–5. I have criticised Schmitt's views in this respect in R. Bellamy and P. Baehr, 'Carl Schmitt and the Contradictions of Liberal Democracy', *European Journal of Political Research* 23 (1993), pp. 163–85.
81. See J. L. Mackie, *Ethics: Inventing Right and Wrong*, Harmondsworth: Penguin, 1977, Ch. 4, and the discussion in Steven Lukes, 'Of Gods and Demons: Habermas and Practical Reason', in J. B. Thompson and D. Held, *Habermas: Critical Debates*, Basingstoke: Macmillan, 1982, pp. 142–4, to which the following is indebted.
82. This point is well made by Albert Weale in his critique of Samuel Brittan's economic liberalism in 'Can *Homo Economicus* Have a Political Theory?' *Political Studies* 35 (1990), pp. 517–25.
83. Very similar thinking, of course, runs through John Rawls's *Political Liberalism*, p. 9. However, the idea of an 'overlapping consensus' on principles of political justice suggests that agreement is reached from within the respective comprehensive moral views of the various participants in the democratic process – an impression confirmed by Rawls's agreement (e.g. at p. 36) with Joshua Cohen's interpretation of his argument in J. Cohen, 'Moral Pluralism and Political Consensus', in D. Capp, J. Hampton and J. E. Roemer (eds), *The Idea of Democracy*, Cambridge: Cambridge University Press, 1993, pp. 270–91. Moreover, whilst Rawls envisages the *modus vivendi* as giving way to a stable consensus that excludes divisive issues from the political agenda (p. 148), this schema regards acceptance of the principles of political decision-making as being at least partly dependent on the continued existence of a fair division of power that makes compromise a virtue.
84. See R. B. Friedman, 'On the Concept of Authority', in J. Raz (ed.), *Authority*, New York: New York University Press, 1990, pp. 56–91 for a discussion of the political

- function of authority underlying this account.
85. This description of a *modus vivendi* liberalism draws on C. Larmore, *Patterns of Moral Complexity*, Cambridge: Cambridge University Press, 1987, pp. 74–5.
 86. Hayek, *Political Order*, p. 93.
 87. See R. Dahl, *Dilemmas of Liberal Democracies*, New Haven, Conn: Yale University Press, 1982, for a fuller discussion.
 88. The issue of sovereignty was a consistent concern of the English pluralists J. N. Figgis, G. D. H. Cole and Harold Laski. Much of what I have to say about democratic liberalism is indebted to their ideas and the exposition and development of them by P. Q. Hirst in Hirst (ed.), *The Pluralist Theory of the State*, London: Routledge, 1989.
 89. e.g. Hayek, *Rules and Order*, p. 138.

2 Trimming values: Rawls and the constitutional avoidance of politics

1. Brian Barry hazards a similar conjecture, remarking that although there are clear internal causes to explain the recent evolution of his thought which Rawls himself insists upon, the increased salience of religiously motivated political demands by figures such as Jerry Falwell from 1980 onwards offers the most plausible external cause. See B. Barry, 'John Rawls and the Search for Stability', *Ethics* 105 (1995), pp. 904–5.
2. J. Rawls 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs* 14 (1985), p. 231.
3. J. Waldron, 'Theoretical Foundations of Liberalism', *Philosophical Quarterly* 37 (1987), pp. 127–50.
4. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, pp. 139–40.
5. Rawls, *Political Liberalism*, pp. 140–1.
6. Rawls, *Political Liberalism*, pp. 54–8.
7. Rawls, *Political Liberalism*, p. 57.
8. Rawls, *Political Liberalism*, pp. 36–8, 58.
9. Rawls, *Political Liberalism*, p. 37.
10. Rawls, *Political Liberalism*, p. 38.
11. Rawls, *Political Liberalism*, pp. 24–5.
12. J. Rawls *A Theory of Justice*, Oxford: Clarendon Press.
13. B. Barry, *Justice as Impartiality*, Oxford: Clarendon Press, 1995, pp. 52–61; R. Bellamy and M. Hollis, 'Liberal Justice: Political and Metaphysical', *Philosophical Quarterly* 45 (1995) pp. 1–19; P. de Marneffe, 'Liberalism, Liberty and Neutrality', *Philosophy and Public Affairs* 19 (1990), pp. 253–74.
14. Rawls, *Political Liberalism*, pp. 16–17, 25 (note 28), 147–8.
15. Rawls, *Political Liberalism*, pp. 142–50.
16. Rawls, *Political Liberalism*, pp. 143–4.
17. Rawls, *Political Liberalism*, p. 223.
18. Rawls, *Political Liberalism*, pp. 10, 40–3, 220. N.B. Rawls studiously avoids contrasting the 'public' with the 'private', on the grounds that all reasoning and activity is 'social' (p. 220, fn. 7).
19. Rawls, *Political Liberalism*, pp. 11–12.
20. Rawls, *Political Liberalism*, Lecture VII.
21. For a good discussion of this weakness in Rawls's theory, see E. Frazer and N. Lacey, 'Politics and the Public in Rawls' *Political Liberalism*', *Political Studies* 43 (1995), pp. 233–47.
22. S. M. Okin, 'Political Liberalism, Justice and Gender', *Ethics* 105 (1994), pp. 23–43.

23. Rawls, *Political Liberalism*, p. 258 – revising the omission of the family in the essay on which this lecture is based (see J. Rawls, ‘The Basic Structure as Subject’, *American Philosophical Quarterly* 14 (1977), p. 159).
24. Rawls, *Political Liberalism*, p. 137.
25. Rawls, *Theory of Justice*, pp. 462–72; Okin, ‘Political Liberalism’, pp. 32–5.
26. Rawls, *Political Liberalism*, p. 15.
27. Rawls, *Political Liberalism*, pp. xvi–xvii.
28. Rawls, *Political Liberalism*, pp. 151, 195–6.
29. Rawls, *Political Liberalism*, pp. 199–200.
30. Rawls, *Political Liberalism*, pp. 228–30, 237.
31. Frazer and Lacey, ‘Politics and the Public in Rawls’ *Political Liberalism*’, p. 235, 244–7.
32. Rawls, *Political Liberalism*, pp. 12–13.
33. Rawls, *Political Liberalism*, p. 12.
34. Rawls, *Political Liberalism*, pp. 11, 12.
35. Rawls, *Political Liberalism*, pp. 12–13.
36. Rawls, *Political Liberalism*, p. 170. These problems with utilitarianism are developed by S. Scheffler, ‘The Appeal of Political Liberalism’, *Ethics*, 105 (1994), pp. 8–11.
37. Rawls, *Theory of Justice*, pp. 14, 33.
38. Rawls, *Theory of Justice*, pp. 181–2.
39. Rawls, *Political Liberalism*, p. 13.
40. Rawls, *Political Liberalism*, pp. 13–14.
41. R. Rorty, ‘The Priority of Democracy to Philosophy’, in M. D. Peterson and R. C. Vaughn (eds), *The Virginia Statute of Religious Freedom*, Cambridge: Cambridge University Press, 1988, p. 262.
42. Rorty, ‘The Priority of Democracy to Philosophy’, p. 265.
43. Rorty, ‘The Priority of Democracy to Philosophy’, p. 268.
44. Rorty, ‘The Priority of Democracy to Philosophy’, p. 264.
45. M. Sandel, ‘Review of *Political Liberalism*’, *Harvard Law Review* 107 (1994), pp. 1775–6, points out that Rawls gives more scope for this interpretation in the articles prior to *Political Liberalism*, notably ‘Kantian Constructivism in Moral Theory: Rational and Full Autonomy’, *Journal of Philosophy* 77 (1980), pp. 515, 517, and ‘Justice as Fairness: Political not Metaphysical’, on which Rorty draws, than he does in the revised versions that form the book.
46. Rawls, *Political Liberalism*, pp. 22–8.
47. J. Rawls, ‘The Law of Peoples’, in H. Shute and S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures*, New York: Basic Books, 1993, pp. 41– 82.
48. Rawls, *Political Liberalism*, pp. 234–35.
49. In his review of *Political Liberalism*, Ackerman emphasises the danger of relativism implicit in Rawls’s new position (cf. B. Ackerman, ‘Political Liberalisms’, *Journal of Philosophy* 91 (1994), pp. 364–86). He argues that Rawls’s political liberalism is worryingly ‘parasitic upon liberal practice’ (p. 375), and he tries to suggest that appeals to the ‘public political culture’ of present democracies should be distinguished from a discourse based on the idea of an ‘overlapping consensus’ (pp. 376–7). He also argues in favour of a ‘constitutive form of public reason’ (p. 368), one on which citizens of the liberal state can ‘construct a new dimension to their social identity’ instead of stripping themselves of their other attachments and obligations in order to enter the public space (pp. 369–71). See also Bellamy and Hollis, ‘Liberal Justice: Political and Metaphysical’, p. 14.
50. The *locus classicus* for this argument is probably E. Burke, *Reflections on the Revolution in France*, Oxford: Oxford University Press, 1993, e.g. pp. 33–5.

51. Rawls, *Political Liberalism*, p. 19.
52. Rawls, *Political Liberalism*, pp. 30–1.
53. See especially Rawls, *Political Liberalism*, p. xxv, where he describes ‘stability’ rather than ‘the highest good’ as the defining issue of political justice.
54. Rawls, *Political Liberalism*, p. 146.
55. Rawls, *Political Liberalism*, p. 151 (note 16).
56. Rawls, *Political Liberalism*, pp. 156–7.
57. Rawls, *Political Liberalism*, p. 161.
58. H. L. A. Hart, ‘Rawls on Liberty and its Priority’ reprinted in N. Daniels (ed.), *Reading Rawls*, Oxford: Blackwell, 1975.
59. Rawls, *Theory of Justice*, p. 302.
60. Q. Skinner, ‘On Justice, the Common Good and the Priority of Liberty’, in C. Mouffe (ed.), *Dimensions of Radical Democracy*, London: Verso, 1992, pp. 214–15.
61. See O. O’Neill, ‘The Most Extensive Liberty’, *Proceedings of the Aristotelian Society* 80 (1979/80), pp. 45–59. and J. Gray, *Liberalisms: Essays in Political Philosophy*, London: Routledge, 1989, Ch. 9 for a fuller elaboration of this thesis.
62. Rawls, *A Theory of Justice*, p. 204.
63. Rawls, *A Theory of Justice*, p. 204.
64. Hart, ‘Rawls on Liberty and its Priority’, pp. 241–2.
65. Hart, ‘Rawls on Liberty and its Priority’, pp. 248–9.
66. Lecture VIII is dedicated to his response to Hart.
67. Rawls, *Political Liberalism*, pp. 310–42.
68. B. Barry, *The Liberal Theory of Justice*, Oxford: Clarendon Press, 1973, pp. 121–5.
69. Rawls, *Political Liberalism*, pp. 49f., 156f., 305f.
70. Rawls, *Political Liberalism*, pp. 192–3.
71. Bellamy and Hollis, ‘Liberal Justice: Political and Metaphysical’, pp. 4–7.
72. Rawls, *Political Liberalism*, pp. 291–2.
73. Rawls, *Political Liberalism*, pp. 295–8.
74. Rawls, *Political Liberalism*, p. 332.
75. Rawls, *Political Liberalism*, p. 294.
76. Rawls, *Political Liberalism*, p. 335.
77. Rawls, *Political Liberalism*, p. 340.
78. Rawls, *Political Liberalism*, p. 346.
79. Rawls, *Political Liberalism*, p. 348.
80. Rawls, *Political Liberalism*, pp. 354–5.
81. Rawls, *Political Liberalism*, pp. 216–20.
82. Rawls, *Political Liberalism*, pp. 220–2.
83. Rawls, *Political Liberalism*, pp. 213–16.
84. Rawls, *Political Liberalism*, p. 243 (note 32).
85. Rawls, *Political Liberalism*, p. 251.
86. Rawls, *Political Liberalism*, pp. 357–63.
87. Rawls, *Political Liberalism*, p. 213.
88. Rawls, *Political Liberalism*, p. 214.
89. Rawls, *Political Liberalism*, p. 214.
90. Rawls, *Political Liberalism*, p. 213.
91. Rawls, *Political Liberalism*, p. 215.
92. Rawls, *A Theory of Justice*, pp. 364, 366–7, 382–3.
93. Rawls, *Political Liberalism*, p. 161.
94. Rawls, *A Theory of Justice*, p. 372.
95. For a fuller discussion of this issue, see R. Bellamy, ‘The Anti-Poll Tax Campaign and Liberal Concepts of Political Obligation’, *Government and Opposition* 29 (1994),

- pp. 22–41, especially 35–6.
96. Rawls, *Political Liberalism*, pp. 214–15.
 97. Rawls, *Political Liberalism*, p. 215.
 98. Rawls, *Theory of Justice*, pp. 232–3.
 99. Rawls, *Political Liberalism*, p. 231.
 100. Rawls, *Political Liberalism*, pp. 231–6.
 101. The rest of this section draws on R. Bellamy and D. Castiglione, ‘Constitutionalism and Democracy : Political Theory and the American Constitution’, *British Journal of Political Science* 27 (1997), pp. 595–618.
 102. For example, R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, p. ix.
 103. J. Waldron, *Liberal Rights*, Cambridge: Cambridge University Press, 1993, Ch. 16.
 104. The key statement here is footnote 4 of *United States v. Carolene Products* of 1938. The fullest philosophical defence of the proceduralist argument is J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, Mass.: Harvard University Press, 1980.
 105. Quoted in J. Arthur, *Words that Bind: Judicial Review and the Grounds of Modern Constitutional Theory*, Boulder Co.: Westview Press, 1995, p. 50.
 106. See, for example, D. J. Amy, *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States*, New York: Columbia University Press, 1993 and L. Gauinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, New York: Free Press, 1994.
 107. Cf. S. Holmes, ‘Gag Rules or the Politics of Omission’, in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1987.
 108. C. Sunstein, ‘Constitutions and Democracies: An Epilogue’, in Elster and Slagstad (eds), *Constitutionalism and Democracy*, pp. 339–40.
 109. Cf. S. Holmes, ‘Precommitment and the Paradox of Democracy’, in Elster and Slagstad (eds), *Constitutionalism and Democracy*, Ch. 7, from whom Rawls takes this idea, *Political Liberalism*, pp. 151 (note 16) and 231 (note 13).
 110. See B. Ackerman, *We the People: Foundations*, Cambridge Mass.: Harvard University Press, 1991, and S. Holmes, ‘Precommitment and the Paradox of Democracy’, in Elster and Slagstad (eds), *Constitutionalism and Democracy*, from whom Rawls draws his account, *Political Liberalism*, p. 231 (note 12 and note 13).
 111. J. Waldron, ‘A Rights-based Critique of Constitutional Rights’, *Oxford Journal of Legal Studies* 13 (1993), in particular pp. 46–9.
 112. Holmes, ‘Precommitment’, offers a brief history of the doctrine, noting the importance of Paine and Locke and also the standard criticisms of Hume, Madison and others. See, too, N. McCormick, ‘Constitutionalism and Democracy’, in R. Bellamy (ed.) *Theories and Concepts of Politics*, Manchester: Manchester University Press, Ch. 6, pp. 138–41 and Arthur, *Words that Bind*, pp. 20–3, 24–32.
 113. T. Jefferson, Letter to Samuel Kercheval, 12 July 1816, in M. D. Peterson (ed.), *The Portable Thomas Jefferson*, New York: Viking Press, 1975, p. 560.
 114. Rawls, *Political Liberalism*, p. 240. This position is put forward most forcefully by R. Dworkin, ‘The Forum of Principle’, in *A Matter of Principle*, Cambridge, Mass.: Harvard University Press, 1985.
 115. For a pathbreaking, if occasionally overstated, analysis of this phenomenon amongst British judges, see J. G. A. Griffith, *The Politics of the Judiciary*, Glasgow: Fontana, 1981. Parallel observations so far as American courts are concerned have fuelled the Critical Legal Studies Movement, e.g. M. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law*, Cambridge, Mass.: Harvard University Press, 1988. I have discussed these arguments in greater depth in ‘Liberal Politics and the Judiciary:

- the Supreme Court and American Democracy', *Res Publica: A Journal of Legal and Social Philosophy* 3 (1997), pp. 91–106.
116. C. R. Sunstein, *The Partial Constitution*, Cambridge Mass.: Harvard University Press, 1993, pp. 145–9.
117. B. Crick, *In Defence of Politics*, Harmondsworth: Penguin, 1962, p. 24; cf. also I. Hampsher-Monk, 'The Individualist Premise and the Practice of Politics', in *idem* (ed.) *Defending Politics*, London and New York: British Academic Press, St. Martin's Press, 1993.

3 Segregating values: Walzer and the communitarian containment of politics

1. M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford: Martin Robertson, 1983.
2. Walzer, *Spheres*, p. 7.
3. Walzer, *Spheres*, pp. 7–8.
4. Walzer, *Spheres*, pp. 6–7.
5. Walzer, *Spheres*, p. 9.
6. Rawls, *Theory of Justice*, Oxford: Clarendon Press, 1971, pp. 92–5, 396–9.
7. Walzer, *Spheres*, p. 8.
8. Walzer, *Spheres*, p. 8.
9. Walzer, *Spheres*, pp. 8–9.
10. Walzer, *Spheres*, p. 9.
11. Walzer, *Spheres*, p. 10.
12. Walzer, *Spheres*, p. 5.
13. Walzer, *Spheres*, p. 28.
14. Walzer, *Spheres*, p. 29.
15. Walzer, *Spheres*, p. 31.
16. Walzer, *Spheres*, pp. 312–13, 9.
17. Walzer, *Spheres*, pp. 314.
18. Walzer, *Spheres*, p. 10.
19. Walzer, *Spheres*, p. 20.
20. Walzer, *Spheres*, pp. 312, 314.
21. I've adapted this example from B. Barry, 'Spherical Justice and Global Injustice', in D. Miller and M. Walzer (eds), *Pluralism, Justice and Equality*, Oxford: Oxford University Press, 1995, pp. 67–71.
22. Walzer, *Spheres*, pp. 10, 95–103.
23. Although I suppose one could imagine a society where degrees were simply the status symbols of the rich.
24. These points are made by J. Raz, *The Morality of Freedom*, Oxford: Clarendon Press, 1986, pp. 345–53.
25. Walzer, *Spheres*, p. 314.
26. *Spheres of Justice* mainly concentrated on the need to preserve the autonomy of different spheres within a community. Walzer has developed the epistemological and international aspects of his argument in later books and articles, most particularly *Interpretation and Social Criticism*, Cambridge Mass.: Harvard University Press, 1987 and *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame: University of Notre Dame Press, 1994. I have addressed the epistemological arguments in my 'Walzer, Gramsci and the Intellectual as Social Critic', in J. Jennings and A. Kemp-Welch (eds), *Intellectuals in Politics*, London: Routledge, 1997, pp. 25–44.
27. For example, Walzer, *Interpretation*, p. 24 and *idem*, *Thick and Thin*, pp. 4, 7, 15.
28. In essence, Walzer's later argument differs little from his suggestion in *Spheres* that

- ‘it may be the case ... that certain internal principles, certain social goods, are reiterated in many, perhaps in all human societies. That is an empirical matter. It cannot be determined by philosophical argument among ourselves – nor even by philosophical argument among ideal versions of ourselves’ (Walzer, *Spheres*, p. 314, and compare *Thick and Thin*, p. 4).
29. R. Dworkin, *A Matter of Principle*, London: Harvard University Press, 1985, p. 219.
 30. Walzer, *Spheres*, p. 10.
 31. M. Walzer, ‘In Defence of Equality’, in *idem*, *Radical Principles*, New York: Basic Books, 1980.
 32. Walzer, *Spheres*, p. 119.
 33. Walzer, *Spheres*, pp. xi–xii, 13–17.
 34. Walzer, *Spheres*, p. 15.
 35. The exception will be when the distributive principle is need, which Walzer believes to be the appropriate distributive criterion for welfare within western societies. Here an unequal distribution to the most needy has the effect of reducing substantive equality by raising the well-being of those who receive it towards the level of the rest of the population.
 36. Walzer, *Spheres*, p. 318.
 37. M. Walzer, ‘Liberalism and the Art of Separation’, *Political Theory*, 12 (1984), pp. 315–30.
 38. For a recent outline of the pluralist case see J. Kekes, *The Morality of Pluralism*, Princeton N.J.: Princeton University Press, 1993.
 39. Walzer, *Spheres*, p. 6.
 40. Walzer, *Spheres*, p. 84.
 41. Walzer, *Spheres*, p. 65.
 42. Walzer, *Spheres*, pp. 64–7.
 43. ‘Distributive justice in the sphere of welfare and security has a twofold meaning: it refers, first, to the recognition of need and, second, to the recognition of membership’ (Walzer, *Spheres*, p. 78).
 44. A. Gutmann, ‘Justice Across the Spheres’, in Miller and Walzer (eds), *Pluralism, Justice and Equality*, pp. 112–13.
 45. This point is well made by Brian Barry, ‘Spherical Justice and Global Injustice’, in Miller and Walzer (eds), *Pluralism, Justice and Equality*, pp. 72–3.
 46. W. Kymlicka, *Liberalism, Communitarianism and Culture*, Oxford: Clarendon Press, 1989, p. 222, where he offers an incisive critique of Walzer’s position.
 47. Walzer, *Spheres*, pp. 28–9.
 48. Walzer, *Spheres*, pp. 39, 62.
 49. Walzer, *Spheres*, p. 20.
 50. Walzer, *Spheres*, p. 17. Some supporting empirical evidence is provided by David Miller, ‘Complex Equality’, and Adam Swift, ‘The Sociology of Complex Equality’, both in Miller and Walzer (eds), *Pluralism, Justice and Equality*.
 51. Walzer, *Spheres*, p. xiii.
 52. Miller, ‘Complex Equality’.
 53. Walzer, *Spheres*, p. xiii.
 54. Walzer, *Spheres*, p. 313.
 55. S. M. Okin, ‘Justice and Gender’, *Philosophy and Public Affairs* 16 (1987), p. 57.
 56. Swift, ‘Sociology of Complex Equality’, surveys the relevant literature. His analysis inspires the argument of this paragraph.
 57. Swift, ‘Sociology of Complex Equality’, pp. 255, 265.
 58. Walzer, *Spheres*, p. 154, although Gutmann rightly points out the contentiousness of this argument, noting that jobs are also viewed as a welfare good (Gutmann, ‘Justice

- across the Spheres', pp. 103–11). As usual Walzer tries to dodge these issues by saying that there ought to be a commitment to full employment and a policy of reparations to disadvantaged groups such as Blacks. Even so, the redistribution of resources would be hard to justify without engaging in inter-spherical comparisons and evaluations.
59. For a useful summary of this literature, see B. Brown, 'Feminism', in R. Bellamy (ed.), *Theories and Concepts of Politics*, Manchester: Manchester University Press, 1993, Ch. 7.
 60. Walzer, *Spheres*, p. 70.
 61. The next few paragraphs draw on R. Keat, 'The Moral Boundaries of the Market', in C. Crouch and D. Marquand (eds), *Ethics and Markets*, Oxford: Basil Blackwell, 1993, pp. 6–20 and R. Bellamy, 'Moralising Markets', *Critical Review* 8 (1994), pp. 341–57.
 62. Alasdair MacIntyre develops a similar point to Walzer's employing precisely this analogy. See his *After Virtue: A Study in Moral Theory*, London: Duckworth, 1981, pp. 175–6, 221, and the discussion of his thesis by Andrew Mason, 'MacIntyre on Modernity and How it has Marginalized the Virtues', in R. Crisp (ed.), *How Should One Live? Essays on the Virtues*, Oxford: Clarendon Press, 1996, pp. 191–209.
 63. J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, Lecture VII.
 64. T. H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press, 1950, remains the *locus classicus* of this argument.
 65. Walzer, *Spheres*, p. 320.
 66. See M. Walzer, 'Philosophy and Democracy', *Political Theory*, 9 (1981), pp. 379–99 for his clearest statement of this argument.
 67. Walzer, *Spheres*, p. 304.
 68. Walzer, *Spheres*, p. 304, emphasis in original.
 69. Walzer, *Spheres*, p. 15, note.
 70. Rawls, *Political Liberalism*, Lecture VI. S. Mulhall and A. Swift have suggested a Walzerian reading of Rawls on this point in their *Liberals and Communitarians*, 2nd edn, Oxford: Basil Blackwell, 1996, pp. 206–10.
 71. Here I follow Okin, 'Justice and Gender', pp. 61–2.
 72. Walzer, *Spheres*, p. 61.
 73. Walzer, *Spheres*, p. 240
 74. Walzer, *Spheres*, pp. 174–5, 233, note.
 75. On this point I disagree with Okin, 'Justice and Gender', p. 64
 76. Walzer, *Spheres*, p. 29.
 77. M. Walzer, *Obligations*, New York: Simon and Schuster, 1970.
 78. Walzer, 'Introduction', *Thick and Thin*, p. ix.
 79. J. Raz, 'Morality as Interpretation', *Ethics* 101, (1991), pp. 392–405.
 80. Walzer, 'Maximalism', in *Thick and Thin*, pp. 59–60.
 81. Walzer, 'Moral Minimalism', in *Thick and Thin*, Ch. 1, pp. 1–19.
 82. Walzer, 'Maximalism', pp. 59–61
 83. A similar argument has recently been put forward at some length by David Miller in his *On Nationality*, Oxford: Oxford University Press, 1995, Ch. 4. I have criticised this position in a review of Miller's book entitled 'National Socialism: A Liberal Defence' in *Radical Philosophy* 80 (Nov/Dec 1996), pp. 37–40.
 84. Which is not to deny that they have been, usually (though not always) with disastrous results.
 85. In a recent critique of Charles Taylor, Ronald Beiner has noted how he too oscillates between these two positions. See his 'Hermeneutical Generosity and Social Criticism', *Critical Review* 9 (1995), pp. 447–64.

86. Walzer, 'Maximalism', p. 45.
87. Walzer, *Spheres of Justice*, p. 318.
88. The above criticisms are developed more fully in my 'Walzer, Gramsci and the Intellectual as Social Critic'.
89. I owe this observation to Martin Hollis.
90. Although in fairness one should acknowledge that he has been forced to recognise this difficulty. See his 'Exclusion, Injustice and the Democratic State', *Dissent* 40 (1993), pp. 55–64.

4 Negotiating values: from consensus to compromise

1. E. Burke, 'Speech on Conciliation with America' (March, 1775), in I. Hampsher-Monk (ed.), *The Political Philosophy of Edmund Burke*, Harlow: Longman, 1987, p. 126. A parallel point is made by T. B. Macaulay, *History of England*, London: Longman, 1849, p. 629, where he writes: 'Logic admits of no compromise. The essence of politics is compromise. It is therefore not strange that some of the most important and most useful political instruments in the world should be among the most illogical compositions that ever were penned.'
2. J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p.10.
3. P. Singer, *Democracy and Disobedience*, Oxford: Oxford University Press, 1974, p. 32.
4. G. Becker, *The Economic Theory of Human Behaviour*, Chicago: Chicago University Press, 1976.
5. A. Downs, *An Economic Theory of Democracy*, New York: Harper and Brothers, 1957. Similar reasoning underlies the interest-group pluralism of R. A. Dahl, *A Preface to Democratic Theory*, Chicago: University of Chicago Press, 1956 – the main target of this section.
6. R. A. Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, p. 252.
7. D. Gauthier, *Morals by Agreement*, Oxford: Oxford University Press, 1986.
8. Burke, 'Speech on Conciliation with America', p. 126.
9. 'The Character of a Trimmer' (1699) in Halifax, *Complete Works*, ed. J. P. Kenyon, Harmondsworth: Penguin, 1969, p. 50.
10. C. Larmore, 'Political Liberalism', *Political Theory* 18 (1990) pp. 339–60; Rawls, *Political Liberalism*, pp. xvii, 141–4.
11. For example, Larmore 'Political Liberalism', p. 357; Rawls, *Political Liberalism*, p. xviii.
12. See S. Holmes, 'Gag Rules or the Politics of Omission', in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988, pp. 19–58.
13. Rawls, *Political Liberalism*, who explicitly refers to Holmes, 'Gag Rules or the Politics of Omission', in this context at p. 151, note 16.
14. I owe this splendid quote to Martin Hollis. Unfortunately I have been unable to locate a precise reference for it.
15. Rawls, *Political Liberalism*, pp. 145–50.
16. I have criticised Rawls's equivocation over whether he is adopting a historico-political or a metaphysical argument in detail in Richard Bellamy and Martin Hollis, 'Liberal Justice: Political and Metaphysical', *Philosophical Quarterly* 45 (1995), pp. 1–19.
17. This phrase comes from Robert Frost's poem 'Mending Wall'.
18. For this distinction between integrative and distributive compromises, and their relationship to a problem-solving and an individualistic orientation, see J. H. Carens,

- ‘Compromises in Politics’, in J. Roland Pennock and J. W. Chapman (eds), *Compromise in Ethics, Law and Politics*, New York: New York University Press, 1979, pp. 126–9. Carens cites some empirical findings to support this argument.
19. See C. R. Sunstein, *The Partial Constitution*, Cambridge, Mass.: Harvard University Press, 1993, pp. 145–9, and R. Bellamy, ‘Liberal Politics and the Judiciary: The Supreme Court and American Democracy’, *Res Publica* 3 (1997) pp. 81–96.
 20. For a review of some of this largely empirical literature, see D. Luban, ‘Bargaining and Compromise: Recent Work on Negotiation and Informal Justice’, *Philosophy and Public Affairs* 14 (1985), pp. 397–416. As Luban notes, there is a tendency to beg the question as to what constitutes a successful negotiation and regard agreement *per se* as a good thing – a view that tends to favour the approaches criticised here.
 21. Cited by M. P. Golding, ‘The Nature of Compromise: A Preliminary Inquiry’, in Pennock and Chapman (eds), *Compromise in Ethics, Law and Politics*, p. 4, who provides no reference for this quote.
 22. For a solid survey of the elements making for what he calls the ‘circumstances of compromise’, see M. Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics*, Lawrence: University Press of Kansas, 1990, pp. 26–32.
 23. I’ve borrowed this typology from Claus Offe, ‘Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights’, *Journal of Political Philosophy* 6 (1998), p. 119, though I do not share all the conclusions he draws from it.
 24. A. O. Hirschman, ‘Social Conflicts as Pillars of Democratic Market Society’, *Political Theory* 22 (1994) pp. 203–18.
 25. R. Goodin, ‘Political Ideals and Political Practice’, *British Journal of Political Science* 25 (1995), pp. 37–56.
 26. For example, I. Berlin’s pluralist justification for compromise in ‘The Pursuit of the Ideal’, collected in his *The Crooked Timber of Humanity*, London: Fontana Press, 1991, p. 17.
 27. A. Gutmann and D. Thompson, *Democracy and Disagreement*, Cambridge Mass.: Harvard University Press, 1996, Ch. 2.
 28. J. Morely, *On Compromise*, London: Macmillan, 1901, p. 19.
 29. For example, I. M. Young, *Justice and the Politics of Difference*, Princeton: Princeton University Press, 1990.
 30. See B. Williams, ‘Persons, Character and Morality’, in *Idem, Moral Luck: Philosophical Papers 1973–1980*, Cambridge: Cambridge University Press, 1981, pp. 1–19.
 31. R. Rorty, *Contingency, Irony and Solidarity*, Cambridge: Cambridge University Press, 1989 and M. Walzer, *Spheres of Justice*, Oxford: Blackwell, 1983, respectively have a tendency to fall into these traps.
 32. For example, Young, *Justice and the Politics of Difference*.
 33. For example, Rawls, *Political Liberalism* and Brian Barry, *Justice as Impartiality*, Oxford: Clarendon Press, 1995.
 34. H. L. A. Hart, ‘Between Utility and Rights’, in A. Ryan (ed.) *The Idea of Freedom*, Oxford: Clarendon Press, 1979.
 35. See his ‘Discourse Ethics: Notes on a Programme of Philosophical Justification’, *Moral Consciousness and Communicative Action*, Cambridge: Polity, 1990, p. 72, where Habermas draws a distinction between negotiating a fair compromise by striking a balance between conflicting particular interests and the discursive generation of a rationally motivated consensus that is perceived to be in the common interest of all. Likewise, in his brief discussion of compromise in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity,

- 1996, he restricts it to the ‘balancing of interests’ and bargaining, contrasting it with the negotiation of values, where consensus is the goal (pp. 140–1).
36. Habermas, *Between Facts and Norms*, p. 166, italics in the original.
 37. Habermas, *Between Facts and Norms*, p. 165.
 38. Habermas’s recourse to an ‘ideal speech situation’ to derive the norms of his discourse ethics arguably indicates that he regards theoretical consensus as removing the need for practical politics. The ambivalence towards actual deliberation created by the regulative employment of the ‘ideal speech situation’ is apparent in the discussion in *Between Facts and Norms*, pp. 322–7.
 39. First edition in *The Works of John C. Calhoun*, New York: D. Appleton and Co., 1853.
 40. Quoted by M. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy*, Cambridge Mass.: Harvard University Press, 1996, p. 23, whose analysis of these debates (pp. 19–24) inspires this discussion.
 41. Morely, *On Compromise*, pp. 15–16.
 42. R. Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia*, London: HarperCollins, 1995, p. 3

5 A negotiating democracy: the political constitution of a pluralist polity

1. See J. Gray, ‘Agonistic Liberalism’, in his *Enlightenment’s Wake: Politics and Culture at the Close of the Modern Age*, London: Routledge, 1995, especially pp. 71–80, for apposite comments on this failing of traditional liberalism.
2. I. M. Young, *Justice and the Politics of Difference*, Princeton, NJ: Princeton University Press, 1990, addresses this issue.
3. Two clarifications are needed here. First, these two traditions are of course historically entwined and elements of both can be found in the political systems of most western democracies. See J. Isaac, ‘Republicanism vs. Liberalism: A Reconsideration’, *History of Political Thought* 9 (1988), pp. 349–77 and S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago and London: University of Chicago Press, 1995, p. 5. However, coexistence should not be taken for complementarity or overlap. As we shall see, republican justifications and conceptions of liberty, rights and the rule of law differ from the liberal’s in important respects – most especially in relation to the nature and role of democracy. See, for example, the revisionary work of Cass Sunstein (*The Partial Constitution*, Cambridge, Mass.: Harvard University Press, 1993) and Bruce Ackerman (*We the People: Foundations*, Cambridge, Mass.: Harvard University Press, 1993) on the changes entailed by returning to a republican understanding of the United States’ Constitution. Second, the republican theory advocated here belongs more to the neo-Roman than the ‘civic humanist’ variety. (For this distinction see Q. Skinner, *Liberty before Liberalism*, Cambridge: Cambridge University Press, 1998 and P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Clarendon Press, 1997.) Though I have some doubts as to how tightly that distinction can be drawn, the neo-Machiavellian version has a more realist edge that is more welcoming to pluralism than the soggy communitarianism of most neo-Aristotelian versions. See M. Sandel’s in *Democracy’s Discontent: America in Search of a Public Philosophy*, Cambridge, Mass.: Harvard University Press, 1996, for example, and Pettit’s review, ‘Reworking Sandel’s Republicanism’, *Journal of Philosophy* 95 (1998), pp. 73–96. I shall return to this point in the third section below.
4. See, for example, the French Declaration of the Rights of Man and the Citizen of 1789, especially Articles 1, 2, 4, 6, 14 and 16; I. Kant, ‘On the Common Saying: ‘This May be True in Theory, But It Does Not Apply in Practice’’, in H. Reiss (ed.),

- Kant's Political Writings*, Cambridge: Cambridge University Press, 1970, p. 73 and J. Rawls, *A Theory of Justice*, Oxford: Clarendon Press, 1971, p. 60.
5. J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995, Ch. 3.
 6. The French Declaration of the Rights of Man and the Citizen of 1789, Kant 'On the Common Saying', and Rawls, *A Theory of Justice* once again provide exemplary examples of this mode of thinking.
 7. James Mill, *An Essay on Government* (1820), in T. Ball (ed.), *James Mill: Political Writings*, Cambridge: Cambridge University Press, 1992, is the *locus classicus* of this approach. For the role of 'protective' and 'economic' doctrines of democracy within the liberal tradition more generally, see D. Held, *Models of Democracy*, 2nd edn, Cambridge: Polity, 1996, pp. 70–100.
 8. For example, R. Dworkin, 'Constitutionalism and Democracy', *European Journal of Philosophy* 3 (1995), p. 2.
 9. N. Luhmann, *The Differentiation of Society*, New York: Columbia University Press, 1981.
 10. These processes are naturally exacerbated by globalisation. Many liberal theorists believe this challenge can be met by extending liberal democracy in a cosmopolitan direction, e.g. D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge: Polity, 1995. However, the forces supposed to underpin this extension of liberalism have in reality given rise to the very kinds of diversity that make liberal democracy hard to sustain. For the same processes that drive globalisation have augmented functional differentiation in the economy and society and fostered multiculturalism. I criticise the cosmopolitan liberal thesis, and indicate how democratic liberalism can be extended to transnational political communities, in Chapter 8. However, the state remains the primary locus of political authority and this chapter addresses that context.
 11. See D. Zolo, *Democracy and Complexity*, Cambridge: Polity Press, 1992.
 12. For a brief history, see R. Bellamy, 'The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy', in R. Bellamy and D. Castiglione (eds), *Constitutionalism in Transformation*, Oxford: Blackwell, 1996, pp. 25–44.
 13. Skinner, *Liberty before Liberalism*; Pettit, *Republicanism*.
 14. For example, *Liberalism*, [1911], Oxford: Oxford University Press, 1964, p.71.
 15. C. Sunstein, *The Partial Constitution*, Cambridge Mass.: Harvard University Press, 1993, pp. 3–4.
 16. For example, F. A. Hayek, *The Constitution of Liberty*, London: Routledge, 1960, pp. 153–4.
 17. Pettit, *Republicanism*, p. 189. See also S. Hampshire, 'Justice is Strife', *Proceedings and Addresses of the American Philosophical Association* 65 (1991), pp. 20–1.
 18. See A. Gutmann and D. Thompson, *Democracy and Disagreement*, Cambridge Mass.: Harvard University Press, 1996, p. 57; and J. Cohen, 'Procedure and Substance in Deliberative Democracy', in S. Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, NJ: Princeton University Press, 1996, pp. 100–1.
 19. See Skinner, *Liberty*, pp. 74–6 for the history of this insight.
 20. See Cohen, 'Deliberative Democracy', pp. 102–5.
 21. I'm here following Young's distinction between domination and oppression, and the relations between the two: see *Justice and the Politics of Difference*, pp. 37–8 and Ch. 2.
 22. Pettit, *Republicanism*, p. 30 and Skinner, *Liberty*, p. 74, note 38 stress the first

- benefit but regard the second as a civic humanist rather than a neo-Roman concern, which smacks dangerously of ‘positive’ liberty. Putting history to one side, substantively I doubt a ‘weak’ positive appreciation of the virtues of participation can be totally excised from republicanism.
23. C. R. Beitz, *Political Equality: An Essay in Democratic Theory*, Princeton N.J.: Princeton University Press, 1989, p. 155.
 24. Beitz, *Political Equality*, pp. 225–6, associates this with what he calls ‘complex proceduralism’.
 25. For this point see P. Jones. ‘Political Equality and Majority Rule’, in D. Miller and L. Siedentop (eds), *The Nature of Political Theory*, Oxford: Clarendon Press, 1983, pp. 155–82.
 26. See A. O. Hirschman, ‘Social Conflicts as Pillars of Democratic Market Society’, *Political Theory* 22 (1994), pp. 203–18, and the discussion of this thesis in Chapter 4 above, especially the second section.
 27. Kymlicka notes that ‘threshold’ representation to ensure a group has an adequate voice often conflicts with ‘proportionate’ representation. With very small groups it may mean more than proportional representation, for larger ones – for example, women – quotas making for less-than-strict proportionality may be sufficient. See W. Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995, Ch. 7.
 28. C. R. Sunstein, ‘Preferences and Politics’, *Philosophy and Public Affairs* 20 (1991), pp. 32–4.
 29. C. R. Sunstein, ‘Preferences and Politics’.
 30. H. Pitkin, ‘Justice: On Relating Public and Private’, *Political Theory* 9 (1981), p. 347.
 31. R. A. Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, pp. 251–2.
 32. Dahl, *Democracy*, p. 252.
 33. Dahl, *Democracy*, pp. 324–32.
 34. See C. Offe and U. K. Preuss, ‘Democratic Institutions and Moral Resources’, in D. Held (ed.), *Political Theory Today*, Cambridge: Polity, 1991, Ch. 6.
 35. P. C. Schmitter, ‘The Irony of Modern Democracy and Efforts to Improve its Practice’ in J. Cohen and J. Rogers, *Associations and Democracy* ed. E. O. Wright, London: Verso, 1995, pp. 167–83. P. Hirst’s scheme for *Associative Democracy*, Cambridge: Polity, 1994, which draws on Schmitter, strikes me as suffering from similar difficulties. For parallel criticisms, see J. Mansbridge, ‘A Deliberative Theory of Interest Representation’, in M. Petracca (ed.), *The Politics of Interests: Interest Groups Transformed*, Oxford: Westview, 1992, Ch. 2.
 36. Dahl, *Democracy*, p. 252.
 37. Dahl, *Democracy*, p. 254.
 38. A. Lijphard, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, Berkeley: University of California Press, 1968.
 39. He has, for example, advocated it for both Northern Ireland and South Africa.
 40. B. Barry, ‘Political Accommodation and Consociational Democracy’, *British Journal of Political Science* 5 (1975), pp. 502–3.
 41. M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford: Martin Robertson, 1983.
 42. H. Daalder, ‘On Building Consociational Nations: The Cases of the Netherlands and Switzerland’, *International Social Science Journal* 23 (1971), p. 361.
 43. The following comments are inspired by A. Phillips’ discussion in ‘Pluralism, Solidarity and Change’, in her collection *Democracy and Difference*, Cambridge: Polity, 1993.

44. Kymlicka, *Multicultural Citizenship*, pp. 157–8, cites this as a weakness of the millets system.
45. J. C. Calhoun, *A Disquisition on Government*, Indianapolis: Hackett, 1958.
46. The following paragraph largely summarises the excellent points made by Claus Offe, ‘“Homogeneity” and Constitutional Democracy: Coping with Identity Conflicts through Group Rights’, *Journal of Political Philosophy* 6 (1998), pp. 125–31.
47. See T. Modood, ‘“Black”, Racial Equality and Asian Identity’, *New Community* 14 (1988), pp. 397–404, and *Idem*, ‘Political Blackness and British Asians’, *Sociology* 24 (1994), pp. 859–76.
48. See Hirst, *Associative Democracy* and Cohen and Rogers, *Associations and Democracy*.
49. R. Putnam’s classic study, *Making Democracy Work*, Princeton: Princeton University Press, 1993, sometimes falls into this trap of seeing all associational activity, from choral societies to supporting a football team, as fostering a civic consciousness.
50. Bellamy, ‘Political Form’, p. 38; S. L. Elkin, ‘Madison and After: The American Model of Political Constitution’, in Bellamy and Castiglione (eds), *Constitutionalism*; Pettit, *Republicanism*, Ch. 7.
51. G. Brennan and A. Hamlin, ‘Economic Constitutions’, in Bellamy and Castiglione (eds), *Constitutionalism*, pp. 197–200.
52. For example, A. Downs, *An Economic Theory of Democracy*, New York: Harper and Brothers, 1957.
53. Brennan and Hamlin, ‘Economic Constitutions’, pp. 200–3; Pettit, *Republicanism*, Ch. 7.
54. M. Weber, ‘The Profession and Vocation of Politics’, in *Political Writings*, ed. and trans. P. Lassman and R. Speirs, Cambridge: Cambridge University Press, 1994, pp. 319–20.
55. A. Weale, *Democracy*, Basingstoke: Macmillan, 1999, Ch 7.
56. This example is adapted from Weale, *Democracy*, pp. 132–3.
57. Technically known as ‘the issue-median’.
58. Weale, *Democracy*, pp. 135–6.
59. Weale, *Democracy*, p. 137.
60. Weale, *Democracy*, pp. 146–7.
61. Madison in A. Hamilton, J. Madison and J. Jay, *The Federalist*, London: Dent, 1992, no. 10, p. 46.
62. Robert Michels, *Political Parties*, Glencoe, Ill.: Free Press, 1949; M. Olson, *The Logic of Collective Action*, Cambridge Mass.: Harvard University Press, 1965.
63. Cohen, ‘Deliberative Democracy’, pp. 112–13
64. J. Fishkin, *Democracy and Deliberation*, New Haven: Yale University Press, 1991.
65. Sunstein, ‘Preferences and Politics’, pp. 28–31.
66. For example, this misunderstanding vitiates Habermas’s contrast between republicanism and liberalism in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity, 1996, pp. 267–74, 296–302. Q. Skinner in his ‘The Paradoxes of Political Liberty’ in *The Tanner Lectures on Human Values*, vol. VII, ed. S. M. McMurrin, Cambridge: Cambridge University Press, 1986, pp. 232–5, 237–8, 246–50 attributes this error to confusing an Aristotelian civic humanism and neo-Roman civic republicanism. However, I question the cuddly picture of Aristotle portrayed by certain communitarian thinkers, such as Hannah Arendt, Charles Taylor and Michael Sandel, who perhaps provide better targets for Skinner’s argument and who appear to be the main objects of Habermas’s critique (e.g. pp. 279–81 and 285 where he equates the two). Contrast C. Taylor, ‘What’s Wrong with Negative Liberty’, in A. Ryan (ed.), *The Idea of Freedom*, Oxford: Oxford University Press, 1979, pp. 145–55, who does adopt the civic humanist view, and the reply to Skinner’s critique

- in his ‘Cross-Purposes: The Liberal-Communitarian Debate’, in N. Rosenblum (ed.), *Liberalism and the Moral Life*, Cambridge Mass.: Harvard University Press, 1989, p. 280, note 19.
67. For details, see Bellamy, ‘Political Form’, pp. 35–43.
 68. I owe this example and much of the argument that follows to J. S. Dryzek, *Discursive Democracy*, Cambridge: Cambridge University Press, 1990, Ch. 3. I’ve also drawn on Cohen and Rogers, *Associations and Democracy*.
 69. A. Mason, *Explaining Political Disagreement*, Cambridge: Cambridge University Press, 1993.
 70. Dryzek, *Discursive Democracy*, pp. 73–4.
 71. For example, Young, *Justice and the Politics of Difference*, Ch. 4.
 72. For example, D. Miller, *On Nationality*, Oxford: Clarendon Press, 1995, pp. 150–2.
 73. For example, Sunstein, *Partial Constitution*, Ch. 1.
 74. For example, Young, *Justice and the Politics of Difference*, Ch. 4.
 75. I. M. Young, ‘Communication and the Other: Beyond Deliberative Democracy’, in Benhabib (ed.), *Democracy and Difference*, pp. 128–32.
 76. For example, R. Cohen, *Negotiating Across Cultures*, Washington DC: United States Institute of Peace Press, 1991.
 77. J. Raz, ‘Right-Based Moralities’, in J. Waldron (ed.), *Theories of Rights*, Oxford: Oxford University Press, 1984, p. 187.
 78. J. Habermas, *Communication and the Evolution of Society*, Boston: Beacon, 1979, p. 90; *Idem*, *Beyond Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Note that Habermas’s conception of basic rights is the same as the Liberal’s and similarly aims at ‘the greatest possible measure of equal individual liberties’ (p. 122). As we saw when analysing Hayek and Rawls, this formula is fraught with difficulties from a pluralist perspective.
 79. See E. A. Lind and T. Tyler, *The Social Psychology of Procedural Justice*, New York: Plenum, 1988, for empirical evidence to this effect.

6 Trading democracy for markets: the Citizen’s Charter and the contracting state

1. See D. S. King, *The New Right: Politics, Markets and Citizenship*, Basingstoke: Macmillan, 1987, for a succinct account of the ideas of Hayek and the New Right and of their influence on Mrs Thatcher’s administration.
2. T. H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press, 1950.
3. *Ibid.*, pp. 10–11.
4. *Ibid.*, p. 28.
5. Although a canonical New Right text is hard to find, N. Barry, ‘Markets, Citizenship and the Welfare State: Some Critical Reflections’, in R. Plant and N. Barry (eds), *Citizenship and Rights in Thatcher’s Britain: Two Views*, London: Institute of Economic Affairs, 1990, and P. Saunders, ‘Citizenship in a Liberal Society’, in B. S. Turner (ed.), *Citizenship and Social Theory*, London: Sage, 1993 offer concise applications of the writings of Nozick and Hayek to this issue.
6. J. M. Buchanan *et al.*, *The Economics of Politics*, London: IEA Readings 18, 1978, p. 17.
7. J. Shaw, ‘Breaking New Ground: Public Choice Economists Explain Why Government Doesn’t Work’, *Policy Review* 33 (1985), p. 78.
8. M. Olson, *The Rise and Decline of Nations*, New Haven: Yale University Press, 1982.
9. W. A. Niskanen, *Bureaucracy and Representative Government*, Chicago, Ill.: Aldine-Atherton, 1971.

10. S. Brittan, 'The Economic Contradictions of Democracy', *British Journal of Political Science* 14 (1975), pp. 129–59.
11. Enoch Powell, *Freedom and Reality*, Kingswood: Elliot Right Way Books, 1969, p. 33.
12. J. Stewart and K. Walsh, 'Change in the Management of Public Services', *Public Administration* 70 (1992), p. 507.
13. Hurd's 'one nation' past may have made him keener than some 'drier' Cabinet colleagues to link the neo-liberal economic and social policies of the New Right with traditional conservative moral concerns about the family and nation. However, the assumption that the two can fit together is common to most New Right politicians. This is the theme, for example, of David Willett's book, *Modern Conservatism* (Harmondsworth: Penguin, 1992), in the conclusion of which he maintains that 'Conservative thought at its best conveys the mutual dependence between the community and the free market. Each is enriched by the other. ... The tension between market and communities is resolved because they help to sustain each other' (pp. 182, 186). The weaknesses of this attempted marriage form a sub-theme of the recent writings of John Gray, a thinker who in the past had also sought to emphasise the conservatism of libertarian philosophers such as Hayek. See his *After the New Right*, London: Routledge, 1993.
14. D. Hurd, 'Citizenship in the Tory Democracy', *New Statesman*, 29 April 1988.
15. D. Hurd, 'Freedom Will Flourish Where Citizens Accept Responsibility', *The Independent*, 13 September 1989.
16. Hurd, 'Freedom Will Flourish'.
17. Saunders, 'Citizenship in a Liberal Society', p. 85.
18. G. Mather, *Government by Contract*, London: Institute of Economic Affairs, 1991.
19. These tensions are especially in evidence in Hurd, 'Citizenship in the Tory Democracy'.
20. E. Burke, *Reflections on the Revolution in France*, Oxford: Oxford University Press, 1993, p. 96.
21. See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Oxford: Oxford University Press, 1976, Book V, Ch. 1 and the even more trenchant remarks of J. S. Mill, *Principles of Political Economy* (1848), Harmondsworth: Penguin, 1970, Book V, Ch. XI.
22. A. O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States*, Cambridge, Mass.: Harvard University Press, 1970.
23. I. Harden, *The Contracting State*, Buckingham: Open University Press, 1992, Ch. 2.
24. M. Connolly, P. McKeown and G. Milligan-Byrne, 'Making the Public Sector More User Friendly? A Critical Examination of the Citizen's Charter', *Parliamentary Affairs* 47 (1994), pp. 25–7; G. Bruce Doern, 'The UK Citizen's Charter: Origins and Implementation in Three Agencies', *Policy and Politics* 21, no. 1 (1993), p. 19.
25. W. Waldegrave, *The Reality of Reform and Accountability in Today's Public Service*, London: Public Finance Foundation, BDO Consulting, Chartered Institute of Public Finance and Accountancy, 1993, as cited by K. Walsh, *Public Services and Market Mechanisms*, Basingstoke: Macmillan, 1995, p. xv.
26. *The Citizen's Charter: First Report, 1992*, Cm 2101, London: HMSO, 1992.
27. *Citizen's Charter: Raising the Standard*, Cm 1599, London: HMSO, 1991, p. 4.
28. *Ibid.*, p. 2.
29. Public Finance Lecture, July 1993, quoted in Connolly, McKeown and Milligan-Byrne, p. 35.
30. *The Citizen's Charter Second Report, 1994*, p. 89
31. *Memorandum by the Cabinet Office (OPSS): The Citizen's Charter*, HC 27, 1993–4, p. 17.

32. *Competing for Quality*, Cm 1730, London: HMSO, 1991; Kieron Walsh, 'Quality and Public Services', *Public Administration* 69 (1991), pp. 503–14.
33. *The Citizen's Charter: First Report, 1992*.
34. HC 390-II, Evidence, qq. 22, 32.
35. *Daily Telegraph*, 18 October 1994.
36. Doern, p. 24.
37. As an example see the Harrow and Hillingdon Benefits Agency, 'Modern, Improved, Efficient', *Charter Mark Application* (Benefits Agency, n.d. but 1993).
38. *Financial Times*, 14 March 1994.
39. Diana Goldsworthy, Deputy Director of Citizen's Charter Unit, speaking at Public Administration Committee of JUC's Conference, York, 7 September 1993.
40. *Guardian*, 26 March 1994. Diane Abbott, a Labour MP on the Treasury and Civil Service Committee, described this omission as 'an astonishing lacuna': she declared 'what really matters to my electorate in Hackney is that they get the benefits they are entitled to. ... The fact that the target is missing gives the clue about these targets, they are not about the essence of the Agencies, they are targets which are convenient for the Government'.
41. Peter Kemp, *Beyond the Next Steps: A Civil Service for the 21st Century*, London: Social Market Foundation, 1993, p. 24.
42. HC 27, 1993–4, Treasury and Civil Service Committee, Garrett, Memorandum, 'Government Dismembered', pp. 99–105, para. 14.
43. *Financial Times*, 14 March 1994.
44. Norman Lewis, 'The Citizen's Charter and Next Steps: A New Way of Governing?' *Political Quarterly* 64 (1993), pp. 318–22.
45. Kieron Walsh, 'Citizens and Markets', paper presented at JUC Public Administration Committee Conference, University of York, September 1993, p. 15; see also Kieron Walsh 'Citizens, Charter and Contracts', in Russell Keat, Nigel Whitely and Nicolas Abercrombie (eds), *The Authority of the Consumer*, London and New York: Routledge, 1994, pp. 189–206.
46. Lewis, p. 320.
47. *Guardian*, 8 February 1995.
48. See P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Clarendon Press, 1997, pp. 215–19, 255–6 for a discussion of the drawbacks of an exclusively deviant-centred policy of sanctions.
49. These problems are explored further in Richard Bellamy, 'Moralising Markets', *Critical Review* 8 (1994), pp. 341–57.
50. See Pettit, *Republicanism*, pp. 220–2 on the advantages of screens over sanctions.
51. For a summary, see L. Lewin, *Self-interest and Public Interest in Western Politics*, Oxford: Oxford University Press, 1991.
52. See Hirschman, *Exit, Voice and Loyalty*.
53. See J. Elster, *Sour grapes*, Cambridge: Cambridge University Press, 1983 on the educative value of public dialogue. This Rousseauian aspect of politics was appreciated both by new liberals such as L. T. Hobhouse and J. Hobson, and Fabian socialists such as G. D. H. Cole and H. J. Laski. On the former, see R. Plant and A. Vincent, *Philosophy, Politics and Citizenship: The Life and Thought of the British Idealists*, Oxford: Blackwell, 1984, on the latter see P. Hirst (ed.), *The Pluralist Theory of the State: Selected Writings of G. D. H. Cole, J. N. Figgis and H. J. Laski*, London: Routledge, 1989.
54. For example, P. Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Cambridge: Polity, 1994, Ch. 7 and P. Schmitter, 'The Irony of Modern Democracy and the Viability of Efforts to Reform its Practice', in J. Cohen and J.

- Rogers, *Associations and Democracy* ed. E. O. Wright, London: Verso, 1995, Ch. 7.
55. J. Cohen and J. Rogers, 'Secondary Associations and Democratic Governance' in Cohen and Rogers, *Associations and Democracy*, Ch 1, from whom many of the arguments of the next two paragraphs are taken.
 56. So far all that has been issued is a policy statement entitled 'Service First: The New Charter Programme', available from the Service First Unit within the Cabinet Office.
 57. The inspiration for deliberative opinion polls comes from J. S. Fishkin, *Democracy and Deliberation*, New Haven: Yale University Press, 1991, whose arguments are reported in the next two sentences. On citizens' juries see John Stewart, E. Kendall and A. Coote, *Citizens' Juries*, London: IPPR, 1994.
 58. See the following reports on citizen's juries: N. Timms, 'How Would You Spend the Health Service Budget', *The Independent*, 13 May 1996 and D. Kennedy, 'Power to the People – But Who Should Speak for All?' *The Times*, 11 November 1996.

7 Trimming democracy: the Human Rights Act

1. 'Preface by the Prime Minister' to the White Paper 'Rights Brought Home: The Human Rights Bill', Cm. 3872, 1997, p. 1 The Human Rights Act was ratified 9 November 1998, but will not come fully into force until judges are deemed to have had sufficient training in handling rights issues.
2. 'Rights Brought Home', Ch. 1, para. 16.
3. For example, the communitarian criticisms of Melanie Phillips, *Observer*, 9 June 1996 and 21 December 1997.
4. J. Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980, p. 205. There are of course numerous ways of justifying rights, notably the 'choice' and 'benefit' theories, and of categorising them, as Hohfeld in particular has done. Important though the differences are between both these alternative accounts of rights and the various kinds of rights, nothing in my argument turns upon these distinctions.
5. For example, J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p. 164.
6. For example, D. King and J. Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision', *British Journal of Political Science* 18 (1988), pp. 415–43, and R. Plant, 'Citizenship and Rights', in R. Plant and N. Barry, *Citizenship and Rights in Thatcher's Britain: Two Views*, London: IEA, 1990, pp. 1–32.
7. For example, N. Barry, 'Markets, Citizenship and the Welfare State: Some Critical Reflections', in Plant and Barry, *Citizenship and Rights in Thatcher's Britain*, pp. 34–77 and F. A. Hayek, *The Constitution of Liberty*, London: Routledge, 1960.
8. R. Nozick, *Anarchy, State and Utopia*, Oxford: Blackwell, 1974, p. 169.
9. For example, H. Steiner, 'Individual Liberty', *Proceedings of the Aristotelian Society* 75 (1974–5), pp. 33–50.
10. The metaphor is Nozick's, *Anarchy, State and Utopia*, pp. 10, 56, 57.
11. O. O'Neill, 'The Most Extensive Liberty', *Proceedings of the Aristotelian Society*, 80 (1979–80), pp. 45–59.
12. J. Gray, *Liberalisms: Essays in Political Philosophy*, London: Routledge, 1989, Ch. 9.
13. M. Cranston, *What Are Human Rights?*, London: Bodley Head, 1973.
14. See R. Plant, *Modern Political Thought*, Oxford: Blackwell, 1991, Ch. 7.
15. R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1985, pp. 91, 199–200.
16. I owe this observation to Finnis, *Natural Law and Natural Rights*, pp. 211–12
17. Finnis, *Natural Law and Natural Rights*, p. 213; J. Feinberg, *Social Philosophy*, New Jersey: Prentice Hall, 1973, pp. 82–3.

18. Rawls, *Political Liberalism*, pp. 291–2.
19. Rawls, *Political Liberalism*, pp. 295–6.
20. See Feinberg, *Social Philosophy*, pp. 80–1, for a clear statement of this thesis.
21. Feinberg, *Social Philosophy*, pp. 95–6.
22. Dworkin, *Taking Rights Seriously*, p. 269.
23. I owe this point to J. Raz, ‘Rights and Individual Well-Being’, in *Idem, Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, Ch. 3, though I draw different conclusions concerning constitutional judicial review to his.
24. For empirical evidence from Canada to this effect, see P. M. Sniderman, J. Fletcher, P. H. Russell and P. E. Tetlock, *The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy*, New Haven and London: Yale University Press, 1996.
25. See J. Waldron, ‘A Right-Based Critique of Constitutional Rights’, *Oxford Journal of Legal Studies* 13 (1993), pp. 31–4 for a discussion of this issue, to which I’m indebted.
26. Waldron, ‘A Right-based Critique’, pp. 34–41. See also J. Allan, ‘Bills of Rights and Judicial Power: A Liberal’s Quandary’, *Oxford Journal of Legal Studies* 16 (1996), pp. 348–51.
27. I. Berlin, *Four Essays on Liberty*, Oxford: Oxford University Press, 1969, pp. 14–15.
28. F. Oppenheim, *Political Concepts: A Reconstruction*, Oxford: Blackwell, 1981, p. 92.
29. For example, R. Dworkin, *A Bill of Rights for Britain*, London: Chatto and Windus, 1990, pp. 13–14.
30. D. Held, *Models of Democracy*, 2nd edn, Cambridge: Polity, 1996.
31. Although there is a growing academic legal literature dealing with quotas for women, PR, race and redistricting, only the latter policy has been put into practice and hence been a matter of judicial review by the Supreme Court. For a discussion of some of these issues, see R. Bellamy and D. Castiglione, ‘Constitutionalism and Democracy – Political Theory and the American Constitution’, *British Journal of Political Science* 27 (1997), especially pp. 597–603.
32. Dworkin, *Taking Rights Seriously*, Ch. 2.
33. See J. Waldron, ‘Rights and Majorities: Rousseau Revisited’, in J. Chapman and A. Wertheimer (eds), *Nomos XXXII: Majorities and Minorities*, New York: New York University Press, 1990 for a forceful discussion of this point, that inspires much of what follows. Where I disagree with Waldron is in his argument that democracy is only valid as a basis for weighing up the claims of rights when it takes a Rousseauian form. As I argue below, utilitarian considerations will almost always be involved as well, and decisions about rights validly take the form of a compromise between Benthamite and Rousseauian perspectives, the claims of utility and those of community.
34. Waldron, ‘A Rights-based Critique’, pp. 34–6.
35. Waldron, ‘A Rights-based Critique’, pp. 36–8. For parallel points, that likewise draw on Waldron, see C. Adjei, ‘Human Rights Theory and the Bill of Rights Debate’, *Modern Law Review* 58 (1995), pp. 17–36. Allan, ‘Bills of Rights and Judicial Power’, p. 347.
36. See H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, pp. 113, 167; and T. O’Hagan, *The End of Law?* Oxford: Blackwell, 1984, pp. 124–7, whose discussion of this distinction I am essentially developing below.
37. Hart, *The Concept of Law*, p. 113.
38. Hart, *The Concept of Law*, p. 197.
39. S. Holmes, ‘Precommitment and the Paradox of Democracy’, in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988.
40. A. H. Robertson, *Human Rights in Europe*, Manchester: Manchester University

- Press, 1963, pp. 4–6.
41. C. Lefort, *The Political Forms of Modern Society*, Cambridge: Polity Press, 1986, p. 260.
 42. Lefort, *The Political Forms of Modern Society*, p. 260.
 43. Critics of earlier versions of my argument failed to grasp this central point, mistakenly regarding the fact that democracy implies rights as a knock-down case against it. See T. Prosser, 'Understanding the British Constitution', *Political Studies* 44 (1996), pp. 482, 484, 486; and C. Fabre, 'A Philosophical Argument for Bills of Rights', *British Journal of Political Science*, section III.2, forthcoming.
 44. C. Lefort, *Democracy and Political Theory* Cambridge: Polity, 1988, p. 37.
 45. N.B. The title of the government's White Paper was 'Rights Brought Home'.
 46. See 'Rights Brought Home', Ch. 1, paras 5 and 2, respectively.
 47. For example, E. Burke, *Reflections on the Revolution in France*, Oxford: Oxford University Press, 1993, p. 60 and T. Paine, *The Rights of Man*, Indianapolis/Cambridge: Hackett, 1992, p. 43.
 48. For a useful survey, see A. Ryan, 'The British, the Americans and Rights', in M. J. Lacey and K. Haakonssen (eds), *A Culture of Rights*, Cambridge: Cambridge University Press, 1991.
 49. For example, F. A. Hayek, *The Political Order of a Free People*, London: Routledge, 1979, Ch. 16.
 50. (as Quentin Hogg), *New Charter*, London: Conservative Political Centre: 1969.
 51. K. Joseph, *Freedom under the Law*, London: Conservative Political Centre, 1975.
 52. S. Brittan, 'The Economic Contradictions of Democracy', *British Journal of Political Science* 5 (1995), pp. 129–59.
 53. Dworkin, *A Bill of Rights for Britain*, A. Lester *et al.*, *A British Bill of Rights*, London: IPPR, 1990.
 54. Lord Hailsham writing in *The Times*, 19 May 1975.
 55. M. Zander, *A Bill of Rights?* Chichester and London: Barry Rose, 1975, p. 31.
 56. See A. Coote (ed.), *The Welfare of Citizens*, London: IPPR/Rivers Oram Press, 1992.
 57. Dworkin, *A Bill of Rights for Britain*, pp. 1–9.
 58. Article 5 relates to the liberty and security of the person. Section (3) sets conditions on when a person may be arrested or detained against his or her will. The ECHR ruled to detain someone without charge for more than four days was excessive. The Prevention of Terrorism Act allows the Secretary of State to authorise the detention of a terrorist suspect for up to seven days.
 59. According to the Act (Sections 14–17) derogations will be subject to renewal by both Houses of Parliament every five years, unless they lapse before.
 60. 'Rights Brought Home', Ch. 4, para. 16.
 61. Human Rights Act, Section 21.5. Britain ratified Protocol 6 in January 1999.
 62. J. G. A. Griffith, *The Politics of the Judiciary*, Glasgow: Fontana, 1981, (4th edn 1991).
 63. For example, Dworkin, *A Bill of Rights for Britain*, pp. 45–56, and Lester *et al.*, *A British Bill of Rights*, pp. 11–13. See also, 'Rights Brought Home', Ch 1, para. 18.
 64. For example, R. J. McKeever, *Raw Judicial Power? The Supreme Court and American Society*, 2nd edn, Manchester: Manchester University Press, 1995.
 65. For the United States, see M. A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York: The Free Press, 1991.
 66. As we shall see below, the definition of 'public authority' remains unclear and is a likely source of future tension.
 67. 'Rights Brought Home', Ch. 2, para. 4.
 68. 'Rights Brought Home', Ch. 2, para. 5.

69. 'Rights Brought Home', Ch. 2, para. 7; Human Rights Act, Section 3.
70. 'Rights Brought Home', Ch. 2 para. 8.
71. Human Rights Act, Sections 4 and 6. Naturally, recourse can still be had to the ECHR once domestic remedies have been exhausted.
72. Human Rights Act, section 19.
73. These three models figured in the debate with, for example, Dworkin, *A Bill of Rights for Britain*, leaning towards the first; A. Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain', *Oxford Journal of Legal Studies*, 17 (1997), pp. 341–4 offering a defence of the second; and Lord Woolf of Barnes, 'Droit Public – English Style', *Public Law* (1995), pp. 70–1, advocating the third. The White Paper explicitly avoids all three, Ch. 2, para. 11.
74. Canadian Charter of Rights and Freedoms, 1982, section 33.
75. New Zealand Bill of Rights Act, 1990 section 4.
76. For an analysis of this problem, see G. Marshall, 'Interpreting Interpretation in the Human Rights Bill', *Public Law*, Summer 1998, pp. 167–70.
77. Canadian Charter of Rights and Freedoms, 1982, section 1. See J. L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, Montreal: McGill-Queen's University Press, 1996 for an instructive analysis.
78. Lord Irvine, 'Benchmark Rules', *The Guardian* 11–6–1996, a shortened version of a speech given in the House of Lords on June 5.
79. Lord Irvine, 'The Development of Human Rights in Britain', *Public Law*, Summer (1998), p. 235.
80. Lord Irvine, 'Human Rights in Britain', pp. 229, 233
81. Lord Irvine, 'Human Rights in Britain', pp. 235–6.
82. Human Rights Act, section 6.3.
83. I owe the rest of this paragraph to Patricia Leopold's perceptive article, 'Parliamentary Free Speech, Court Orders and European Law', *Journal of Legislative Studies* 4 (1998), pp. 53–69, especially pp. 55–62. I am also grateful to her for comments on this section of this chapter more generally.
84. For example, Clare Dyer, 'Commercial Lawyers to Judge Human Rights' and Hugo Young, 'Lords Justices Hobhouse and Millett, Who They?' both in the *Guardian*, 18 July 1998.
85. Butler, 'The Bill of Rights Debate', pp. 325–41 correctly notes these difficulties in the New Zealand system, for example, but fails to see (as Hiebert, *Limiting Rights* reveals) that they are as present within his favoured Canadian model.
86. *The Charter of Rights: Guaranteeing Individual Liberty in a Free Society*, London: Labour Party, 1990. This policy is also defended by Adjei, 'Human Rights Theory', pp. 31–6.
87. See L. Scarman, *English Law – The New Dimension*, London: Stevens and Sons, 1974, for an early view from the left and J. Buchanan *et al.*, *Europe's Constitutional Future*, London: IEA, 1990, for a survey from the right.
88. 'Rights Brought Home', Ch. 2, para 12.
89. For example, Case 11/70 [1970] ECR 1125 *Internationale Handelsgesellschaft*, although the Court stresses that like other principles of law, these rights are subject to interpretation 'within the framework of the structure and objectives of the Community'. Article F(2) of the Maastricht treaty also enjoins that the 'Union shall respect fundamental rights, as guaranteed by the European Convention ... as general principles of law'.
90. Respectively, *Internationale Handelsgesellschaft* [1974] 2 CMLR 549 and *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372 and *Granital SpA v Amministrazione delle Finanze* (Dec 170 of 8 June 1984) (1984) CMLRev 756.

91. It should be noted that the ECHR has developed the notion of a ‘margin of appreciation’, which allows that national courts and states may sometimes be in a better position than an international judge when applying the Convention. However, it reserves the right to review any act of a national authority (*Handyside v. UK* (1976), Series A, vol. 24, paras [48]–[49]).

8 De-segregating democracy: whose Europe, which community?

1. As D. Bell, ‘The World and the United States in 2013’, *Daedalus* 116 (1987), pp. 1–32, has noted, these days the state is either too small or too large to tackle the standard tasks of government.
2. For example, D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge: Polity, 1995 and A. Linklater, *The Transformation of Political Community*, Cambridge: Polity, 1998.
3. For this analysis I draw on joint research on European constitutionalism and citizenship undertaken with Dario Castiglione and funded by the ESRC. See in particular Richard Bellamy and Dario Castiglione, ‘The Communitarian Ghost in the Cosmopolitan Machine: Constitutionalism, Democracy and the Reconfiguration of Politics in the New Europe’ in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Aldershot and Brookfield USA: Avebury, 1996, pp. 111–29; *idem*, ‘Building the Union: The Nature of Sovereignty in the Political Architecture of Europe’, *Law and Philosophy* 16 (1997), pp. 421–45; and *idem*, ‘The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined’, in A. Føllesdal and P. Koslowski (eds), *Democracy and the European Union*, Berlin: Springer, 1998, Ch. 12; (reproduced as ‘Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union’, in D. Archibugi, D. Held and M. Koheler (eds), *Reimagining Political Community*, Cambridge: Polity, 1998, Ch. 8).
4. For an analysis tending towards the first characterisation, see Held, *Democracy and the Global Order*, pp. 111–13; whilst for the second see D. N. Chrysoschoou, *Democracy in the European Union*, London: I. B. Tauris, 1998.
5. The following reflections are inspired by P. C. Schmitter, ‘If the Nation State were to Wither Away in Europe, What Might Replace It?’ in: S. Gustavsson and L. Lewin (eds), *The Future of the Nation-State: Essays on Cultural Pluralism and Political Integration*, Stockholm: Nerenius and Santérus, 1996, pp. 211–44, especially p. 219.
6. For an overview, see G. Marks, L. Hooghe and K. Blank, ‘European Integration from the 1980s: State-centric vs. Multi-level Governance’, *Journal of Common Market Studies* 34 (1996), pp. 341–78.
7. See T. Pogge, ‘Cosmopolitanism and Sovereignty’, in C. Brown (ed.), *Political Restructuring in Europe: Ethical Perspectives*, London: Routledge, 1994, Ch. 5, whose argument I broadly report below.
8. Pogge, ‘Cosmopolitanism and Sovereignty’, p. 92.
9. Pogge, ‘Cosmopolitanism and Sovereignty’, p. 90, and C. Beitz, ‘Cosmopolitan Liberalism and the States System’, in Brown (ed.), *Political Restructuring in Europe*, p. 124.
10. Pogge, ‘Cosmopolitanism and Sovereignty’, pp. 103–117.
11. For example, David Miller, *On Nationality*, Oxford: Oxford University Press, 1995, pp. 74–80.
12. M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame: University of Notre Dame Press, 1994, Ch. 1.
13. Quotes from M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*,

- Oxford: Martin Robertson, 1983, pp. 28, 31.
14. The arguments reported in the next five paragraphs can all be found in Miller, *On Nationality*, who aligns his case to Walzer's (albeit critically) at a number of points. See, too, his sympathetic introduction to D. Miller and M. Walzer (eds), *Pluralism, Justice and Equality*, Oxford: Oxford University Press, 1995. Miller's argument is usefully synthesised in his 'The Nation-State: A Modest Defence', in Brown (ed.), *Political Restructuring in Europe*, Ch. 7.
 15. For doubts of these kinds see P. Hirst and G. Thompson, *Globalisation in Question: The International Economy and the Possibilities of Governance*, Cambridge: Polity, 1996, and R. J. B. Jones, *Globalisation and Interdependence in the International Political Economy: Rhetoric and Reality*, London: Pinter, 1995.
 16. C. Kukathas, 'Are There Any Cultural Rights?' *Political Theory* 20 (1992), pp. 105–39.
 17. Kukathas, 'Are There Any Cultural Rights?', p. 124.
 18. I owe this point to Andrew Mason, 'Imposing Liberal Principles', in R. Bellamy and M. Hollis (eds), *Pluralism and Liberal Neutrality*, London: Cass, 1999.
 19. In addition to Rawls's discussion explored in Chapter 2, see, for example, J. Habermas's explicit use of this distinction in his 'Struggles for Recognition in the Democratic Constitutional State', in C. Taylor *et al.*, *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann, Princeton: Princeton University Press, 1994, pp. 134–5. In fact, Rawls is more cautious than his followers about extending his principles of justice from western liberal democracies to the international sphere – compare his 'The Law of Peoples', in H. Shute and S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures*, New York: Basic Books, 1993, pp. 41–82 with Pogge, 'Cosmopolitanism and Sovereignty'.
 20. Habermas, 'Struggles for Recognition in the Democratic Constitutional State', p. 135.
 21. W. Kymlicka reports that 'the world's 184 independent states contain over 600 living language groups, and 5000 ethnic groups'. *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995, p. 1.
 22. W. Kymlicka, *Multicultural Citizenship*, Ch. 5. Kymlicka denies this thesis has any communitarian connotations, 'weak' or otherwise. However, whilst he rightly notes that Sandel looks at more local communities to make this point (pp. 91–2), his argument clearly resonates with those of Walzer and Miller, albeit with important differences.
 23. Kymlicka, *Multicultural Citizenship*, p. 76.
 24. Kymlicka, *Multicultural Citizenship*, Ch. 2.
 25. For these points, see Kymlicka, *Multicultural Citizenship*, Ch. 8 and especially pp. 163–72.
 26. See A. Mason's Review of Kymlicka's *Multicultural Citizenship* in *Philosophical Quarterly* 47 (1997), pp. 250–3.
 27. For examples of this school, see the essays in J. M. Buchanan *et al.*, *Europe's Constitutional Future*, London: IEA, 1990.
 28. For this line of argument, see P. van Parijs, 'Basic Income and the Political Economy of the New Europe', in P. Lehning and A. Weale (eds), *Citizenship, Democracy and Justice in the New Europe*, London: Routledge, 1997, Ch. 10.
 29. These terms are employed by P. van Parijs, 'Should the European Union Become More Democratic?', in Føllesdal and Koslowski (eds), *Democracy and the European Union*, Ch. 13, who favours the latter for the reasons given in the text.
 30. J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1990), reproduced as Appendix 2 of *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity, 1996, p. 500

31. Habermas, 'Citizenship and National Identity', pp. 514–15.
32. Habermas, 'Citizenship and National Identity', p. 507
33. A. Smith, 'National Identity and the Idea of European Unity', *International Affairs* 68 (1992), pp. 65, 74.
34. J. Delors, *Our Europe*, London: Verso, 1992.
35. For example, Miller, *On Nationality*, pp. 160–5.
36. See A. Milward, *The European Rescue of the Nation-State*, London and New York: Routledge, 1992.
37. See Miller, *On Nationality*, pp. 156–7, 159–63.
38. In addition to Marks, Hooghe and Blank, 'European Integration from the 1980s: State-Centric v. Multi-level Governance', see G. Marks, F. W. Scharpf, P. Schmitter and W. Streek, *Governance in the European Union*, London: Sage, 1996.
39. A. Lijphart, 'Typologies of Democratic Systems', *Comparative Political Studies* 1 (1) (1968), pp. 3–44. and D. N. Chryssochoou, 'Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?' *West European Politics* 17 (1994), pp. 1–14.
40. G. F. Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26 (1989), pp. 595–614.
41. J. H. H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Area of Political Integration', *Journal of Common Market Studies* 31 (1994), pp. 1–30.
42. D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review* 30 (1993), pp. 17–69, at pp. 23–4, 67.
43. For these criticisms, see C. Lyons, 'Citizenship in the Constitution of the European Union: Rhetoric or Reality?' in Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty*, pp. 96–110. One can only become a European citizen by being a member state national. The status gives all European citizens the right to vote in local elections and for the European Parliament wherever they happen to be resident within the EU, but not to vote in elections to national parliaments other than their own.
44. Figures from Eurobarometer Report Number 48 (March 1988 – Researched October–November 1997). This was the first time since 1991 there has been an upturn in support for the EU, which fell below 50 per cent in 1992.
45. Number 6 (October 1995, drawing on monthly surveys between July and October 1995).
46. E. Gellner, *Nations and Nationalism*, Oxford: Blackwell, 1983.
47. Habermas, 'Citizenship and National Identity', pp. 11–13.
48. Still to be ratified at the time of writing. References refer to the draft.
49. In case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1134. See also case 29/69, *Stauder v. Ulm*, [1969] ECR 419, at 425 where the Court first stated that fundamental rights were 'enshrined in the general principles of Community law and protected by the Court'.
50. Notably, Cinéthèque, Groener, Bond and ERT. For details see B. De Witte, 'Droit communautaire et valeurs constitutionnelles nationales', *Droits* 14 (1991), pp. 87–96 and J. Coppel, and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' *Common Market Law Review* 29 (1992), pp. 669–92.
51. *The Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and others*, Case 159/90, 4 October 1991, reported in [1991] 3 CMLR 689. See Coppel and O'Neill, 'The European Court of Justice', pp. 685–9.
52. Opinion of the Advocate General of 11 June 1991, paras 18, 21, 24.
53. German Federal Court, *Ruling, Second Division, Dated 12 October 1993*, 2BvR

- 2134/92 2BvR 2159/92, English version, C I 2 b(2).
54. J. H. H. Weiler, 'European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order', in R. Bellamy and D. Castiglione, *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford: Blackwell, 1996, pp. 118–21.
 55. J. Habermas, 'Reply to Grimm', in P. Gowan and P. Anderson (eds), *The Question of Europe*, London: Verso, 1997, pp. 263–4.
 56. Habermas, 'Citizenship and National Identity', p. 500 and 'Struggles for Recognition in the Democratic Constitutional State', p. 134.
 57. In a 1989 Eurobarometer poll 59 per cent preferred the idea that the European Parliament should be organised around national criteria rather than the current political ones, even though as yet no European-wide parties, as opposed to groupings of national parties exist. The latest (1997) poll reports only 38 per cent wanting more powers given to the European Parliament, with a majority of member states wanting even less.
 58. Weiler, 'European Neo-constitutionalism', pp. 110–13 makes this point particularly well.
 59. Habermas, 'Reply to Grimm', p. 264.
 60. This argument draws inspiration from Weiler, 'European Neo-constitutionalism', pp. 113–16, but develops his notion of multiple demoi in a different (but in many respects compatible) way.
 61. J. Scott, 'Law, Legitimacy, and EC Governance: Prospects for "Partnership"', *Journal of Common Market Studies* 36 (1998), pp. 175–94.
 62. Council Regulation 2081/93 OJ 1993 L193/5, Article 4(1), cited Scott, 'Law, Legitimacy, and EC Governance', p. 181.
 63. N. MacCormick, 'Democracy, Subsidiarity, and Citizenship in the "European Commonwealth"', *Law and Philosophy* 16 (1997), pp. 331–56; P. Craig, 'Democracy and Rule-making within the EC: An Empirical and Normative Assessment', *European Law Journal* 3 (1997), pp. 105–30.

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